BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE NO. 37-07842 IN THE NAME OF THE IDAHO WATER RESOURCE BOARD	Docket No. P-DR-2017-002 **ORDER RESCINDING PERMIT AND AMENDMENT APPROVAL; ORDER DELAYING PROCESSING**

BACKGROUND

In 1980, Earl Hardy, Thorleif Rangen, John LeMoyne, and John W. Jones Jr. ("Applicants") filed application for permit number 37-7842 ("Application") with the Idaho Department of Water Resources ("Department"), seeking to appropriate 800 cfs year-round from the Little Wood and Big Wood Rivers for ground water recharge. IDWR Ex. 3 at 75. The Application proposed a point of diversion in the SW¼ of the SE¼ of Section 24, Township 4S, Range 19E in Lincoln County. *Id.* This point of diversion is not located on either the Big Wood or Little Wood Rivers. Tr. Vol. I, p. 33; IWRB Ex. 108 at 3045. The Application described the "Proposed diverting works" as "[c]ontract use of Dietrich Canal System and Richfield Canal system." IDWR Ex. 3 at 75.

The Application required a map of the proposed project to "show clearly the proposed point of diversion, place of use, section number, township and range number." *Id.* at 78. The map submitted with the Application depicts the "Lower Snake Plains Aquifer Recharge District" boundary and nine numbered shapes, one of which (#6) is located outside the District's boundary, off the Dietrich Canal, and highlighted with hatched lines. IDWR Ex. 3 at 77; *Water Right Back File 37-7842* at 5.[1] Another shape on the map (#3) approximately corresponds to the Shoshone recharge site located off the Milner-Gooding Canal within the District's boundary. *Id.* The Richfield Canal system is not shown on the map. *Id.*

The Department published notice of the Application (*see* IDWR Ex. 3 at 80). The publication described the "Diversion Point" consistent with the Application. However, as of at least December 1981, the Department noted that the proposed point of diversion appeared "to be in error" and should "be in SWSE-Sec 25, T4S, R19E rather than in Sec 24."[2] IWRB Ex. 108 at Appendix H. The publication described the "Place of Use" as "[w]ithin the boundaries of the

[1] The Director of the Department took official notice of Water Right Back File 37-7842 at the hearing in this matter pursuant to the Department's Rule of Procedure 602 (IDAPA 37.01.01.602).

[2] Water is diverted into the Dietrich Canal from the Little Wood River within the SWSE-Sec 25, T4S, R19E.

Lower Snake Plains Aquifer Recharge District." IDWR Ex. 3 at 80. The publication specified that "[p]ossible sites for recharge of the water are within the following described lands: Sec. 15, 16, 21, 22, 28, T.5S R19E." *Id.* The publication described the "Diversion Means" as "[c]ontract use of Dietrich Canal system and Richfield Canal system." *Id.*

On January 18, 1982, the Applicants assigned the Application to the Lower Snake Aquifer Recharge District ("LSARD"). IWRB Ex. 114.

On June 2, 1982, the Department approved the Application and issued Permit 37-7842 upon several conditions. IDWR Ex. 3 at 79. The Department's approval consists of one page attached to the Application. *Id.* Permit 37-7842 required that "[p]roof of construction of works and application of water to beneficial use shall be submitted on or before June 1, 1987." *Id.*

On June 1, 1987, LSARD filed a Request for Extension of Time to submit Proof of Beneficial Use. *Recommended Order Granting Petitioners' Motion of Summary Judgment and Rescinding Extension of Time* ("Development Period Order") (Nov. 30, 2011) at 3; IWRB Ex. 108 at Appendix C, p.3091. The Department extended the deadline for filing proof of beneficial use to June 1, 1992. *Development Period Order* at 3. When LSARD did not submit proof of beneficial use by June 1, 1992, the Department notified LSARD that Permit 37-7842 had lapsed. *Id.* at 4.

On July 27, 1992, LSARD filed Proof of Beneficial Use for Permit 37-7842. Petitioner's Ex. 201. Included with the Proof of Beneficial Use was a Beneficial Use Field Report dated July 6, 1992, prepared by Gerald Martens, a certified water rights examiner. *Id.* On July 29, 1992, the Department issued an order reinstating Permit 37-7842 and advancing the priority date to August 25, 1980. *Water Right Back File 37-7842* at 30.

On October 21, 1993, the Department sent a letter to Mr. Martens requesting additional information regarding Permit 37-7842. *Id.* at 80-81. On November 29, 1993, the Department received another Beneficial Use Field Report prepared by Mr. Martens for Permit 37-7842. IDWR Ex. 5; IWRB Ex. 108 at Appendix D, pp.3095-3112.[3] The 1993 Report identifies the Big Wood River as the source of water for ground water recharge pursuant to Permit 37-7842 and the place of use as the Shoshone recharge site. IDWR Ex. 5 at 81; Tr. Vol. I, pp. 36-39. The 1993 Report recommends a maximum diversion rate of 300 cfs from a point of diversion distinct from the one authorized by Permit 37-7842. IDWR Ex. 5 at 81, 84.

On December 1, 1993, the Department issued an order affirming reinstatement of Permit 37-7842 and the advanced August 25, 1980, priority date. IWRB Ex. 108 at Appendix C, p. 3093.

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[3] Mr. Martens' November 29, 1993 Report also references Permit 01-7054, which is based on an application to appropriate water from the Snake River for ground water recharge that the Applicants filed at the same time they filed the Application. The two applications "have followed a similar course and are referenced together throughout many of the documents contained in the respective water right files." *Development Period Order* at 3. The Director of the Department took official notice of Water Right Back File 01-7054 at the hearing in this matter pursuant to the Department's Rule of Procedure 602 (IDAPA 37.01.01.602).

On April 28, 1999, LSARD assigned Permit 37-7842 to the Idaho Water Resource Board ("IWRB"). *Development Period Order* at 4. In 2000, 2004, and 2009, IWRB submitted to the Department requests for extension of time to submit proof of beneficial use for the undeveloped portion of Permit 37-7842. The Department approved each request by order, the last of which the Department issued on September 2, 2010, extending the time to submit proof of beneficial use to June 1, 2014. *Id.* at 4-5.

On September 22, 2010, William Arkoosh; the Estate of Vernon Ravenscroft; Koyle Hydro, Inc.; Notch Butte Hydro Company, Inc.; and Shorock Hydro, Inc., filed a joint petition for hearing and petition for declaratory ruling asserting the Department erred by approving IWRB's 2009 request for extension of time. The Department initiated a contested case proceeding and issued the Development Period Order. The Department determined that "[a]ll Department actions on the undeveloped portion of Permit 37-7842 occurring after July 27, 1992" are void and "[t]he only portion of Permit 37-7842" that remains valid "is that portion of the permit put to beneficial use prior to June 1, 1992." *Development Period Order* at 8. The Department, therefore, established that the development period for Permit 37-7842 is June 2, 1982, to June 1, 1992. The Department noted that "the proper venue to raise arguments regarding the true extent of beneficial use would be within the licensing process." *Id.* at 7.

On October 29, 2014, Department staff, Michele Edl ("Edl"), prepared a Memorandum documenting the Department's license review for Permit 37-7842 and recommending elements for License 37-7842. IDWR Ex. 2. Edl stated that "[t]he Beneficial Use Field Reports which have been submitted for the licensing of this permit consider only the Shoshone site." *Id.* at 8. However, review of those Beneficial Use Field Reports raised questions for Edl that resulted in staff conducting additional research, site visits, and analysis. Tr. Vol. I, pp. 37-42; IDWR Ex. 2 at 8. Edl ultimately recommended only the "Dietrich Canal site as the place-of-use for this water right." *Id.* at 9. Edl required "[a] license amendment" to correct the point of diversion[4] and recommended "only the Little Wood River as the source for water diverted under this permit." *Id.* at 10. Edl also recommended a maximum diversion rate of 250 cfs and a maximum annual diversion volume of 13,900 acre-feet. *Id.* at 12.

On July 13, 2017, IWRB submitted, and the Department approved, an Application for Amendment for licensing purposes. IDWR Ex. 7. The Application for Amendment requested that Permit 37-7842 be amended to align with Edl's recommendations in the October 29, 2014 Memorandum. *See id.*

On July 14, 2017, the Department issued License 37-7842 consistent with IWRB's Application for Amendment. IDWR Ex. 1. On August 1, 2017, William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro, Inc., Koosh, Inc., and Shorock Hydro ("Petitioners"), filed a *Petition for Hearing, and Petition for Declaratory Ruling*. The Director granted the Petitioners' request for a hearing on the Department's "determination of the amount of water beneficially applied during the development period of Permit No. 37-7842 . . . ." *Order Re: Prehearing Motions* (Dec. 21, 2017) at 5.

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[4] Edl recommended the point of diversion that the Department noted appeared to be correct in 1981. *See* IWRB Ex. 108 at Appendix H.

The Director scheduled[5] and held the Petitioners' requested hearing on November 1 and November 2, 2018, at the Lincoln County Community Center in Shoshone, Idaho. Edl testified regarding the Department's determination that only Little Wood River water was beneficially applied pursuant to Permit 37-7842 at the Dietrich site. IWRB presented evidence regarding the extent of beneficial use pursuant to Permit 37-7842, including a *Certified Water Rights Examiner Analysis of Water Right No. 37-7842* dated August 10, 2018. Consistent with this 2018 analysis, IWRB asserts that water was used for ground water recharge pursuant to Permit 37-7842 at three locations: 1) the "Dietrich site located along the Dietrich Canal," 2) the "Shoshone site located along the Milner-Gooding Canal," and 3) along the Richfield Canal. IWRB Ex. 108 at 3046. The Petitioners presented evidence in response.

At the close of the hearing, the parties requested, and the Director thereafter ordered, a December 7, 2018, deadline to submit initial post-hearing briefs and a December 21, 2018, deadline for responses to initial post-hearing briefs. *Order Establishing Post Hearing Briefing Deadlines* (Nov. 15, 2018). IWRB and the Petitioners submitted initial post-hearing briefs on December 7, 2018. IWRB submitted a response brief on December 21, 2018.

ANALYSIS

A. The Department's licensing review is not limited to the proof of beneficial use submitted by the permit holder.

As an initial matter, the Director must address the Petitioners' argument that the Department's licensing review "is limited to the proof of beneficial use submitted by the permit holder." *Petitioners' Initial Post-Hearing Memorandum* at 8. The Petitioners assert "it is improper to go beyond the Proof of Beneficial Use submitted by the permit holder." *Id.* at 9. In other words, the Petitioners appear to argue that the Department's licensing review process, which considered the Dietrich Canal site, was in error because the Department can only consider the July 27, 1992 Proof of Beneficial Use form and Mr. Martens' Beneficial Use Field Reports for Permit 37-7842.

The Department's licensing review process is not limited to the July 27, 1992 Proof of Beneficial Use form and Mr. Martens' Beneficial Use Field Reports for Permit 37-7842. Idaho Code § 42-219(1) states:

> Upon receipt by the [Department] of all the evidence in relation to such final proof, it shall be the duty of the [D]epartment to carefully examine the same, and if the [D]epartment is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the [D]epartment shall issue to such user or users a license confirming such use.

[5] *See Order Amending Deadlines; Order Establishing Burdens of Proof; Notice of Status Conference; Amended Notice of Hearing* (July 5, 2018).

This language requires that the Department review "*all the evidence in relation to*" the permit holder's proof of beneficial use, not just the proof of beneficial use itself.[6] The Department's Beneficial Use Examination Rules also allow the Department to go beyond the permit holder's proof of beneficial use in licensing review by authorizing the Department to request additional information from the certified water right examiner "to clarify the field report." IDAPA 37.03.02.035.02(c). Further, Idaho Code § 42-217 requires that, upon receipt of the permit holder's proof of beneficial use, the Department must "examine, or cause to be examined" the place the water is diverted and used, the capacities of the means by which water is conveyed to such place of use, and the quantity of water beneficially applied. *Id.* "The [D]epartment or person making such examination . . . shall prepare and file a report of the investigation." *Id.* In addition, "the [D]epartment may conduct a supplemental examination on its own initiative at any time." IDAPA 37.03.02.050.01(b). The Petitioners' argument that the Department is limited to the permit holder's proof of beneficial use in conducting a licensing review is without merit.[7]

B. Evidence in the record establishes that beneficial use occurred pursuant to Permit 37-7842 that should be licensed.

Again, Idaho Code § 42-219(1) states:

> Upon receipt by the [Department] of all the evidence in relation to such final proof, it shall be the duty of the [D]epartment to carefully examine the same, and if the [D]epartment is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the [D]epartment shall issue to such user or users a license confirming such use.

Idaho Code § 42-219(1) also states that "[s]uch license shall state the name and post-office address of such user, the purpose for which such water is used, and the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied." Idaho Code § 42-219(8) states that, if the Department finds "that the applicant has not fully complied with the law and the conditions of permit, it may issue a license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit."

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[6] The Petitioners' attempt to limit the Department to consideration of "personal knowledge as to the circumstances existing during the recharge event set forth in the permit holder's Proof of Beneficial Use" (*Petitioners' Initial Post-Hearing Memorandum* at 8) is contrary to Idaho Code § 42-219(1)'s directive that the Department consider "*all* the evidence in relation to such final proof" (emphasis added).

[7] The Petitioners suggest that the statement in the Proof of Beneficial Use form that the permit holder "relinquish[ed] any undeveloped portion of the permit to the state of Idaho" prevents the Department from licensing anything other than what was described in the Proof of Beneficial Use. A permit holder's statement of relinquishment in a Proof of Beneficial Use form does not prevent the Department from determining, upon its own investigation as authorized by Idaho Code and the Department's Beneficial Use Examination Rules as discussed herein, that additional beneficial use occurred beyond that identified by the permit holder and licensing that additional use.

As described above, the Department's October 29, 2014 Memorandum recommended only the "Dietrich Canal site as the place-of-use for this water right." IDWR Ex. 2 at 9. On July 14, 2017, the Department issued License 37-7842 consistent with the Department's recommendation and IWRB's Application for Amendment. IDWR Ex. 1. However, at the hearing in this matter, IWRB submitted a 2018 *Certified Water Rights Examiner Analysis of Water Right No. 37-7842* asserting water was used for ground water recharge pursuant to Permit 37-7842 at three locations: 1) the "Dietrich site located along the Dietrich Canal," 2) the "Shoshone site located along the Milner-Gooding Canal," and 3) along the Richfield Canal. IWRB Ex. 108 at 3046. The Petitioners argue the Director should refuse issuance of License 37-7842 because "the permit holder has failed to meet its burden that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended." *Petitioners' Initial Post-Hearing Memorandum* at 11. The Director will evaluate whether the evidence in the record related to the permit holder's proof of beneficial use pursuant to Permit 37-7842 supports a determination that beneficial use occurred within the authorized development period (June 2, 1982, to June 1, 1992) that should be licensed.

1. Richfield Canal

IWRB asserts that Big Wood River surface water delivered in the Richfield Canal recharged ground water pursuant to Permit 37-7842 within the Richfield Canal during the authorized development period. *IWRB's Post Hearing Brief* at 6. The Director disagrees. Contrary to IWRB's assertion, the Richfield Canal has never been an authorized place of use for Permit 37-7842. *See id.* The map included with the Application, which was required to "show clearly the proposed point of diversion, place of use, section number, township and range number" for the proposed project, does not depict the Richfield Canal. IDWR Ex. 3 at 77; *Water Right Back File 37-7842* at 5. The Richfield Canal is only described in the Application as one of the "Proposed diverting works." IDWR Ex. 3 at 75. The advertisement for the Permit only lists the Richfield Canal as a "Diversion Means." IDWR Ex. 3 at 80. The advertisement does not include the Richfield Canal in the "Place of Use" description. *Id.*

Even if the Richfield Canal was an authorized place of use for Permit 37-7842 during the development period, evidence in the record is insufficient to reasonably quantify the surface water that recharged the ground water. IWRB's expert concludes that, based on data from April 1984, a maximum flow rate of 63 cfs should be licensed for ground water recharge along the Richfield Canal. IWRB Ex. 108 at 3057. To reach this conclusion, IWRB's expert considered diversions from the Big Wood River into the Richfield Canal "outside of the irrigation season, April 1 through April 30, or after September 30, when water was not being diverted into the East or West Canals." *Id.* at 3056.[8] IWRB's expert relied on Water District 37 watermaster records for diversion data from the Big Wood River into the Richfield Canal. *Id.* at 3048, 3055. IWRB's expert also "supplemented the data with records from the Big Wood Canal Company,

[8] "Irrigation water rights diverted into the Richfield Canal have periods of use either from April 1st through October 31st or from March 15th through November 15th." IWRB Ex. 108 at 3047. However, IWRB's expert relied on "personal conversation" with the former "manager of the American Falls Reservoir District 2 at Big Wood Canal Company," (Tr. Vol. II, p. 5) to determine the "typical start of the irrigation season on the Richfield Canal is May 1st and the irrigation season usually ends in mid-September." *Id.* at 3047-48. IWRB's expert testified at the hearing that Mr. Harmon also informed him that a "real good indication" irrigation is occurring "is if water is delivered or diverted into the East and West Main Canals." Tr. Vol. II, pp. 112-13.

especially diversion data during the non-irrigation season which was outside of the watermaster's records." *Id.* at 3051. IWRB's expert calculated "recharge within the Richfield Canal system" as the difference between station #4 (where Big Wood River water is diverted into the Richfield Canal) and the head of the Jim Byrns Slough. *Id.* at 3055. IWRB's expert assumed, based on discussion with Mr. Harmon, former "manager of the American Falls Reservoir District 2 at Big Wood Canal Company" (Tr. Vol. II, p. 5), "that there are no stockwater diversions into the Richfield Canal during the non-irrigation season." *Id.*

Mr. Harmon's testimony at the hearing conflicts with the assumption of IWRB's expert that there are no stockwater diversions in the Richfield Canal system during the non-irrigation season. Mr. Harmon testified that, with respect to "measured diversions on the Richfield at Gauge No. 4 before May 1st," there was "[a] good possibility it could be for stockwater." Tr. Vol. II, p. 36. Mr. Harmon also testified that, with respect to "measured diversions into the Richfield Canal at Gauge No. 4 after October 1st "it would be probably stock-water flow or just a leak coming through the system." Tr. Vol. II, p. 37. Mr. Harmon clarified that, by "stock-water flow," he meant the "domestic run" the canal company did "for years" where "[t]hey would come on after the 1st of October, probably anywhere between the last week in October to the first week or so of November, and run a small flow for a few days to fill stock ponds for livestock watering for the fall pasture." *Id.* In addition, Petitioners' Ex. 205 demonstrates that Big Wood Canal Company holds water right 37-13115 for stockwater diverted from the Big Wood River at the head of the Richfield Canal in the amount of 20 cfs with a period of use from November 1st to March 31st. Upon Petitioners' questioning, Mr. Harmon testified he forgot about this water right. Tr. Vol. II, Pp. 50-51.

In response to questioning about Mr. Harmon's testimony regarding diversions from the Richfield Canal during the non-irrigation season, IWRB's expert stated: "He did not indicate that to me. In his testimony he alluded to some small ones and I don't recall. I don't know the system nearly as well as he did. And I don't remember where those are, but he alluded to a lot more diversions than he ever alluded to me on the phone." Tr. Vol. II, p. 118. IWRB's expert concluded those diversions "should not be" a factor. *Id.* But, diversions from the Richfield Canal during the non-irrigation season would directly impact the amount of ground water recharge IWRB's expert calculated along the Richfield Canal.

IWRB asserts that, even if its expert's analysis regarding ground water recharge post October 1st is discounted because of Mr. Harmon's testimony about "a late season domestic run on the Richfield [C]anal," "the outcome of IWRB's expert analysis is unchanged." *IWRB's Post-Hearing Brief* at 10. IWRB asserts this is because its "analysis of recharge on the Richfield [C]anal was limited to early season recharge occurring between April 1st and April 30th." *Id.* Indeed, IWRB's requested rate of 63 cfs for ground water recharge along the Richfield Canal is based on April 28, 1984, data. IWRB Ex. 108 at 3057, Table 14; IWRB Ex. 108 at Appendix N, p. 3551. However, as stated above, Mr. Harmon testified that, with respect to "measured diversions on the Richfield at Gauge No. 4 before May 1st," there was "[a] good possibility it could be for stockwater." Tr. Vol. II, p. 36. In addition, Mr. Harmon testified at the hearing that "[w]hen the Big Wood Canal Company is looking to commence the irrigation season" there is not really "a process of charging the system and filling the canals." Tr. Vol. II, p. 59. Mr. Harmon stated "they just basically bring the water in and pretty much bring it up to what the

early-season demand is in a matter of about two days, and you're there. They have gotten away from doing it otherwise." Tr. Vol. II, pp. 59-60.

The measurement data for station #4 during the development period demonstrates the process of "charging the system and filling the canals" which, according to Mr. Harmon's testimony, the canal company has "gotten away from." *See* IWRB Ex. 108 at Appendix N, p. 3551. Specifically, from April 1 to April 16, 1984, (the year IWRB relies upon for its request for 63 cfs of ground water recharge along the Richfield Canal) no water was diverted from the Big Wood River into the Richfield Canal. *Id.* On April 17 and 18, 38 cfs was diverted from the Big Wood River into the Richfield Canal; then between 40 and 63 cfs was diverted until May 1; then 133 cfs was diverted on May 2; and on May 3, over 200 cfs was diverted. A similar pattern was followed in 1985. *Id.* at 3555. In contrast, data from 1988-92 shows that no water was diverted into the Richfield Canal until the first week of May or even mid-May, at which point over 200 cfs was diverted. *Id.* at 3568, 3572, 3577, 3581, 3586.

In sum, Mr. Harmon's testimony calls into question how much of the water diverted into the Richfield Canal during the development period for Permit 37-7842 was for stockwater and, therefore, not available for ground water recharge. Mr. Harmon's testimony and data from station #4 also show that, when water was diverted into the Richfield Canal in April 1984, it was likely diverted to charge the system, not to recharge ground water. The evidence in the record does not reasonably quantify what amount of Big Wood River water, if any, recharged ground water along the Richfield Canal during the development period for Permit 37-7842. Further, as discussed above, the Richfield Canal has never been an authorized place of use for Permit 37-7842. Accordingly, License 37-7842 should not include ground water recharge along the Richfield Canal. *See* I.C. 42-219(1).

2. Dietrich Site

Both IWRB's expert and Edl determined that surface water recharged ground water at a site off the Dietrich Canal during the development period for Permit 37-7842. IWRB Ex. 108 at 3058; IDWR Ex. 2. The Dietrich site was "constructed circa 1970" by the U.S. Army Corps of Engineers. IDWR Ex. 2 at 9; Tr. Vol. I, pp. 58-59, 166. Lincoln and Gooding Counties have used the Dietrich site "for flood or flow control . . . since the re-diversion structure was constructed." *Id.* at 10-11. Both Edl and Mr. Harmon testified that the Dietrich site was constructed and operated to divert water from the Little Wood River to protect downstream towns and farms from flooding. Tr. Vol. I, p. 134; Tr. Vol. II, pp. 65-66.

The Dietrich site is an authorized place of use for Permit 37-7842. The map included with the Application depicts the Dietrich site (#6) highlighted with hatched lines. IDWR Ex. 3 at 77; *Water Right Back File 37-7842* at 5. Further, the Department's approval of IWRB's July 13, 2017 Application for Amendment specifies that the Dietrich site is the place of use for Permit 37-7842. IDWR Ex. 7. Mr. Harmon testified at the hearing that the Big Wood Canal Company "goes out and operates the actual facility." Tr. Vol. II, p. 67. Mr. Harmon also testified that, "in time of flood," the watermaster has instructed the canal company to divert water into the Dietrich site. Tr. Vol. II, p. 66.

The Department's determination that surface water recharged ground water at the Dietrich site pursuant to Permit 37-7842 focused on data from 1984 because water delivery and flow data demonstrated high flows occurred in the spring of 1984 and "there would have been excess water." Tr. Vol. I, p. 59 (Edl testifying: "I had an idea of which water years within the development period were big water years that there would have been excess water. So my pursuit of use of this site was limited to the years that excess water was available."); Tr. Vol I, p. 62 (Edl testifying: "I recognized that 1984 was a pretty good year in that it was approaching the capacity of the [Dietrich] canal."); IDWR Ex. 2 at 11, 13. Lee Peterson, previous watermaster for Water District 37, Big Wood River, characterized water delivered to the Dietrich site as "flood control." (Edl) Tr. Vol. I, p. 134. Edl testified: "I believed that this event [at the Dietrich site] constituted aquifer recharge, but it was not managed aquifer recharge." Tr. Vol. I, p. 154. Edl characterized the activity at the Dietrich site as "unmanaged" recharge because of the following definition: "Unmanaged recharge is mostly due to a need to get rid of water, dispose of water, excess water. Get it out of the way." Tr. Vol. I, p.155. Edl also focused on 1984 because infrared aerial photography from 1980 to 1987 showed that water appeared at the Dietrich site that year. Tr. Vol. I, pp. 60-62; IDWR Ex. 2 at 11-14.

Based on conversations with the current watermaster and Mr. Harmon, Edl determined "the customers served by the Dietrich Canal have an early irrigation season demand of approximately 150 cfs." *Id.* Mr. Harmon testified at the hearing that the "early irrigation season on the Dietrich" runs from approximately April 10th until June 1st and that "the demand during that time period would be between 100 and 150 cfs." Tr. Vol. II, pp. 38-40.

To estimate ground water recharge at the Dietrich site pursuant to Permit 37-7842 in 1984, Edl started with the daily amounts of water diverted into the Dietrich Canal measured at station #11 ("the headgate where the Dietrich Canal diverts from the Little Wood River") from April through September 1984. *Id.* at 13-14; Tr. Vol. I, pp. 165-66. Edl subtracted 150 cfs from those daily discharge measurements to calculate the flow of water that could have been available for recharge at the Dietrich site. *Id.* at 13. At the hearing, Edl characterized the 150 cfs estimate as "generous." Tr. Vol. I, p. 148. Based on those calculations, and focusing on dates between April 19 and May 21, the Department recommended a maximum annual diversion rate of 250 cfs and a maximum annual diversion volume of 13,900 acre-feet for ground water recharge at the Dietrich site for License 37-7842. IDWR Ex. 2 at 12-13.

IWRB's expert also analyzed flows diverted into the Dietrich Canal measured at station #11 to estimate potential recharge at the Dietrich site pursuant to Permit 37-7842. IWRB Ex. 108 at 3051. Like Edl, IWRB's expert recognized that 1984 was a high water year where excess flows were available. *Id.* at 3052. IWRB's expert "focused on the dates between April 15th and May 31st as the logical period when recharge would occur, because irrigation demand [] increases in June and peaks in July while spring runoff is less." *Id.* at 3051. In contrast to the Department's analysis, IWRB's expert estimated "an early irrigation flow rate of 120 cfs as an average irrigation demand during the dates of April 15 through May 31" based on discussions with Mr. Harmon. *Id.*; Tr. Vol. II, p. 124.[9] IWRB's expert testified that "Mr. Harmon indicated

[9] IWRB's expert testified in response to questioning about whether the 120 cfs value included "any stock water" that he understood from Mr. Harmon "that 120 demand was all the water, so maybe just calling it irrigation could

that while there might be some maximum diversion during that time of 150, he felt that 120 was a much more reasonable value on an average demand for the Dietrich Canal during that period." Tr. Vol. II, p. 124. Also in contrast to the Department's analysis, IWRB's expert recognized the "F-Waste gage" which measures water that returns to the Little Wood River from the Dietrich Canal. IWRB Ex. 108 at 3051.[10] IWRB's expert calculated daily ground water recharge rates pursuant to Permit 37-7842 by subtracting 120 cfs and flows measured at the F-Waste gage from the total flows into the Dietrich Canal measured at station #11. *Id.*

There are no measurement stations on either side of the Dietrich site along the Dietrich Canal to definitively establish the flow rate of water that was actually diverted into the Dietrich site. Tr. Vol. I, p. 150; Tr. Vol. II, p. 127. However, the general approach taken by the Department and IWRB to quantify recharge at the Dietrich site pursuant to Permit 37-7842 is reasonable and supported by substantial evidence in the record. Nevertheless, the Department and IWRB reached different conclusions regarding what diversion rate, annual diversion volume, and source of water should be included on License 37-7842.

IWRB's recommended diversion rate (276 cfs) is more appropriate than the Department's recommended diversion rate (250 cfs). At the hearing, Edl characterized the 150 cfs estimate as "generous." Tr. Vol. I, p. 148. IWRB's expert testified that "Mr. Harmon indicated that while there might be some maximum diversion during that time of 150, he felt that 120 was a much more reasonable value on an average demand for the Dietrich Canal during that period." Tr. Vol. II, p. 124. License 37-7842 should include a diversion rate of 276 cfs for the Dietrich site.[11]

Edl's calculation only accounted for 28 days between April 19 and May 21 where at least 100 cfs remained after subtracting 150 cfs from daily flows measured at station #11. IDWR Ex. 2 at 13. However, Edl testified at the hearing that daily measurement data could be off by "10 percent." Tr. Vol. I, pp. 171-72. Edl testified: "I remember thinking 10 percent of 400 is 40 CFS. And if I avoid making conclusions on numbers that are 40 CFS or lower—too close to 40 CFS I would not use in my recommendation. They are just too close to the margin of error." *Id.* By this logic, Edl should have accounted for thirteen additional days in May when at least 40 cfs remained after subtracting 150 cfs from daily flows measured at station #11. *See* IDWR Ex. 2 at 13. In contrast, IWRB's expert calculated an annual diversion volume in 1984 (12,942 acre-feet) by converting the calculated daily recharge rates between April 19 and May 31 into volumes and summing the daily recharge volumes. IWRB Ex. 108 at Appendix L, pp. 3455-56, 3458. The Director agrees with IWRB's expert that "[t]his method is more defensible." IWRB Ex. 108 at 3060.

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probably—maybe it had been a misstatement on my part, but any demand from the system was that 120 value." Tr. Vol. II, pp. 125-26.

[10] Mr. Harmon testified there are four or five laterals off the Dietrich system with returns into the Milner-Gooding Canal. Tr. Vol. II, p. 65. Mr. Harmon estimated that, during the irrigation season, "3 CFS, possibly 4" flow from the Dietrich Canal as "waste that comes back into the Milner-Gooding." Tr. Vol. II, p. 18. IWRB's expert testified he did not include the laterals off the Dietrich Canal in his analysis because Mr. Harmon told him "those only flow during the peak irrigation season, so July/August timeframe." Tr. Vol. II, p. 153.

[11] License 37-7842 should also contain a combined limit on the diversion rate for the Dietrich site consistent with Edl's recommendation. *See* IDWR Ex. 2 at 11.

Edl only recommended the Little Wood River for ground water recharge at the Dietrich site. IDWR Ex. 2 at 1. IWRB concludes the source should include both the Little Wood and Big Wood Rivers. *IWRB's Post Hearing Brief* at 32; IWRB Ex. 108 at 3051. IWRB's conclusion is based on the assertion that Big Wood River water comingles with the Little Wood River at the mouth of the Jim Byrns Slough, and that such comingled water is diverted into the Dietrich Canal. *Id.*; IWRB Ex. 108 at 3070, Figure 9. Mr. Harmon testified that there is a check structure on the Little Wood River "just below where the Byrn[s] Slough comes in" that serves the purpose of backing up Little Wood River water comingled with Big Wood River water so it can flow into the Dietrich Canal. Tr. Vol. II, pp. 22-23.

IWRB's expert requested a rate of 276 cfs for ground water recharge at the Dietrich site based on data from April 19 through May 31 of 1984. Infrared aerial photography from 1980 to 1987 shows that water appeared at the Dietrich site in 1984. Tr. Vol. I, pp. 60-62; IDWR Ex. 2 at 11-14. No water was measured at the mouth of the Jim Byrns Slough from April 1 to April 30 of 1984. IWRB Ex. 108 at Appendix N, p.3551. Accordingly, no Big Wood River water could be attributed to ground water recharge at the Dietrich site in April of 1984.

From May 1 to May 31, 1984, however, water flowed at the mouth of the Jim Byrns Slough at rates between 94 and 149 cfs. IWRB Ex. 108 at Appendix N, pp. 3551-52. But evidence in the record establishes that water measured at the mouth of the Jim Byrns slough is not all Big Wood River water. Mr. Harmon testified at the hearing that "[t]here's seven or eight laterals that come off the East Main—and I'm estimating those laterals, I don't know the exact number—that come back and tail back into the Byrn[s] Slough." Tr. Vol. II, p. 12. This water that "tails back into the Byrn[s] Slough" is waste water. In addition, IWRB's expert report states that, "sometimes," water measurements at the mouth of the Jim Byrns Slough are higher than measurements at the head, "leading [IWRB's expert] to conclude that water from unknown sources were entering the slough." IWRB Ex. 108 at 3055; *see* Tr. Vol. II, pp. 113-14. Accordingly, the best starting point to estimate the quantity of Big Wood River water that could have actually flowed at the mouth of the Jim Byrns Slough is measurement data at its head, where the Richfield Canal "splits into the Jim Byrn[s] Slough, the East Main, and West Main Canals." Tr. Vol. II, p. 9. Mr. Harmon also testified that there is "one private headgate in a small lateral . . . that runs about five or six feet" between the head and mouth of the Jim Byrns Slough. Tr. Vol. II, pp. 11-12. Therefore, the best measure of the quantity of Big Wood River water that could have been diverted into the Dietrich Canal at station #11 and delivered to the Dietrich site pursuant to Permit 37-7842 is daily measurement data at the head of the Jim Byrns slough during May of 1984, minus 6 cfs. Taking daily measurement data at the head of the Jim Byrns Slough during May 1984 (IWRB Ex. 108 at Appendix N, pp. 3551-52), subtracting 6 cfs per day, converting the calculated daily flow rates to volumes, and summing those volumes results in a diversion volume of 1,607 acre-feet.[12]

Based on the foregoing, License 37-7842 should include both the Big Wood River and Little Wood River as sources for ground water recharge at the Dietrich site. Further, of the

[12] Based on this analysis, the licensed diversion rate from the Big Wood River into the Richfield Canal to accomplish delivery of Big Wood River water to the Dietrich site should be 54 cfs (the highest rate of flow at the head of the Jim Byrns Slough from May 1 to May 31, 1984 (60 cfs), minus 6 cfs).

12,942 acre-feet annual diversion volume calculated for the site by IWRB's expert, 1,607 acre-feet should be Big Wood River water and 11,335 acre-feet should be Little Wood River water.[13]

Petitioners suggested at the hearing that the Department cannot license ground water recharge that occurred at the Dietrich site pursuant to Permit 37-7842 because the permit holder failed to satisfy the condition of the Permit which states: "Water may not be diverted under this permit until the Board of Directors of the District establish and implement a procedure acceptable to the Director for assuring that the water quality of the Lower Snake Aquifer will not be impaired." IDWR Ex. 3 at 79. Evidence in the record establishes that, as of November 23, 1983, Mr. Martens had "developed a plan to evaluate the ground water impacts of the proposed recharge efforts." IWRB Ex. 119. On December 1, 1983, the Department sent a letter to the Chairman of LSARD citing the above-quoted condition on Permit 37-7842 and clarifying the roles of the Department and "[Idaho Department of Health & Welfare] regarding the water quality aspect of recharge systems proposed by [the] Board." IWRB Ex. 120. On March 9, 1984, Mr. Martens submitted to the Department a draft of the "Lower Snake River Aquifer Recharge Project Impact and Monitoring Program" drafted by Mr. Brockway. IWRB Ex. 121. The draft is specific to the Shoshone recharge site diverted off the Milner-Gooding Canal. *Id.* On March 16, 1984, the Department sent Mr. Martens a letter informing him "that Mr. Brockway's Impact Evaluation and Monitoring Program for the Lower Snake Plain Aquifer Recharge Project would be acceptable" with some modifications. IWRB Ex. 122. On April 11, 1984, the Chairman of LSARD sent the Department a letter confirming that LSARD would conform to the requirements of the Department's letter. IWRB Ex. 124. On April 12, 1984, the Department sent a letter to the Chairman of LSARD acknowledging receipt of the Chairman's April 11, 1984, letter and authorizing LSARD to "begin recharge." IWRB. Ex. 123.

IWRB's Exhibits 119-124 establish that, by early April 1984, LSARD had submitted a procedure (i.e. Impact Evaluation and Monitoring Program for the Lower Snake Plain Aquifer Recharge Project) to the Department for assuring that the water quality of the Lower Snake Aquifer will not be impaired and the Department found that procedure acceptable, with some modifications that LSARD accepted. The condition at issue does not specify that the procedure LSARD submitted had to be specific to a particular source, or a particular recharge site, and does not prevent the Department from issuing License 37-7842 for ground water recharge at the Dietrich site.

In sum, License 37-7842 should include ground water recharge at the Dietrich site consistent with the limitations described herein. *See* I.C. 42-219(1).

3. Shoshone Site

The Shoshone recharge site was an authorized place of use for Permit 37-7842, prior to IWRB's July 13, 2017 Application for Amendment. The Shoshone site is depicted as shape #3

[13] IWRB asserts there should be no volume limit for License 37-7842. IWRB Ex. 108 at 3059; *IWRB's Post-Hearing Brief* at 22-23. The Department's Beneficial Use Examination Rules require an annual diversion volume for water uses, unless such uses are exempt from the requirement. IDAPA 37.03.02.035.01(j). Ground water recharge is not exempt from the requirement. *See id.* The Director will not exempt License 37-7842 from an annual diversion volume requirement contrary to the Department's Beneficial Use Examination Rules.

on the map attached to the Application and falls within the Lower Snake Plains Aquifer Recharge District boundary. IDWR Ex. 3 at 77. The Shoshone site was constructed at the direction of LSARD by April 18, 1984. IWRB Ex. 125.

Edl acknowledged in the October 29, 2014 Memorandum that Mr. Martens recommended the Shoshone recharge site for License 37-7842. IDWR Ex. 2 at 8. "The Shoshone recharge site is located between measuring stations #56 and #57 on the Milner-Gooding Canal. It is also downstream from a structure" referred to as the "bifurcation." IDWR Ex. 2 at 8; IWRB Ex. 108 at 3047. "The bifurcation is a hydraulic structure where Snake River water in the Milner-Gooding Canal can be split and either injected into the Little Wood River or through a siphon tube under the Little Wood River to the north section of the Milner-Gooding Canal." IWRB Ex. 108 at 3047. Edl stated in the October 29, 2014 Memorandum that discussions with the current watermaster "confirmed that, although unlikely, it is possible to bring water from the Big and Little Wood Rivers to the Shoshone site." IDWR Ex. 2 at 8. Edl reasoned that the only way Little Wood River water could flow into the Milner-Gooding Canal is "if the water in the Milner-Gooding Canal has less energy than the water in the Little Wood River." *Id.* at 9. Edl determined that the "quantity of water flowing in the Milner-Gooding Canal at the time" Mr. Martens concluded surface water was recharging ground water at the Shoshone site in April and May of 1986 "excluded a reversal of the flow through the bifurcation." *Id.* Edl concluded that Mr. Martens "confirmed a recharge event at the Shoshone recharge site but that little if any of the source water for that event could be attributed to the Big or Little Wood Rivers." *Id.* Based on this analysis, while Edl recognized water from the Little Wood River could flow through the bifurcation into the Milner-Gooding Canal, Edl did not recommend the Shoshone site for License 37-7842.

IWRB's expert report states that "Mr. Harmon has witnessed water flowing from the Little Wood River into the bifurcation." IWRB Ex. 108 at 3047. Mr. Harmon testified consistent with IWRB's expert report at the hearing and as to how the bifurcation operates. Mr. Harmon explained that two radial gates maintain backwater conditions in the bifurcation. Tr. Vol. II, pp. 72-73. The gate for the channel delivering Snake River water to the Little Wood River is located at the head of the bifurcation structure beneath the catwalk. Tr. Vol. II, p. 72; *see* IDWR Ex. 2 at 50. The gate for the siphon delivering water to the Milner-Gooding Canal north of the Little Wood River is located below the upstream mouth of the siphon. *Id.*; *see* IDWR Ex. 2 at 49. A wall approximately five feet tall, extends longitudinally through the center of the bifurcation between the two gates. Tr. Vol. II, p. 72. The five foot wall is an overflow spillway that spills excess Milner Gooding Canal water into the Little Wood River. Tr. Vol. II, pp. 72-73.

Mr. Harmon explained that the "surface lateral in the [Little Wood River], at low flows, is just about the same elevation as the floor of the canal . . . [so] with a flow of maybe 60 CFS in that river, you'll get 20 to 30 of it flow back into the canal if there's no water in that Milner-Gooding Canal." Tr. Vol. II, p.74. Mr. Harmon stated: "Even with the radial gate [located at the head of the bifurcation structure] closed, it will leak that much. Those seals just do not hold. . . . It will leak right underneath and around that radial gate." *Id.*

Mr. Harmon testified that, since at least 1997, a cofferdam is constructed during the winter to: (1) prevent Little Wood River water from flowing backwards through the bifurcation channel that delivers water to the Little Wood River; (2) prevent water from leaking through the radial gate located at the head of the bifurcation channel that delivers water to the Little Wood River; and (3) prevent "leakage flowing upstream into the [Milner-Gooding] canal." Tr. Vol. II, pp. 30, 59, 75. Based on this information, the cofferdam is constructed in the bifurcation channel that delivers water to the Little Wood River downstream of the radial gate and prevents upstream back-flow through the bifurcation into the Milner-Gooding Canal. Prior to the irrigation season, the cofferdam must be removed.

During the irrigation season, at the bifurcation, Snake River water is delivered to both irrigators diverting from the Little Wood River and irrigators who received water from the Milner-Gooding Canal below the bifurcation siphon. Mr. Harmon stated that Little Wood River water does not generally back up into the Milner-Gooding Canal and go through the siphon "during irrigation flow." Tr. Vol. II, p. 29. However, "at the very start of irrigation season" in 2017, "a high water season," he observed flow in the Milner-Gooding Canal at a rate of approximately 300 cfs and flow in the Little Wood River of approximately 500 to 600 cfs. Tr. Vol. II, pp. 74-76. Mr. Harmon testified "the head pressure was great enough that the water was actually flowing upstream under that radial gate against the Milner flow and going around and down that siphon." *Id.*

IWRB's expert concludes that water from the Little Wood River contributes to the Milner-Gooding Canal at the bifurcation. IWRB's expert also concludes that such water is directed from the Milner-Gooding Canal past the bifurcation into the Shoshone recharge site. To reach these conclusions, IWRB's expert obtained measurement data from three locations along the Milner-Gooding Canal during the development period for Permit 37-7842: 1) #53 which measures the flow of Snake River water coming into the bifurcation, 2) #56 which measures water flowing away from the bifurcation, and 3) #57 after the Shoshone site recharge diversion. IWRB Ex. 108 at 3053. To calculate recharge at the Shoshone site pursuant to Permit 37-7842, IWRB's expert determined what days flow measurements at station #56 exceeded flow measurements at station #53 during the development period. *Id.* For those days, IWRB's expert assumed that the quantity of water measured in the Milner-Gooding Canal at #56 in excess of water measured at #53 was water from the Little Wood River, because "no other sources of the additional water exist during the time periods analyzed." *Id.* at 3053-54. IWRB's expert also quantified the amount of water diverted into the Shoshone recharge site from the Milner-Gooding Canal past the bifurcation by subtracting flows measured at station #57 from flows measured at station #56. *Id.* at 3054. Based on these calculations, IWRB's expert concludes that, on days Little Wood River water contributed to the Milner-Gooding Canal, that water was also directed into the Shoshone recharge site. *Id.*

Edl's October 29, 2014 Memorandum, Mr. Harmon's testimony at the hearing, and IWRB's expert report all support a finding that it is possible for water from the Little Wood River to contribute to the flow in the Milner-Gooding Canal via the bifurcation during high flow, spring runoff events, but only during the irrigation season and only when the Little Wood River surface water elevations are higher than the surface water elevation in the back water pool of the bifurcation.

By subtracting flow measured at station #53 (Milner-Gooding Canal above the bifurcation) from flow measured at station #56 (Milner Gooding Canal below the bifurcation), IWRB's expert reasonably calculated the amount of water that the Little Wood River contributed to the Milner-Gooding Canal at the bifurcation during high flows in the Little Wood River. By subtracting flow at station #57 (Milner Gooding Canal below the Shoshone Recharge Site) from the flow at station #56 (Milner Gooding Canal below the bifurcation), IWRB's expert reasonably calculated the amount of water in the Milner-Gooding Canal diverted into the Shoshone recharge site during the development period. Because the water delivered into the Shoshone recharge site included both Little Wood River and Snake River water, the portion of the water delivered into the recharge site attributable to the Little Wood River could not exceed what was back-flowing through the bifurcation. The contribution from the Little Wood River was always less than the total recharge, so the recharge water attributable to the Little Wood River was limited to the amount back-flowing through the bifurcation, or the flow at station #56 (Milner Gooding Canal below the bifurcation) minus the flow at station #53 (Milner-Gooding Canal above the bifurcation).

IWRB's expert reasonably determined a maximum annual flow rate for ground water recharge at the Shoshone recharge site of 295 cfs in April of 1984. IWRB Ex. 108 at 3055, Table 12, Appendix M, p. 3503. License 37-7842 should include ground water recharge at the Shoshone recharge site with a maximum annual diversion rate of 295 cfs.

With respect to the source of water for ground water recharge at the Shoshone site, IWRB argues that both the Little Wood and Big Wood Rivers should be included. *IWRB's Post Hearing Brief* at 5. IWRB's conclusion is based on the assertion that Big Wood River water comingles with the Little Wood River at the mouth of the Jim Byrns Slough, and that such comingled water continues down the Little Wood River until it reaches the bifurcation. *Id.* However, data from 1984 shows that, when Little Wood River water contributed to the Milner Gooding Canal (between April 14 and April 30—*see* IWRB Ex. 108 at Appendix M, p. 3503) no water also exited the Jim Byrns Slough into the Little Wood River (*see* IWRB Ex. 108 at Appendix N, p. 3551). Data from 1985, 1989, and 1991 shows the same result—when Little Wood River water contributed to the Milner Gooding Canal, no water exited the Jim Byrns Slough into the Little Wood River. *Compare* IWRB Ex. 108 at Appendix M with Appendix N. The weight of the evidence in the record does not support a determination that, at the time the Little Wood River contributed water to the Milner-Gooding Canal via the bifurcation during the development period, such water included both Big Wood River water and Little Wood River water. License 37-7842 should only include the Little Wood River as a source for ground water recharge at the Shoshone site.

IWRB's expert calculated a daily volume based on flow rates diverted for recharge at the Shoshone site and summed the daily recharge volumes. IWRB Ex. 108 at 3060. IWRB's expert calculated a maximum annual volume diverted for ground water recharge at the Shoshone site during the development period for Permit 37-7842 of 2,126 acre-feet in 1984. IWRB Ex. 108 at Appendix M, p. 3506, Appendix O, p. 3591. License 37-7842 should limit the annual diversion volume for the Shoshone site to 2,126 acre-feet.

C. The period of use should be limited because recharge to ground water was a byproduct of the Little Wood River back-flow through the bifurcation or flood control operations in the Dietrich Canal during high water flows.

As discussed above, water was delivered during the development period for Permit 37-7842 to the Dietrich and Shoshone sites where water percolated into the ground. These deliveries were byproducts of operations other than recharge. The operations only recharged ground water during high water events that either: (1) unusually reversed the direction of flow in the bifurcation on the Milner-Gooding Canal, or (2) required reducing flows in the Little Wood River by sending some of the 1984 flood waters down the Dietrich Canal to the U.S. Army Corps of Engineers' flood water dump site. In other words, during the development period, groundwater recharge occurred only when natural flow in the Little Wood River was so high it was a detriment (flooding) or it back-flowed enough water into the Milner-Gooding Canal that the water was delivered to the Shoshone site. These were periods when there was likely more than enough water to satisfy all existing water rights, including those of the Petitioners, with extra water to spare.

Because the above-described water deliveries were byproducts of specific operations caused by spring flooding during high water years, and did not happen, nor would they ever happen, during normal flow conditions, a water right license issued for Permit No. 37-7842 must be limited to the time periods when flood waters were delivered as a byproduct of operations other than recharge, and water percolated into ground water. *See* I.C. § 42-234(3) (stating the Director "may regulate the amount of water which may be diverted for recharge purposes and may reduce such amount . . . .").[14] Accordingly, the period of use for the Dietrich site should be April 19 through May 31 for Little Wood River water, and May 1 through May 31 for Big Wood River water. For the Shoshone site, the period of use should be April 1 to April 30.[15]

Diversion of water outside of these periods of use (flood water time frames) could reduce the water available to existing water rights that likely did not happen during the development period for Permit 37-7842. License 37-7842 should include a condition specifying that, for any proposal to change the period of use through an application for transfer (Idaho Code § 42-222) or an application to rent the water right from the Water Supply Bank (Idaho Code § 42-1763), the right holder bears the burden of proving that the change in the period of use will not injure other water rights, including the power generation water rights of the Petitioners.[16]

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[14] For these same reasons, a water right license issued for Permit No. 37-7842 must also be limited to the quantities of water shown to have been delivered to sites where surface water percolated into ground water. As discussed herein, for the Dietrich site, License 37-7842 should be limited to an annual diversion volume of 12,942 acre-feet, of which 1,607 acre-feet should be Big Wood River water and 11,335 acre-feet should be Little Wood River water. For the Shoshone site, License 37-7842 should be limited to an annual diversion volume of 2,126 acre-feet from the Little Wood River.

[15] April 1 was the earliest date that Little Wood River water back-flowed into the bifurcation during the development period. IWRB Ex. 108 at Appendix M, p.3511. April 30 was the latest date Little Wood River water back-flowed into the bifurcation. *Id.* at 3503. The years 1982 and 1983 cannot be considered because the Shoshone site was not constructed until 1984. IWRB Ex. 125.

[16] The "Petitioners are interested in this matter as owners of permits and water rights for hydropower purposes" listed in the *First Amended Petition for Hearing, and Petition for Declaratory Ruling* at 1-2, par.1 (Sep. 8, 2017).

D. License 37-7842 should be rescinded and Permit 37-7842 should be amended for licensing purposes.

The Department issued License 37-7842 consistent with and pursuant to the Department's approval of IWRB's July 13, 2017 Application for Amendment regarding Permit 37-7842. However, License 37-7842 only includes the Dietrich site. License 37-7842 should include the Dietrich site and Shoshone site as described herein. Accordingly, the Director will rescind License 37-7842 and the Department's approval of IWRB's July 13, 2017 Application for Amendment. The Director will delay the licensing process for Permit 37-7842 for thirty days from the date of this order to allow IWRB time to withdraw the July 13, 2017 Application for Amendment and submit another Application for Amendment. A draft Application for Amendment consistent with this order is attached hereto.[17]

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that License 37-7842 and the Department's approval of IWRB's July 13, 2017 Application for Amendment regarding Permit 37-7842 are RESCINDED.

IT IS FURTHER ORDERED that the licensing process for Permit 37-7842 shall be delayed for thirty days from the date of this order to allow IWRB time to withdraw the July 13, 2017 Application for Amendment and submit another Application for Amendment.

DATED this 11th day of March 2019.

GARY SPACKMAN
Director

[17] Because the Dietrich site and Shoshone site have distinct points of diversion and delivery systems, the attached Application for Amendment splits Permit 37-7842 to move a portion of the Permit to the point of diversion for the Dietrich site (37-7842) and the remainder to the point of diversion for the Shoshone site (37-23145).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March 2019, I served a true and correct copy of the foregoing document on the following by the method(s) indicated.

JOSEPH F JAMES BROWN & JAMES 125 FIFTH AVENUE WEST GOODING ID 83330 joe@brownjameslaw.com dana@brownjameslaw.com	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
ANN Y VONDE DEPUTY ATTORNEY GENERAL IDAHO WATER RESOURCE BOARD STATE OF IDAHO PO BOX 83720 BOISE ID 83720-0010 ann.vonde@ag.idaho.gov	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
BRIAN PATTON IDAHO WATER RESOURCE BOARD 322 EAST FRONT STREET PO BOX 83720 BOISE ID 83720-0098 brian.patton@idwr.idaho.gov	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email
KEVIN LAKEY WATER DISTRICT #37 107 W 1ST SHOSHONE ID 83352 watermanager@cableone.net	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Overnight Mail ☐ Facsimile ☒ Email

Kimberle English

Kimberle English

State of Idaho
Department of Water Resources

Application for Amendment

(For Licensing Purposes)
Water Right No. 37-23145

Priority: August 25, 1980

Maximum Diversion Rate: 295.00 CFS
Maximum Diversion Volume: 2,126.0 AF

The owner and holder of Permit to Appropriate the Public Waters of the State of Idaho No. 37-23145

STATE OF IDAHO IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720 BOISE ID 83720-0098

requests the permit be changed as follows:

Source : LITTLE WOOD RIVER **Tributary:** MALAD RIVER

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
GROUND WATER RECHARGE	04/01 to 04/30	295.00 CFS	2,126.0 AF

Location of Point(s) of Diversion
LITTLE WOOD RIVER SW¼ NE¼, Sec. 36, Twp 05S, Rge 17E, B.M. LINCOLN County

Place of Use: GROUND WATER RECHARGE

Twp	Rng	Sec	NE				NW				SW				SE					Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	No QQ	
05S	17E	22			X	X				X	X		X	X	X	X				

Permit holder asserts that no one will be injured by such change and that such change will be made at permit holder's own risk.

Signed this _____ day of _____, 20____.

_____
(Signature)

State of Idaho
Department of Water Resources

Application for Amendment

(For Licensing Purposes)
Water Right No. 37-23145

FOR DEPARTMENT USE ONLY

Preliminary check by _____ Fee = $___ Receipted by _____ # _____ Date _____

ACTION OF THE DEPARTMENT OF WATER RESOURCES

The Idaho Department of Water Resources hereby approves the above Application for Amendment for Permit No. 37-23145 with the following:

Conditions of Approval

1. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).
2. The issuance of this right does not grant any right-of-way or easement across the land of another.
3. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 37.
4. Places of use for groundwater recharge describing federal public lands within the canals and discharges outside of the canals onto federal public land are not authorized, unless specifically authorized in writing by the United States.
5. Prior to further diversion and use of water in accordance with this water right, the right holder shall obtain Bureau of Land Management authorization necessary to access the point of diversion or place of use or to convey water across federal land.
6. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
7. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
8. For any proposal to change the period of use through an application for transfer (Idaho Code § 42-222) or through an application to rent the water right from the Water Supply Bank (Idaho Code § 42-1763), the right holder bears the burden of proving that the change in the period of use will not injure other water rights, including the following power generation water rights: 37-7943, 37-7857, 37-7865, 37-7922, 37-7889, 37-7916, 37-8096, 37-8251, 37-7863, 37-7911 and the following permits or licenses issued on the basis of them: 37-21297, 37-8113, and 37-8262.

This amendment is issued pursuant to the provisions of Idaho Code § 42-211.

Signed this _____ day of _____, 20____.

_____
GARY SPACKMAN
Director

State of Idaho
Department of Water Resources

Application for Amendment

(For Licensing Purposes)
Water Right No. 37-7842

Priority: August 25, 1980

Maximum Diversion Rate: 276.00 CFS
Maximum Diversion Volume: 12,942.0 AF

The owner and holder of Permit to Appropriate the Public Waters of the State of Idaho No. 37-7842

STATE OF IDAHO IDAHO WATER RESOURCE BOARD
322 E FRONT ST
PO BOX 83720 BOISE ID 83720-0098

requests the permit be changed as follows:

Source : BIG WOOD RIVER **Tributary:** MALAD RIVER
Source : LITTLE WOOD RIVER **Tributary:** MALAD RIVER

Beneficial Use	Period of Use	Rate of Diversion	Annual Volume
GROUND WATER RECHARGE from the Little Wood River	04/19 to 05/31	276.00 CFS	11,335.0 AF
GROUND WATER RECHARGE from the Big Wood River	05/01 to 05/31	54.00 CFS	1,607.0 AF

Location of Point(s) of Diversion

BIG WOOD RIVER SE¼ NE¼, Sec. 30, Twp 02S, Rge 18E, B.M. BLAINE County
BIG WOOD RIVER L4 (SW¼ SE¼), Sec. 25, Twp 04S, Rge 19E, B.M. LINCOLN County(Injection)
BIG WOOD RIVER L4 (SW¼ SE¼), Sec. 25, Twp 04S, Rge 19E, B.M. LINCOLN County(Rediversion)
LITTLE WOOD RIVER L4 (SW¼ SE¼), Sec. 25, Twp 04S, Rge 19E, B.M. LINCOLN County

Place of Use: GROUND WATER RECHARGE

Twp	Rng	Sec	NE				NW				SW				SE					Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	No QQ	
04S	19E	35															X L7	X L8		
05S	19E	2	X L1	X L2	X					X	X	X	X			X				
05S	19E	3															X	X		
05S	19E	10	X			X														
05S	19E	11						X												

Permit holder asserts that no one will be injured by such change and that such change will be made at permit holder's own risk.

Signed this _____ day of _____, 20____.

_____
(Signature)

State of Idaho
Department of Water Resources

Application for Amendment

(For Licensing Purposes)
Water Right No. 37-7842

FOR DEPARTMENT USE ONLY

Preliminary check by _____ Fee = $____ Receipted by _____ # _____ Date _____

ACTION OF THE DEPARTMENT OF WATER RESOURCES

The Idaho Department of Water Resources hereby approves the above Application for Amendment for Permit No. 37-7842 with the following:

Conditions of Approval

1. The issuance of this right does not grant any right-of-way or easement across the land of another.
2. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 37.
3. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion(s).
4. Rights 37-7842, 37-13043, 37-13112, 37-13113, 37-13114, 37-14264, 37-21401, 37-21402, 37-21403, 37-21404, and 37-21405 when combined shall not exceed a total diversion rate of 647.38 cfs
5. Pursuant to Section 42-234(4), Idaho Code, to ensure that other water rights are not injured by the operations of the recharge project authorized by this right, the Director has authority to approve, disapprove, or require alterations in the methods employed to achieve ground water recharge.
6. Pursuant to Section 42-234(3), Idaho Code, the Director may reduce the amount of water that may be diverted for recharge purposes under this right even though there is sufficient water to supply the entire amount authorized for appropriation under this right.
7. Prior to further diversion and use of water in accordance with this water right, the right holder shall obtain Bureau of Land Management authorization necessary to access the point of diversion or place of use or to convey water across federal land.
8. Places of use for groundwater recharge describing federal public lands within the canals and discharges outside of the canals onto federal public land are not authorized, unless specifically authorized in writing by the United States.
9. The following rights are diverted through point of diversion L4 (SW1/4SE1/4) Sec.25, Twp 04S, Rge 19E, B.M. : 37-7842, 37-13043, 37-13112, 37-13113, 37-13114, 37-14264, 37-21401, 37-21402, 37-21403, 37-21404, and 37-21405.
10. For any proposal to change the period of use through an application for transfer (Idaho Code § 42-222) or through an application to rent the water right from the Water Supply Bank (Idaho Code § 42-1763), the right holder bears the burden of proving that the change in the period of use will not injure other water rights, including the following power generation water rights: 37-7943, 37-7857, 37-7865, 37-7922, 37-7889, 37-7916, 37-8096, 37-8251, 37-7863, 37-7911 and the following permits or licenses issued on the basis of the following permits: 37-21297, 37-8113, and 37-8262.

This amendment is issued pursuant to the provisions of Idaho Code § 42-211.

State of Idaho
Department of Water Resources

Application for Amendment

(For Licensing Purposes)
Water Right No. 37-7842

Signed this _____ day of _____, 20____.

_____
GARY SPACKMAN
Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

(a) The petition for reconsideration is disposed of; or
(b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

i. A hearing was held,
ii. The final agency action was taken,
iii. The party seeking review of the order resides, or
iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.