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DEPARTMENT OF
WATER RESOURCES

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**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF LICENSE
NO. 37-7842 IN THE NAME OF
THE IDAHO WATER RESOURCE
BOARD

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)
) IWRB'S RESPONSE TO
) PETITIONER'S INITIAL POST-
) HEARING MEMORANDUM
)
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The Idaho Water Resource Board ("IWRB"), by and through its counsel of record, hereby files its Response to Petitioner's Initial Post-Hearing Memorandum in the above captioned matter.

Argument

In their Initial Post-Hearing Memorandum, Petitioners make four arguments: (1) IWRB failed to meet its burden of proving beneficial use under water right permit 37-

IWRB'S RESPONSE TO PETITIONER'S
INITIAL POST HEARING MEMORANDUM – 1

7842 because “no one was able to testify regarding personal knowledge as to the circumstances existing during the recharge event set forth in the permit holder’s Proof of Beneficial Use,” (2) during license review IDWR is limited to the proof of beneficial use submitted by the permit holder, (3) it is improper to grant a license based upon the application and use of water outside the diversions authorized by the permit, and (4) IWRB failed to meet its burden because it provided “no evidence . . . that the permit holder took any action to divert water under the permit.” Each of these issues will be addressed in turn.

1. IWRB is not Limited to Testimony Based on Personal Knowledge as Proof of Beneficial Use under Water Right 37-7842.

The IWRB is not limited solely to presenting testimony based on “personal knowledge” to meet its burden of proving beneficial use under water right 37-7842. Petitioner did not file a motion in limine or otherwise seek to narrow the types of evidence that might be presented at the hearing. Petitioner’s Initial Post-Hearing Brief at 8. Therefore, the IWRB was free to present all evidence relevant to beneficial use of water right 37-7842. I.R.E. 401, 402

In this matter, the IWRB was tasked with proving beneficial use between 1982 and 1992. Much of the evidence that would normally be relied on in demonstrating proof of beneficial use has been lost to the mists of time. It is unrealistic to expect the IWRB to solely produce evidence based on “personal knowledge” testimony. Those with first-hand knowledge of the facts are in their nineties or are no longer alive. *See* TR Vol II pg. 70 ln. 16–pg. 71 ln. 6. In addition, the beneficial use period predated use of internet databases, smart phones, and email so even written documentation of those with “personal knowledge” is lacking. Petitioners themselves produced no evidence based on

“personal knowledge” demonstrating that recharge did not occur under water right permit 37-7842 during the development period.

Rather, the most reliable documentation that does exist are canal measurements. The IWRB produced extensive evidence and analysis of the canal measurements demonstrating that recharge occurred under water right permit 37-7842 during the development period. *See* IWRB Post Hearing Brief Section 3. It is appropriate for the hearing officer to consider all relevant evidence in this matter, not just testimony based on “personal knowledge.”

2. IDWR is not Limited to the Proof of Beneficial Use Submitted under I.C. § 42-217 in its Licensing Review under I.C. § 42-219.

The IWRB addressed the issue of presentation of additional proof of beneficial use under I.C. § 42-219 at length in Section 7 of its Post Hearing Brief. The IWRB incorporates those arguments herein by reference and reiterates that it is appropriate for IDWR to, within certain limitations, consider additional proof of beneficial use at the I.C. § 42-219 licensing stage that was not originally submitted by the permittee pursuant to I.C. § 42-217.

3. Evidence at the Hearing Demonstrated that Beneficial Use Made under Water Right 37-7842 was made within the Permitted Place of Use.

The IWRB presented evidence at the hearing demonstrating that the place of use recommended by its expert was included within the permitted place of use. IWRB Exhibit 108 at IWRB 00003049–00003050; IWRB 00003062 Figure 1, IWRB 00003068 Figure 7. The Richfield canal was included in the permit. IDWR Exhibit 3 at 1, IWRB Exhibit 108, Appendix B, IWRB00003084. The Dietrich site was included in the permit. IDWR Exhibit 3 at 1; IWRB Exhibit 108, Appendix B, IWRB00003084, TR Vol I pg. 57

ln. 4–21. The Shoshone recharge site was also included in the permit. IWRB Exhibit 108 Appendix C IWRB 00003086–3090. As noted by IWRB’s expert there was some discrepancy between the permitted place of use and the advertised place of use, but the permitted place of use is controlling because the permit is the legal authorization to use water. TR Vol II pg. 95 ln. 23–pg. 96 ln. 8, *see also* I.C. § 42-204. Therefore, this discrepancy is of no legal importance and Petitioner’s assertion that the Richfield canal, Dietrich site, and Shoshone site are outside the permitted place of use are incorrect.

In addition, Petitioners assertion that the “permit was incomplete as to the description of the proposed place of use” is also unavailing. Petitioner’s Initial Post-Hearing Brief at 10. The permit was issued in 1982. Petitioners did not challenge the adequacy of the permit or application and the time period for challenging the contents of the application and permit have long since passed. *See* I.C. § 42-1701A. Therefore, the issue of the adequacy of the application or permit cannot be raised in this matter.

4. Evidence at the Hearing Demonstrated that Water was Diverted under Water Right Permit 37-7842.

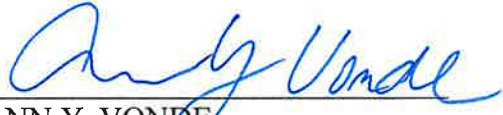
As set forth in the IWRB’s Post Hearing Brief in Sections 3.a–c., the IWRB demonstrated that water was diverted for recharge under water right permit 37-7842 within the Richfield Canal, at the Dietrich Recharge Site, and at the Shoshone Recharge Site. The IWRB incorporates those arguments herein by reference. Petitioner’s arguments that the permit holder did not take any “action to divert water under the permit” are unavailing. Petitioner’s Initial Post-Hearing Brief at 10–11. Petitioners provided no affirmative evidence at the hearing rebutting the IWRB’s evidence of canal measurements that demonstrate that water was diverted into the Richfield canal, the Dietrich canal, and the Shoshone site over and above what was needed by other water

rights. Petitioners failed to put on evidence or make legal arguments demonstrating that water may be diverted into canals over and above what is authorized by water rights in existence at the time. Petitioner's bare assertions of inaction fail to rebut the canal measurements put into evidence by the IWRB.

Conclusion

Petitioners failed to rebut evidence presented by the IWRB at the hearing demonstrating that water right permit 37-7842 was used in the amount of 634 cfs from both the Big and Little Wood Rivers in the Richfield canal, at the Dietrich recharge site, and at the Shoshone recharge site between 1982 and 1992.

DATED December 21, 2018.


ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December 2018, I caused to be served a true and correct copy of the foregoing IWRB'S RESPONSE TO PETITIONER'S INITIAL POST HEARING MEMORANDUM by placing a copy thereof in the manner listed below:

1. Original to:

Idaho Department of Water Resources Director Spackman PO Box 83720 Boise ID 83720-0098	☐ U.S. Mail, postage prepaid ☒ Hand Delivery ☐ Federal Express ☐ Facsimile: _____ ☐ Email: _____
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2. Copies to

Joseph F. James James Law Office 125 Fifth Avenue West Gooding ID 83330	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: _____ ☒ Email: joe@jamesmvlaw.com
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