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DEPARTMENT OF
WATER RESOURCES

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Attorneys for the Idaho Water Resource Board

**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

**IDAHO WATER RESOURCE BOARD'S
RESPONSE IN OPPOSITION TO
PETITION FOR RECONSIDERATION**

COMES NOW, the Idaho Water Resource Board ("IWRB"), by and through its attorneys of record, and hereby submits this response in opposition to Petitioners' *Petition for Reconsideration* filed on March 27, 2019.¹ IWRB respectfully requests that the *Petition for Reconsideration* be dismissed as untimely, or if found to be timely, denied on the merits.

¹ The term "Petitioners" refers collectively to petitioners William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro, Inc., Koosh Inc., and Shorock Hyrdo.

A. The Petition for Reconsideration is Untimely

According to the file stamp, the *Petition for Reconsideration* was received by the Idaho Department of Water Resources (“IDWR”) on March 27, 2019. *See Petition for Reconsideration* at 1. The *Petition for Reconsideration* sought reconsideration of a portion of the Director’s *Order Rescinding Permit and Amendment Approval; Order Delaying Processing* dated March 11, 2019 [hereinafter “*Order*”]. *Id.* The certificate of service attached to the *Order* states that the *Order* was served on the parties, including the representative for Petitioners, on March 11, 2019. *Order* at 18.

All hearings required by law to be held before the Director of IDWR are governed by the Idaho Administrative Procedures Act, title 67, chapter 52, Idaho Code, and IDWR’s Rules of Procedure, IDAPA 37.01.01. Idaho Code § 42-1701A(1). The Idaho Administrative Procedures Act provides that “[u]nless otherwise provided by statute or rule, any party may file a motion for reconsideration of any final order issued by the agency head within fourteen (14) days of the service date of that order.” Idaho Code § 67-5246(4). The same requirement is repeated in IDWR’s Procedural Rule 740: “Any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order.” IDAPA 37.01.01.740.02.a. Attached to the *Order* was the *Explanatory Information to Accompany a Final Order* [hereinafter “*Attachment*”]. The *Attachment* specifically notified the parties that “[a]ny 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.**” *Attachment* at 2 (emphasis in original).

The *Petition for Reconsideration* did not comply with the above requirements. According to the file stamp, the *Petition for Reconsideration* was received by IDWR on March

27, 2019, sixteen (16) days after the service date of the *Order* as shown on the certificate of service. See *Petition for Reconsideration* at 1; *Order* at 18. An untimely *Petition for Reconsideration* can have no impact on the effectiveness of a final order. See Idaho Code § 67-5246(5); *A&B Irrigation Dist. v. Idaho Dep't of Water Res.*, 154 Idaho 652, 655, 301 P.3d 1270, 1273 (2012) (under Idaho Code § 67-5246(5), a final order is effective fourteen (14) days after the order's service date unless "there is a *timely* petition for reconsideration filed") (emphasis added). Where no timely petition for reconsideration was filed, the *Order* issued on March 11, 2019, became effective on March 25, 2019, and the Director no longer has jurisdiction to alter or amend the *Order*. See *A&B Irrigation Dist.*, 154 Idaho at 655-56, 301 P.3d at 1273-74. IWRB, therefore, respectfully requests that the *Petition for Reconsideration* be dismissed. See IDAPA 37.01.01.304.

B. The Proposed Applications for Amendment for Permit Nos. 37-7842 and 37-23145 Should Not Include A Total Combined Maximum Diversion Rate of 295 cfs.

Even if the Director concludes that the *Petition for Reconsideration* is timely, the petition should be denied. The *Petition for Reconsideration* asserts that the proposed Applications for Amendment for Permit Nos. 37-7842 (Dietrich site) and 37-23145 (Shoshone site) attached to the *Order* should have "included a condition of approval that Rights No. 37-7842 and No. 37-23145 when combined shall not exceed a total diversion rate of 295 cfs." *Petition for Reconsideration* at 2. The *Petition for Reconsideration* 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 "[b]ecause the Dietrich site and Shoshone site have distinct points of diversion and delivery systems." *Id.* at 2 (citing *Order* at 17 n.17). Additionally, the *Petition for Reconsideration* does

not challenge the Director's findings regarding the extent of beneficial use that occurred at each recharge site in 1984. *See generally id.*

What Petitioners appear to argue is that the Director should limit the diversion of water at the Dietrich and Shoshone sites to the maximum diversion rate that was achieved at both sites simultaneously in 1984. IWRB disagrees.

Petitioners do not challenge the Director's conclusion that 276 cfs was diverted and put to beneficial use at the Dietrich site within the development period or that 295 cfs was diverted and put to beneficial use at the Shoshone site within the development period. *See Order* at 10, 15. Nor has there been any challenge to the Director's determination that the beneficial use of water achieved at both sites fits within the parameters of the original permit. *See id.* at 1, 8, 12-13. The fact that the maximum rate of diversion at each site was not achieved simultaneously is irrelevant. As set forth in the Director's *Order*, there is no overlap in points of diversion, delivery system, or place of use for the Dietrich and Shoshone recharge sites. *See Order* at 8, 12, and 17 n.17.

The diversion and use of water at these two recharge sites are completely distinct, and were considered separately by the Director. *See id.* at 8-15. The diversion and use of water at the Dietrich site does not overlap with or otherwise limit the diversion and use of water at the Shoshone site. 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.

Petitioners are concerned that "[t]he Director's proposed Applications for Amendment would allow the right holder to divert a combined total of 571 cfs during the month of April." Petitioners fail to recognize that the quantity of water that can be diverted and used under the

proposed Applications for Amendment is already significantly limited when considering the maximum diversion rates in conjunction with the annual volume limits and periods of use. Under the proposed Applications for Amendment, IWRB would not be able divert 571 cfs throughout April. The proposed Application for Amendment for Permit No. 37-7842 only authorizes the diversion of water for twelve (12) days in April and is limited to a total possible diversion of 11,335 acre feet ("AF") during that month.² The proposed Application for Amendment for Permit No. 37-23145 authorizes the diversion and use of water throughout April, but is limited to a total diversion volume of 2,126 AF. It would not be possible to divert 571 cfs of water throughout April and stay within the diversion rates, periods of use, and volume limitations set forth in the proposed Applications for Amendment.

The diversion and use of water under the proposed Applications for Amendment is already significantly limited when considering the maximum diversion rates in conjunction of the periods of use and annual volume limits. There is no reason to further limit the use by including a total combined diversion rate. This is especially true where there is no overlap in the points of diversion, delivery works, or places of use at the Dietrich and Shoshone recharge sites. IWRB, therefore, respectfully requests that the *Petition for Reconsideration* be denied should the Director determine that it is timely.

DATED this 8 day of April, 2019.



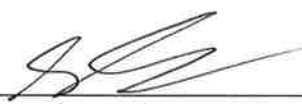
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² Under the proposed Application for Amendment for Permit No. 37-7842, water could only be diverted from the Little Wood River in April, as the period of use for the Big Wood River does not begin until May 1. While 12,942 AF could be diverted under the water right, only 11,335 AF could possibly be diverted in April.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8 day of April, 2019, I caused to be served a true and correct copy of the foregoing document by the methods indicated:

DIRECTOR SPACKMAN IDAHO DEPARTMENT OF WATER RESOURCES P.O. BOX 83720 BOISE, ID 83720-0098	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Federal Express ☐ Facsimile: ☐ Statehouse Mail ☐ Email
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 ☐ Federal Express ☐ Facsimile: _____ ☐ Statehouse Mail ☐ Email
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