

**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 ON
RECONSIDERATION**

BACKGROUND

On March 11, 2019, the Director of the Idaho Department of Water Resources (“Department”) issued an *Order Rescinding Permit and Amendment Approval; Order Delaying Processing* (“*Order*”) in this matter. On March 25, 2019, counsel for William Arkoosh, the Estate of Vernon Ravencroft, Koyle Hydro, Inc., Notch Butte Hydro Company, Inc., and Shorock Hydro, Inc. (“Petitioners”), emailed a *Petition for Reconsideration* (“*Petition*”) to the Director. On April 8, 2019, the applicant in this matter, the Idaho Water Resources Board (“IWRB”), filed its *Response in Opposition to Petition for Reconsideration* (“*Response*”).

ISSUES FOR RECONSIDERATION

A. The Petition

The Petitioners ask the Director to include a combined use condition on the licenses for water right nos. 37-7842 and 37-23145 so that, when combined, the rights “shall not exceed a total diversion rate of 295 cfs.” *Petition* at 4. Petitioners state the record in this matter shows that “at no point...was water diverted pursuant to the permit at a rate greater than 295 cfs.” *Id.* Petitioners argue that if the combined limit is not added, the right holder would instead be allowed to “increase its maximum rate of diversion from 295 to 571 cfs.” *Id.* Petitioners argue that allowing the license holder to divert at a rate nearly double any diversion rate accomplished during the developmental period is contrary to Idaho Code § 42-219. *Id.* at 2-3.

B. The Response

First, the IWRB argues the *Petition* should be “dismissed . . . as untimely.” *Response* at 1. To be timely, a petition for reconsideration must be filed within 14 days of the date of service of the order. Idaho Code § 67-5246(4); Department Rule of Procedure 740.02.a (IDAPA 37.01.01.740.02.a). The *Order* was served on March 11, 2019. The *Petition* was due on March 25, 2019. The IWRB argues the *Petition* is untimely because the date stamp on the copy of the *Petition* posted to the Department’s website shows the *Petition* was received by the Department on March 27, 2019. The IWRB argues that because the petition was filed after the deadline of

March 25, 2019, “the Director no longer has jurisdiction to alter or amend the *Order*” and the Petition should be dismissed. *Response* at 3.

In the alternative, the IWRB argues that if the Director accepts the *Petition* as timely, it should be denied because “the [*Petition*] does not take issue with any of the factual findings and conclusions in the *Order* regarding the other elements of the proposed Applications for Amendment or the Director’s conclusion that Permit No. 37-7842 should be split” due to distinct points of diversion and delivery, nor does it “challenge the Director’s findings regarding the extent of beneficial use that occurred at each recharge site in 1984.” *Id.* at 4. The IWRB argues “the diversion and use of water at these two recharge sites are completely distinct, and were considered separately by the Director” and therefore “a combined use limitation tying the amount of water that could be diverted and used at one site to the amount of water diverted and used at the other site is inappropriate.” *Id.* The IWRB argues that the “fact that the maximum rate of diversion at each site was not achieved simultaneously is irrelevant.” *Id.* Finally, the IWRB argues the *Petition* should be denied because “the diversion and use of water under the proposed Applications for Amendment is already significantly limited when considering the maximum diversion rates in conjunction [with] the periods of use and annual volume limits.” *Id.* at 5.

C. Director’s Answer to the Petition

The *Petition* was received by the Director on March 25, 2019, via an email from counsel for the Petitioners.¹ The certificate of mailing reflects that counsel for Petitioners mailed a copy of the *Petition* to the Director, the IWRB and counsel for the IWRB by U.S. mail the same day. *Petition* at 5. The copy sent to the Director by U.S. mail was received on March 27, 2019, and was date stamped as received the same day. The copy date stamped March 27, 2019, was the copy scanned and posted to the Department’s website.

The Department’s Rules of Procedure do not expressly authorize the service of documents by email. However, Rule 300 of the Department’s Rules of Procedure allows for the filing of a petition by facsimile transmission so long as the original is mailed or physically delivered the next business day. IDAPA 37.01.01.300. While the *Petition* was not sent by facsimile, Rule 52 of the Department’s Rules of Procedure states that the rules of procedure “will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency” and permits deviation from the rules when the Director finds that “compliance with them is impracticable, unnecessary or not in the public interest.” IDAPA 37.01.01.052. There is effectively no difference between the Director receiving a petition by fax and the Director receiving a petition by email. As authorized pursuant to Rule of Procedure 52, the Director will liberally construe rule 300 and will permit a deviation from the rule because strict compliance is unnecessary, not in the public interest and contrary to a just and speedy determination of the issues in this matter. Because the *Petition* was received by the Director by email on March 25, 2019, and the *Petition* was mailed to the Department the same day, the Director concludes the *Petition* was timely filed.

¹ The email was also addressed to counsel for the IWRB.

The purpose of this *Order on Reconsideration* is to determine whether Permit Nos. 37-7842 and 37-23145, should be further conditioned at licensing to include a combined total diversion limit of 295 cfs. The Director concludes that both the Dietrich and Shoshone recharge sites were developed and utilized at the same time, using divided Little Wood River water, and, therefore, diversion should be limited based on evidence in the record related to cumulative maximum recharge flows, in this case 295 cfs.

Comparing data in the record from both recharge sites during the relevant time period shows that on certain days both sites were diverting Little Wood River water for recharge purposes. *See* IWRB Ex. 108 at Appendix L, p. 3455 and IWRB Ex. 108 at Appendix M, p. 3503. The maximum diversion rate at either site did not occur on the same day, rather the maximum diversion to the Shoshone site was 295 cfs, occurring on April 17, 1984, while the maximum diversion to the Dietrich site was 276 cfs, occurring on May 18, 1984. *Id.*

On those days when both sites were simultaneously receiving recharge water, the combined total flowrates were always less than the maximum rates that had been found to have been developed at either site. This means the flow of Little Wood River water was split between the sites. Therefore it is incorrect to consider either site capable of using the aggregate maximum flowrate of 571 cfs.

When the Director evaluates the extent of beneficial use developed under a permit, the Director must consider “the quantity of water which has been beneficially applied.” Idaho Code § 42-217. Any license issued must conform to the extent of beneficial use occurring during the development period and “in no case shall be an amount in excess of the amount that has been beneficially applied.” Idaho Code 42-219; *Memorandum Decision and Order* at 4, Case No. CV- 2017-458 (7th Jud. Dist. Ct. 2017)². The record in this matter shows that 295 cfs was the maximum recharge amount found to be put to beneficial use during the development period. Accordingly, a combined use condition should be added to the licenses for water right nos. 37-7842 and 37-23145 limiting them to a combined diversion rate of 295.0 cfs.

ORDER

Based upon and consistent with the following, IT IS HEREBY ORDERED that the licenses for water right nos. 37-7842 and 37-23145, when issued, shall include the following condition: “Rights 37-7842 and 37-23145, when combined, shall not exceed a total diversion rate of 295.0 cfs.”

DATED this 15th day of April 2019.



GARY SPACKMAN
Director

² A copy of this decision can be found at <https://idwr.idaho.gov/files/legal/CV-2017-458/CV-2017-458-20170914-Memorandum-Decision-and-Order.pdf>

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of April 2019, I served a true and correct copy of the foregoing document on the following by the method(s) indicated.

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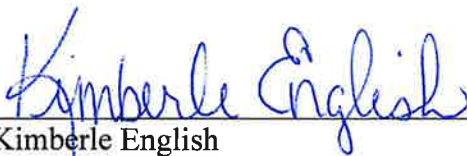
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Kimberle English

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER ON RECONSIDERATION

(To be used in connection with actions when a hearing was held)

The accompanying order is an **Order on Reconsideration** of the "final order" issued previously in this proceeding by the Idaho Department of Water Resources ("Department") pursuant to section 67-5246, Idaho Code.

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 other orders issued in the matter to district court by filing a petition for judicial review in the district court of the county in which:

- (a) the hearing was held; or
- (b) the final agency action was taken; or
- (c) the aggrieved party resides or operates its principal place of business in Idaho; or
- (d) the real property or personal property that was the subject of the agency decision is located.

Section 67-5273, Idaho Code, provides the deadline for filing a petition for judicial review and states, in relevant part:

A petition for judicial review of a final order ... must be filed within twenty-eight (28) days of the service date of the final order, ... or, if reconsideration is sought, within twenty-eight (28) days after the service date of the decision thereon. A cross-petition for judicial review may be filed within fourteen (14) days after a party is served with a copy of the notice of the petition for judicial review.

Pursuant to section 67-5274, Idaho Code, the filing of a petition for judicial review does not itself stay the effectiveness or enforcement of the agency action.