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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 POST HEARING BRIEF**
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The Idaho Water Resource Board ("IWRB"), by and through its counsel of record, hereby files its post-hearing brief in the above captioned matter.

Introduction

The sole issue before the hearing officer in this matter is the extent of beneficial use that occurred pursuant to Permit No. 37-7842 during the development period of the permit. In the *Order Amending Deadlines; Order Establishing Burdens of Proof; Notice*

of Status Conference; Amended Notice of Hearing, the hearing officer set forth the burdens of proof as follows:

The Department will first present evidence regarding the licensing process and the Department's determination of beneficial use that occurred pursuant to Permit No. 37-7842 during the development period of the permit. The Idaho Water Resources Board will then bear the burden of proving the extent of beneficial use that occurred pursuant to Permit No. 37-7842 during the development period. The Petitioners will bear the burden to rebut evidence regarding proof of beneficial use that occurred pursuant to Permit No. 37-7842.

Order Amending Deadlines at 2. Evidence presented at the hearing established the extent of beneficial use made under permit 37-7842 between 1982 and 1992. Petitioners did not present sufficient evidence rebutting this proof. Therefore, a license for water right 37-7842 should be issued in accordance with the recommendations made in the Certified Water Rights Examiner Report presented into evidence at the hearing. IWRB Exhibit 108.

Argument

The Lower Snake River Aquifer Recharge District ("LSARD") was formed in 1981 for the purpose of recharging the Eastern Snake Plain Aquifer ("ESPA"). IWRB Exhibit 118. Water right application 37-7842 was filed in 1980 and a permit was approved in 1982. IWRB Exhibit 108 at IWRB 00003086–3090. LSARD filed acceptable proof of beneficial use under permit 37-7842 in 1992. IWRB Exhibit 108 at IWRB 00003092–3093. In 1999, water right permit 37-7842 was assigned to the IWRB. IWRB Exhibit 108 at IWRB 00003187–3192. The IWRB placed the permit into the Water Supply Bank. In 2009, the IWRB filed a request for extension of time to continue to develop beneficial use under the permit. That request was ultimately denied in a *Final Order* which adopted the *Recommended Order Granting Petitioner's Motion for*

Summary Judgment and Rescinding Extension of Time dated February 28, 2012. On July 17, 2017, the Idaho Department of Water Resources ("IDWR") issued a license for water right permit 37-7842. The Petition for Hearing was filed based on the Preliminary Order Issuing the License.

1. The Evidence Presented at the Hearing Should be Viewed within the Context of the 25 Years that Have Elapsed Since the Development Period.

The reasons for the delay in licensing of water right 37-7842 are unclear and no rule or statute provides a deadline or timeframe under which a water right permit must be licensed after an acceptable proof of beneficial use field exam is filed with IDWR. However, when reviewing the evidence presented at the hearing, it is acceptable for IDWR to consider the difficulties of proving beneficial use after a 25 year delay in licensing. The Beneficial Use Field Exam Rules provide:

The examination requirements listed are intended as a guide to establish acceptable standards to determine the extent of application of water to beneficial use. The requirements are not intended to restrict the application of other sound examination principles by water right examiners. The director will evaluate any deviation from the standards herein stated as they pertain to the review of any given examination. Water right examiners are encouraged to submit new ideas which will advance the art and provide for the public benefit.

IDAPA 37.03.02.001.01. In addition, the SRBA Court has recognized the prejudicial effect that such a delay in licensing may have on a water right holder:

The Court acknowledges that a lengthy delay in conducting the field examination can put a permit holder in an untenable position. To the extent the field exam yields results differing from the proof of beneficial use, the current permit holder is put in the position of having to prove up the conditions as they existed years earlier. Irrigation practices may have changed, the permit may have been transferred, the original permit holder as well as other witnesses may no longer be around, etc. All of which potentially result in prejudice to the current permit holder.

Tanner Lane Ranch, LLLP v. Idaho Dept. of Water Res., In the Matter of Permit No. 27-7549, Case No. CV-2017-458, *Memorandum Decision and Order* at 8 (Sept. 14, 2017). Thus, IDWR has discretion to consider the evidence presented at the hearing in light of the difficulties that are inherent in proving beneficial use from the time period of 1982–1992.

2. Evidence Presented at the Hearing Established Both the Big and Little Wood Rivers as the Sources of Water Used under Permit 37-7842 During the Development Period.

The Preliminary Order Issuing Water Right License 37-7842 listed only the Little Wood River as a source of water for water right 37-7842. In her investigation, Michele Edl concluded that commingled water from the Big and Little Wood Rivers could not be used at the Shoshone Recharge site. TR Vol. I pg. 51 ln. 8–53. She also did not consider the Richfield canal as a potential place of use. Rather, her analysis focused on recharge occurring at the Dietrich recharge site. TR Vol. I pg. 57 ln 4–21. ln. 20. She testified she removed Big Wood River water as a source because she determined that, at the time she found recharge use occurring in the Dietrich Canal there was no water flowing out of the Jim Byrns Slough and into the Little Wood River. TR Vol. I pg. 65 ln. 20–pg. 66 ln. 14.

Evidence produced by the IWRB demonstrated the Big Wood River was used as a source of water for beneficial use under water right 37-7842 during the development period. *See infra* Section 3. First, evidence was produced that demonstrated that recharge occurred in the Richfield canal itself. IWRB Exhibit 108 at IWRB 00003055–3057, TR Vol. III pg. 109 ln 16–pg. 121 ln 12. The testimony of Lynn Harmon demonstrated that the Big Wood River flows out of Magic Reservoir and is diverted into

the Richfield Canal at Gage #4. TR Vol. II pg. 8 ln. 4–12. The Richfield Canal splits into the East and West Main Canals and the Jim Byrns Slough. TR Vol. II pg. 9 ln. 25–6. The Jim Byrns Slough carries Big Wood River water and ultimately dumps it into the Little Wood River. TR Vol. II pg. 14 ln. 15–18, pg. 15 ln. 7–11, ln. 22–25. Thus, the only source of water for recharge occurring in the Richfield Canal was the Big Wood River.

Second, evidence produced by the IWRB demonstrated that recharge also occurred at the Shoshone Recharge site during the development period. *See infra* Section 4. The testimony of Lynn Harmon demonstrated that Big Wood River water from the Jim Byrns Slough dumps into the Little Wood River. TR Vol. II pg. 14 ln. 15–18, pg. 15 ln. 7–11, ln. 22–25. Lynn Harmon testified that the commingled Big and Little Wood River Water also continues down the Little Wood River until they reach the bifurcation structure. TR Vol. II pg. 30 ln. 10–14. Evidence presented, both through the testimony of Lynn Harmon and through canal measurements, demonstrated the commingled Big and Little Wood River Water can and did flow into the Milner-Gooding Canal at the bifurcation to be delivered to the Shoshone Recharge site. IWRB Exhibit 108 at IWRB 00003053–3054; TR Vol. II pg. 30 ln. 24–pg. 31 ln. 9, pg. 129 ln. 3–pg. 130 ln. 5.¹ Thus, the evidence produced at the hearing demonstrated Big Wood River water was used in the Richfield Canal and at the Shoshone Recharge site under water right permit 37-7842. Petitioners did not rebut this evidence.

¹ As is demonstrated by Petitioner's Exhibit 206, it is not unusual for water from the Big Wood River to have a point of diversion at the Richfield Canal, a point of injection into the Little Wood River, and a subsequent point of redirection from the Little Wood River. *See* Petitioner's Exhibit 206 (Source is Big Wood River with a "[p]oint of injection into the Jim Byrns Slough that flows into the Little Wood River. Points of redirection from the Little Wood River.").

3. Evidence Presented at the Hearing Established Beneficial Use of Water for the Purpose of Recharge Occurred in the Richfield Canal, at the Dietrich Recharge Site, and at the Shoshone Recharge Site During the Development Period.

Evidence introduced by the IWRB at the hearing demonstrated that 634 cfs of recharge occurred under permit 37-7842 in the Richfield canal, at the Dietrich recharge site, and at the Shoshone Recharge site between 1982 and 1992. This evidence was not rebutted by the Petitioners.

a. Recharge Occurred Under Permit 37-7842 Within the Richfield Canal During the Development Period.

Evidence presented at the hearing demonstrated that recharge occurred in the Richfield canal during the development period. Both the advertisement of the application and the water right permit contemplated that the Richfield canal would be used under water right 37-7842. IDWR Exhibit 3 at 1. The advertisement of the application issued by IDWR stated: "Diversion Means: Contract use of Dietrich Canal system and Richfield Canal System." IWRB Exhibit 108, Appendix B, IWRB00003084. The application/permit provided: "6.a. Description of ditches, flumes, pumps, headgates etc. Contract use of Dietrich Canal Systems and Richfield Canal System." *Id.* These documents demonstrate that permitted place of use included the Richfield canal.

In Idaho, recharge may occur either through the diversion of water into an off-channel recharge basin or through seepage from a canal system. TR Vol. II pg. 109, ln. 25–pg. 110 ln. 11. In-canal recharge is limited by I.C. § 42-234(5) which provides that "incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for a claim of a separate or expanded water right." For in-canal

recharge to be considered in this matter it must not be incidental to another water use, such as irrigation. Rather, the in-canal recharge must be occurring at time when other water rights are not being used in the canal.

The analysis outlined by IWRB's expert in this matter for the Richfield canal made clear that only water diversions occurring outside the irrigation season were considered as recharge. IWRB Exhibit 108 at IWRB 00003055–3056. Some irrigation water rights on the Richfield canal have a season of use that extends from March 15th to November 15th. *See e.g.* Petitioner's Exhibit 206. However, as demonstrated by the testimony of Lynn Harmon, the actual irrigation season is May 1st because weather conditions in that area are too cold to start irrigating any earlier. TR Vol. II pg. 35 ln. 2–12; pg. 35 ln. 19–pg. 36 ln. 10. Lynn Harmon also testified that the irrigation season end date on the Richfield canal is generally October 1st, though it can be much earlier. TR Vol. II pg. 36 ln. 20–pg. 37 ln. 9. Thus, the evidence presented at the hearing demonstrated that the irrigation season on the Richfield canal begins on May 1st and end, on average, about October 1st. Petitioners presented no evidence demonstrating that the testimony of Lynn Harmon with regard to the start and end dates of the irrigation season on the Richfield canal were incorrect.

IWRB's expert used May 1st to October 1st in his analysis. IWRB Exhibit 108 at IWRB 00003056. He discounted any data inside the irrigation season because, under I.C. § 42-234(5), losses occurring during the irrigation season would be incidental to irrigation and should not be counted as recharge.

i. Evidence Presented at the Hearing Demonstrated that 63 cfs of Water was Beneficially Used During the Development Period in the Richfield Canal.

To calculate in-canal recharge in the Richfield canal IWRB's expert looked at the canal measurements from April 1–April 30th and after October 1st and subtracted the amount of water measured at the HJB from the amount of water measured at Gage #4. IWRB Exhibit 108 at IWRB 00003056–3057 Table 13; TR Vol. II pg. 117 ln. 5–20. A loss between these two measurement points indicates that water seeped into the ground through the bottom of the canal. *Id.* Even if some of the water seeped through diversions or laterals off the Richfield canal, it would still be appropriate to consider it recharge because the diversion of irrigation water was not occurring during between April 1st and April 30th. TR Vol II pg. 9 ln. 21– pg. 10 ln. 1; pg. 117 ln 19– pg. 118 ln. 7.

Table 13 of IWRB Exhibit 108 demonstrates the calculations made by IWRB's expert for the Richfield canal. The year 1987 was chosen for Table 13 because it demonstrated the year in which the highest quantity of recharge was found in the Richfield Canal, 300 cfs. Table 13 elicited much discussion at the hearing that warrants additional clarification. In his testimony, Lynn Harmon referenced a “domestic run” that occurs on the Richfield canal just after the irrigation season ends. TR Vol II pg. 37, ln. 17–pg.38 ln. 8. He described how the canal company would run 200–300 cfs for a couple of days in late October to early November to fill stockwater ponds. *Id.* On the basis of this testimony Petitioners focused their questioning on the data in IWRB Exhibit 108 IWRB 00003057, Table 13. TR Vol II pg. 62 ln. 20–pg. 64 ln. 10. It was noted that on 11/1/87 an amount of 300 cfs had been calculated as recharge. TR Vol II pg. 62 ln. 20–pg. 64 ln. 10, pg. 173 ln. 21–178 ln. 3. It was asserted that, given Lynn Harmon's testimony regarding a late season domestic run, it was inaccurate to attribute 300 cfs to recharge on that day. TR Vol II pg. 62 ln. 20–pg. 64 ln. 10, pg. 173 ln. 21–178 ln. 3.

Lynn Harmon's testimony regarding a late season domestic run on the Richfield canal should not be construed to render all of the data used in the IWRB's analysis of beneficial use inaccurate. IWRB's expert relied on canal measurements kept by the Big Wood Canal Company ("BWCC") and the Basin 37 Watermaster because, when looking back at beneficial use that occurred 25 years ago, the canal measurements are the most reliable data available. TR Vol II pg. 106 ln. 2-16. Lynn Harmon testified as to the methods used by the BWCC and the Watermaster to collect the measurements used in the IWRB's analysis. TR Vol II pg. 43-pg. 48. He also described methods used to adjust rating curves at each gage throughout the season to ensure the measurements were as accurate as possible. TR Vol. II pg. 47 ln. 12-pg. 48 ln. 7. The methods employed by the BWCC and Watermaster to take the canal measurement were acceptable and accurate for the time period between 1982 and 1992. The Watermaster's canal measurements, found in the "Black Books" are IDWR's official record of water measurements in Water District 37. I.C. § 42-606. *See also* I.C. §§ 42-102, 42-602, and 42-604; TR Vol II pg. 107 ln. 13-pg. 108 ln. 3. The Petitioners provided no evidence to rebut the conclusion that the canal measurements found in the BWCC records and the Water District 37 official record are anything other than valid and accurate.

Lynn Harmon's testimony regarding the late season domestic run on the Richfield canal was new to the IWRB on the day of the hearing. TR Vol II pg. 177 ln. 16-19. If it had been known previously, Table 13 would have been modified to account for that late-season use. It should be noted that, even if Table 13 was modified to remove the 300 cfs as a recharge quantity, it would still be accurate with regard to the recharge amounts ranging between 86 to 291 cfs that were calculated for April 1987. IWRB Exhibit 108 at

IWRB 00003057. Petitioners provided no evidence suggesting that the methods used to calculate recharge for the April time period were inaccurate or incorrect.

In addition, even if the canal measurements from early November 1987 found in Table 13 are discounted the outcome of the IWRB's expert analysis is unchanged. As is demonstrated by Table 15, the IWRB did not rely on *any* of the data from 1987 to calculate a recharge quantity for water right 37-7842. IWRB Exhibit 108 at IWRB 00003058, Table 15. Rather, the quantity of water was based on the canal measurements from 1984. *Id.* The data analyzed showed that recharge calculated to have occurred in 1984 within the Richfield Canal was 63 cfs occurring on April 28, 1984. IWRB Exhibit 108 at Appendix N, IWRB 00003551. This was the quantity that was ultimately relied on, not the 300 cfs. IWRB Exhibit 108 at IWRB 00003058, Table 15.

In addition, no other late-season canal measurements contributed to the IWRB's recharge analysis on the Richfield canal. Besides 1987, late season water use appears only in the canal measurements for 1986 (Nov 5, 300 cfs) and 1989 (Nov. 7, 200 cfs). IWRB Exhibit 108 Appendix N at IWRB 00003562, 00003576. The Appendix N spreadsheets demonstrate that IWRB's expert did not calculate any recharge occurring based on these late season measurements in 1986 and 1989. Thus, IWRB's analysis of recharge occurring on the Richfield canal was limited to early season recharge occurring between April 1st and April 30th.

Petitioners' attempts to rebut evidence showing recharge occurring on the Richfield canal between April 1st and April 30th were unavailing. Petitioner's Exhibit 205 is a copy of the water right report for water right 37-13115 which is held in the name of the Big Wood Canal Company for stockwater from the Big Wood River in the amount of 20 cfs.

The period of use for water right 37-13115 is November 1st to March 31st. *Id.* The November 1st start to water right 37-13115's season of use is inapplicable because, as noted above, the IWRB did not rely on any canal measurements on the Richfield from November. In addition, the March 31st end date to water right 37-13115's season of use is also inapplicable because the IWRB's analysis for the Richfield canal relied on canal measurement from April 1st to April 30th 1984. IWRB Exhibit 108 at Appendix N, IWRB 00003551. Diversion of water right 37-13115 outside its season of use would have been a violation of Idaho law. I.C. § 42-201(2). Thus, water right 37-13115 does nothing to rebut the IWRB's analysis on the Richfield canal.

Petitioner's Exhibit 206 is a water right report for water right 37-10343 for 10.67 cfs of irrigation water from the Big Wood River. The period of use for water right 37-10343 is March 15th to November 15th. The testimony of Lynn Harmon made clear that, while the season of use of on the face of many irrigation rights on the Richfield canal begins on March 15th, the actual start of irrigation on the Richfield canal is May 1st. TR Vol. II pg. 35 ln. 2–12; pg. 35 ln. 19–pg. 36 ln. 10. Petitioners presented no evidence demonstrating that Lynn Harmon's testimony regarding the start date of irrigation on the Richfield was incorrect or inaccurate. Therefore, water right 37-10343 does nothing to rebut calculations of recharge occurring on the Richfield canal between April 1st and April 30th.

The IWRB presented evidence demonstrating that 63 cfs of recharge occurred on the Richfield canal in April 1984. Petitioners failed to rebut this evidence. Therefore, at least 63 cfs of recharge should be found to have been beneficially used on the Richfield canal for recharge between 1982 and 1992.

b. Recharge Occurred Under Permit 37-7842 at the Dietrich Recharge Basin During the Development Period.

Evidence presented at the hearing demonstrated that recharge occurred at the Dietrich recharge basin during the development period. Both the advertisement of the application and water right permit contemplated that the Dietrich canal system would be used under water right 37-7842. IDWR Exhibit 3 at 1; IWRB Exhibit 108, Appendix B, IWRB00003084. In addition, the Dietrich recharge site was noted in red on the map that was attached to the application/permit. TR Vol I pg. 57 ln. 4–21. Therefore, it is appropriate to consider the Dietrich recharge basin as place of use under water right 37-7842.

Unlike on the Richfield canal, where the recharge place of use was within the canal itself, recharge on the Dietrich canal occurred in an off-canal recharge basin. Off-canal recharge is not incidental to another water use, such as irrigation, therefore it may occur either inside or outside the irrigation season. The limiting factors on recharge into an off-canal recharge basin during the irrigation season are irrigation demands and canal capacity. Both Michele Edl and IWRB's expert calculated recharge at the Dietrich recharge site by subtracting irrigation demands from the total amount of water diverted into the canal. IDWR Exhibit 2, IWRB Exhibit 108. Both Michele Edl and IWRB's expert found very similar amount of recharge occurring at the Dietrich site, 246 cfs and 276 cfs respectively. *Id.*

The evidence presented at the hearing demonstrated that between April 1 and June 1st of each year the irrigation demand on the Dietrich is low and there is excess canal capacity that can carry recharge water. Lynn Harmon testified that the irrigation season on the Dietrich canal begins, on average April 10–15th. TR Vol. II pg. 38 ln. 13–pg. 39 ln. 6. He stated that during early April and May, irrigation demand on the Dietrich

ranges between 100–150 cfs. TR Vol. II pg. 39 ln. 7–17. By, on average, June 1st the irrigators on the Dietrich begin to demand their “full” irrigation supply which is somewhere between 270–300 cfs. TR Vol. II pg. 39 ln 18–23. The total canal capacity of the Dietrich canal is about 400 cfs. TR Vol II pg. 40 ln. 18–pg. 41 ln. 8. While stockwater rights do exist on the Dietrich canal they go out of priority just before the start of the irrigation season on April 1st. TR Vol II pg. 41 ln. 9–21. Therefore, they would not affect the analysis because they would not be diverted at the same time as recharge. This evidence was not rebutted by Petitioners.

i. Evidence Presented at the Hearing Demonstrated that 276 cfs of Water was Beneficially Used During the Development Period at the Dietrich Recharge Site.

To calculate the quantity of recharge occurring at the Dietrich recharge site during the development period, IWRB’s expert looked at the canal measurements at Gage #11 at the head of the Dietrich canal between April 1 and May 31st of each year during the development period. IWRB Exhibit 108 at IWRB 00003051–3052. He then subtracted 120 cfs as an average early-season irrigation demand. *Id.* He further determined the amount of water, if any, that was draining out of the end of the Dietrich canal through the F-waste. *Id.* Any water in excess of the irrigation demand and the F-waste he attributed to recharge. *Id.* IWRB’s expert found 276 cfs of recharge occurring in the Dietrich canal during May 1984. *Id.*

Under her analysis Michele Edl found a similar quantity of recharge occurring in the Dietrich recharge basin in 1984, 246 cfs. IDWR Exhibit 2 at 6. Michele Edl also used infrared aerial photography to corroborate recharge occurring at the Dietrich site in 1984. IDWR Exhibit 6; TR Vol. I pg.60 ln. 12– pg. 61 ln. 10, pg. 167 ln. 4–22. Thus,

both the analysis of Michele Edl and of IWRB's expert demonstrated that recharge was occurring at the Dietrich site in the spring of 1984.

In an attempt to rebut these analyses, Petitioners asked several questions regarding whether measurements of "rediversions" through laterals and headgates off the Dietrich canal were considered. TR Vol I pg. 149 ln. 25–pg. 150 ln.9, TR Vol II pg. 155 ln. 1–17; pg. 166 Ln7–pg. 167 ln.5. IWRB's expert testified that he asked BWCC for any and all record of canal measurements that it had for the time period between 1982 and 1992. TR Vol II pg. 172 ln. 7–16. The canal measurements IWRB received from both the BWCC and Water District 37 did not include any measurements through laterals or headgates off the Dietrich canal. *See* IWRB Exhibit 108 Appendices J and K, TR Vol II pg. 172 ln. 7–16. If Petitioners believed or knew that additional measurements at specific headgates on the Dietrich canal exist, then they should have produced them at the hearing. Merely suggesting that additional measurements might exist showing additional diversions by irrigators does not rebut the testimony of Lynn Harmon which affirmatively demonstrated that Dietrich canal irrigators were only demanding, on average 120 cfs of water during the early irrigation season.

Petitioners also focused on whether "requests" were made for diversion of recharge water under water right permit 37-7842 into the Dietrich canal. TR Vol II pg. 66 ln. 17–23, pg. 67 ln. 13–19. Petitioners seem to imply that some record or log exists of individual water users asking the BWCC to deliver their water. If such a log or record exists that demonstrates water was not requested under water right permit 37-7842 Petitioners should have produced it at the hearing. Once again, merely suggesting that a request for delivery of water under permit 37-7842 does not exist does not rebut evidence

showing that excess water was diverted into the Dietrich canal over and above irrigation demands. Petitioner must show more than an absence of documentation as rebuttal.

Petitioners also focused on the colloquial designation of the Dietrich basin as a “floodway” in an apparent attempt to suggest that it was not used for recharge. TR Vol III pg. 65 ln. 16–pg. 66 ln. 17. Evidence presented at the hearing demonstrated that the headgate into the Dietrich basin was constructed in 1970. IDWR Exhibit 2 at 16. Prior to the enactment of I.C. § 42-201 in 1971, diverting flood waters into the Dietrich basin without a permit/license would have been permissible. 1971 Idaho Sess. Laws ch. 177. After 1971, a permit or license would have been necessary for diversion of “flood water.” *Id.* (Idaho Code § 42-201(3) denotes several exceptions to the mandatory permitting requirements. Those exceptions do not include “flood control.”). Though it may have been common practice for canal companies and other entities to divert flood waters without a permit, it was not until 2017 that the Director was given the express authority to temporarily approve the diversion of water “to prevent flood damage” without a permit/license. I.C. § 42-202A as amended by 2017 Idaho Sess. Laws ch. 210.

When considering the question of whether water diverted into the Dietrich canal basin was for “flood control” or for “recharge” it is logical to assume that it was diverted pursuant to a permitted water right rather than pursuant to the “practice” of preventing flooding. Diversions under permit 37-7842 were occurring within the irrigation season when the Watermaster was is tasked with administering water in priority. I.C. § 42-602. It must be assumed that permit 37-7842 would have been delivered in priority over other non-water right uses. Thus, Petitioners assertion that the fact the Dietrich basin was, at some point, used as a “floodway” is immaterial.

The IWRB presented evidence demonstrating that 276 cfs of recharge occurred at the Dietrich recharge site. Petitioners failed to rebut this evidence. Therefore, 276 cfs of recharge should be found to have been beneficially used at the Dietrich site for recharge between 1982 and 1992.

c. Recharge Occurred Under Permit 37-7842 at the Shoshone Recharge Site During the Development Period.

Evidence presented at the hearing demonstrated that recharge occurred under water right permit 37-7842 at the Shoshone Recharge site during the development period between 1982 and 1992. IWRB Exhibit 108 at IWRB 00003062 Figure 1, TR Vol II pg. 129 ln. 3–pg. 130 ln. 13. The place of use listed on the advertisement and permit included the Shoshone Recharge site. IWRB Exhibit 108 Appendix C IWRB 00003086–3090. In addition, the original proof of beneficial use submitted by Gerald Martens under I.C. § 42-217 was for recharge occurring at the Shoshone site. IWRB Exhibit 108 Appendix D at IWRB 00003095–3112.

As has already been discussed, the testimony of Lynn Harmon demonstrated that it is possible for Big/Little Wood River water to reach the Shoshone Recharge site through the bifurcation. *See supra* Section 2. The testimony of Lynn Harmon was corroborated by canal measurements at Gage #53 and 56. Gage #53 is located on the Milner-Gooding canal upstream from the bifurcation. TR Vol II pg. 25 ln. 24–pg. 26 ln. 6. It measures Snake River water before it enters the bifurcation. Gage #56 is located on the Milner-Gooding canal downstream from the bifurcation structure. TR Vol II pg. 30 ln. 21–pg. 31 ln. 9. Other than the bifurcation there no other diversions between Gage #53 and Gage #56. TR Vol II pg. 67 ln. 20–25. If the measurement at Gage #53 is lower than the measurement at Gage #56, the only source of water that could account for the increase in

flows in the Milner-Gooding between those two gages is Big/Little Wood River water coming into the canal through the bifurcation. IWRB Exhibit 108 at IWRB 00003053–3054, *see also* TR Vol II pg. 43 ln. 23–pg. 44 ln. 8. Measurement data from 1982–1992 confirmed that water from the Big/Little Wood River did contribute to the flow in the Milner-Gooding Canal between Gage #53 and #56.

Gage #56 is upstream from the Shoshone Recharge site headgate. IWRB Exhibit 105. Gage #57 downstream from the Shoshone Recharge headgate. IWRB Exhibit 105, TR Vol II pg. 31 ln. 21–pg. 32 ln. 2. Thus, to the extent that measurements at Gage #57 are lower than measurements at Gage #56 the water must have been diverted into the Shoshone Recharge site. IWRB Exhibit 108 at IWRB00003053, TR Vol II pg. 43 ln. 9–23. Because there are measurement devices on either side of the Shoshone Recharge site the amount of recharge water entering the site may be calculated without reference to what might be happening with irrigation water on the Milner-Gooding canal.

IWRB's expert used water measurements from Gage #53, #56, and #57 to calculate the amount of water coming through the bifurcation from the Big/Little Wood Rivers and being delivered to the Shoshone Recharge site during the development period. IWRB Exhibit 108 at IWRB 00003053–3054 Table 11. Petitioners provided no evidence rebutting this analysis.

i. Evidence Presented at the Hearing Demonstrated that 295 cfs of Water was Beneficially Used During the Development Period at the Shoshone Site.

Canal measurements presented at the hearing demonstrate that, in the spring of 1984 there was a gain in water between Gage #53 and Gage #56 and a loss of water between Gage #56 and Gage #57. IWRB Exhibit 108 at IWRB 00003054 Table 11. The

highest diversion rate into the Shoshone recharge site was 295 cfs on April 17, 1984. It is interesting to note that this number almost exactly matches the amount of recharge of Big/Little Wood River water that was found at the Shoshone Recharge site by Gerald Martens in 1992. IWRB Exhibit 108 Appendix D.

Diversions into the Milner-Gooding Canal through the bifurcation were actively achieved. The testimony of Lynn Harmon made clear that, while some leakage occurs around the radial gates of the bifurcation structure under certain circumstances, such leakage is minimal (20–30 cfs). TR Vol II pg. 74 ln 16–25. To achieve a diversion rate of 300 cfs of Big/Little Wood River water into the Milner-Gooding canal it adjustments would need to be made to the radial gates water to flow into the canal and through the siphon. Therefore, the bifurcation structure would have needed to have been actively manipulated to achieve 295 cfs of recharge in spring 1984.

The IWRB presented evidence demonstrating that 295 cfs of recharge occurred at the Shoshone recharge site. Petitioners failed to rebut this evidence. Therefore, 295 cfs of recharge should be found to have been beneficially used at the Shoshone site for recharge between 1982 and 1992.

4. Evidence Presented at the Hearing Established that the Permit Conditions that Were Conditions Precedent to Beneficial Use were Met

Idaho Code Section 42-219(8) requires that, at the time of licensing, IDWR must evaluate whether the permittee has complied with all conditions listed on their permit. In this case, only five conditions (Conditions #1, 2, 7, 8, 9) listed on permit 37-7842 required the permittee to take certain actions prior to putting the water to beneficial use. The remainder of the conditions (Conditions #3, 4, 5, and 6) govern administration of the

right or are informational and need not be addressed. For ease of reference, the conditions were numbered during the hearing on IDWR Exhibit 3.

Condition #1 required that the permit holder begin construction of diverting works within one year of the permit being approved. IDWR Exhibit 3 at 5. IWRB Exhibit 110 clearly demonstrated that this condition was removed from the permit and is no longer applicable. Condition #2 requires that a measuring device be installed as part of the diverting works. *Id.* The testimony of Lynn Harmon demonstrated that Gage #4 measures water diverted into the Richfield canal, Gage #11 measures water diverted into the Dietrich Canal, and Gage #53, #56, #57 are used to measure flows into the Shoshone recharge site. TR Vol II. pg. 8 ln. 4–12, pg. 16 ln. 5–14, pg. 25 ln. 24–pg. 26 ln. 6; pg. 30 ln. 15–20; pg. 31 ln. 10–16. These measurement devices allow measurement of recharge water under water right 37-7842 and have been in place since 1982. TR Vol. II pg. 15 ln 16–21, 23 ln. 23–pg. 24 ln. 5; pg. 33 ln. 24– pg. 25 ln. 2. Condition #7 states that the permit shall not be assigned without providing notice to IDWR of the assignment. *Id.* Evidence presented at the hearing clearly demonstrated that IDWR was notified of the assignment of the permit between Thorlief Rangen, John W. Jones Jr. and John LeMoyne and LSARD, and LSARD and the IWRB. IWRB Exhibit 114, 115, 108 Appendix G at IWRB00003187–3192. Thus, the IWRB met its burden of proving conditions #1, 2, and 7 were met. Petitioners failed to put on any evidence rebutting this conclusion.

Condition #8 provides: “Water may not be diverted under this permit until the Board of Directors of the District establish and implement a procedures acceptable to the Director for assuring that the water quality of the Lower Snake Aquifer will not be impaired.” IDWR Exhibit 3 at 5. The IWRB presented IWRB Exhibits 118–125 at the

hearing as demonstration that this condition was met. IWRB Exhibit 118 shows that Gerald Martens first “developed a plan to evaluate ground water impacts of the proposed recharge efforts” in November 1983. IWRB Exhibit 121 demonstrates that a “Lower Snake River Aquifer Recharge Project Impact and Monitoring Program” was submitted to IDWR in March 1984. A follow up letter from IDWR to Gerald Martens demonstrated that the “Impact Evaluation and Monitoring Program for the Lower Snake Plain Aquifer Recharge Project would be acceptable” with several modifications.” IWRB Exhibit 122. Further letters sent by LSARD and Gerald Martens demonstrated that the modification of the monitoring program were acceptable to the permittee and that monitoring was actually conducted in early spring 1984. IWRB Exhibits 124, 125.

At the hearing, the relevance of IWRB Exhibits 118–125 to permit 37-7842 was raised. TR Vol. I pg. 102 ln. 10–pg. 103 ln. 5. Evidence presented at the hearing demonstrated that recharge occurred at the Shoshone Recharge site under permit 37-7842 *See supra* Section 3.c. Given that evidence, IWRB Exhibits 118–125 are relevant to water right 37-7842 and should be considered as evidence that the permittee complied with Condition #8.

Condition #8 does not specify the type of monitoring that must be completed, does not specify the source of water that must be sampled, and does not specify where that sampling must occur. Rather, it simply states that monitoring must occur that is “acceptable” to the Director. IWRB Exhibits 118–125 demonstrate that a monitoring program was developed, was submitted to IDWR, was deemed “acceptable” to IDWR, and was implemented.

Petitioners suggest that the ground water monitoring was not acceptable because it was not done at the Dietrich site. However, Petitioners presented no evidence demonstrating that IDWR considered monitoring to be necessary at the Dietrich site or showing that IDWR considered the submitted monitoring plan to be unacceptable because it did not reference the Dietrich site. Thus, Petitioners failed to rebut the evidence presented in IWRB Exhibits 118–125 which demonstrated an acceptable ground water monitoring plan was submitted to IDWR in 1984.

Condition #9 states: “Plans for recharge facilities and any conveyance works needed shall be submitted to the Department for approval prior to construction.” IDWR Exhibit 3 at 5. Evidence at the hearing demonstrated that the only new recharge facilities built during the permit development period were those at the Shoshone Recharge site. The headgate into the Richfield canal was already in existence in 1982, TR Vol. II pg. 33 ln. 24–pg. 34 ln. 2, as was the headgate into the Dietrich recharge basin which was put in place by the Army Corp of Engineers sometime in the 1970s. IDWR Exhibit 2 at 2, 16, TR Vol. I pg. 157 ln. 8–14. IWRB Exhibit 116 demonstrated that plans for the Shoshone Recharge site diversion works can be found in the backfile for water right 37-7842. Michele Edl testified that their presence in the backfile means they were received by IDWR. TR Vol I. pg. 113 ln. 17–20. IWRB Exhibit 120 further supports the conclusion that construction documents were provided to IDWR. In it IDWR acknowledges “Mr. Martens has provided this office with a blueprint of the proposed Milner-Gooding diversion works. He has indicated that construction of the works is anticipated to begin soon.” IWRB Exhibit 120 at IWRB00002343. These documents clearly demonstrate that Condition #9 was met. Petitioners offered no evidence to rebut this conclusion.

Thus, evidence presented by the IWRB demonstrated that the permittee complied with all relevant conditions on permit 37-7842.

5. Placing a Volume Limit on Water Right 37-7842 is Unnecessary for the Protection of Existing Water Rights and Contrary to the Purpose of a Recharge Water Right.

The Beneficial Use Examination Rules require that a certified water rights examiner include “an annual diversion volume based on actual beneficial use during the development period for the permit” in her report. IDAPA 37.03.02.035.01.j. The report does not need to include a volume limit for certain beneficial uses including, among others, domestic use and run-of-the-river hydropower facilities. IDAPA 37.03.02.035.01.j.i–vii.

The requirement of a volume limit found in the Beneficial Use Field Exam Rules is a *reporting* requirement. IDAPA 37.03.02.035.01.j (emphasis added). The rules do not require that all water right not listed as exceptions *must* ultimately include a volume limit. *Id.* Indeed, IDAPA 37.03.02.035.01.j provides many ways in which a volume limit may be shaped or modified based on additional information, including by taking into account “seasonal variations affecting water use including seasonal variations in water availability.” IDAPA 37.03.02.035.01.j. Thus, the rules do not preclude the issuance of a water right license for the purpose of use of recharge that includes either no volume limit or a volume limit shaped by “seasonal variations affecting water use including seasonal variations in water availability.” IDAPA 37.03.02.035.01.j.

Strictly construing IDAPA 37.03.02.035.01.j’s requirement to “report an annual diversion volume based on actual beneficial use during the development period” has the potential to unduly limit water rights with the purpose of use of recharge. Recharge use

occurs when there is water available over and above what it needed to satisfy senior water uses. In the majority of years there may be little if any recharge water available to fill a recharge water right. If a permittee is unlucky, they may end up with a development period that includes only drought years. Calculating that permittee's recharge volume based on development period that included only drought years would likely result in a volume limit that would make it impossible to use the right during high water events.² Rather, it makes sense to take into account "seasonal variations in water availability" when calculating volume limits for water right 37-7842. IDAPA 37.03.02.035.01.j. Doing so will allow it to take advantage of high water years when high volumes of water are available for recharge.

It is not necessary to place a volume limit on a recharge water right to ensure against enlargement of the right or injury to other water users. IDWR has independent authority to limit the amount of water used under a recharge water right, no matter what quantity or volume is contained on the face of the right. Under I.C. § 42-234(3) "the director of the department of water resources may regulate the amount of water which may be diverted for recharge purposes and may reduce such amount, *even though there is sufficient water to supply the entire amount originally authorized by permit or license.*" (emphasis added). Idaho Code Section 42-234(4) provides "to ensure that other water rights are not injured by the operation of an aquifer recharge project, the director . . . shall have the authority to approve, disapprove or require alterations in the methods employed to

² Idaho Code Section 42-202A was recently amended to allow the issuance of a temporary permit for diversion of water for the purpose of ground water recharge. A temporary permit is not an appropriate mechanism for covering additional volume needed under a ground water recharge right in high water years because temporary approval for ground water recharge "shall only be granted for a use not intended to become an established water right." I.C. § 42-202A(5). Use of recharge water under water right 37-7842 is intended to be continuing, not temporary.

achieve ground water recharge.” These statutory provisions ensure that injury to other water rights, even junior water rights, will not occur if either no volume limit or large volume limits are placed on water right 37-7842. *See also* I.C. § 42-4201(4).

6. The Previous Amendment of Permit Signed by the IWRB Does not Present a Procedural Bar to Additional Amendments to the Permit.

The Application for Amendment of Permit (for Licensing Purposes) signed by the IWRB prior to licensing of water right 37-7842 does not present a procedural bar to additional amendments to the permit. Idaho Code Section 42-211 provides a permittee may request changes to the place, period, nature of use, or may make other substantial changes in the method of diversion of their permit. Such changes may be approved as a matter of course so long as they do not result in the diversion or more water than originally permitted and the rights of others are not affected. *Id.* Idaho Code Section 42-211 also provides that “[p]rotests to the application for amendment may be filed with and heard by the director in the same manner as provided by section 42-203 [42-203A], Idaho Code, for protests to an application for a permit.”

In this case, the changes requested in the Application for Amendment (for Licensing Purposes) were made at the request of IDWR as part of its internal process for issuing the water right license. The application for amendment was “for Licensing Purposes” and not for the purpose of affecting a change independently desired by the IWRB.

Nothing in I.C. § 42-211 precludes the filing of multiple Applications to Amend a Permit. If the hearing officer determines that, based on the proof of beneficial use submitted at the hearing, the licensed elements of water right 37-7842 should be different than those set forth in the Preliminary Order Issuing License, then

another Application for Amendment of Permit may be requested by IDWR as a procedural step in issuing that license. It would not make any sense to preclude the IWRB from filing another Application to Amend the Permit (for Licensing Purposes) if IDWR deems it to be a necessary step in issuing a license after the hearing in this matter.

In addition, while the Application to Amend the Permit (for Licensing Purposes) was not challenged by Petitioners under I.C. § 42-211, the Petitioners did challenge the Preliminary Order Issuing Water Right License 37-7842 pursuant to I.C. § 42-1701A(3). Because the water right elements described in the licensing investigation and the Application to Amend the Permit (for Licensing Purposes) mirrored the water right elements that were ultimately issued in the Preliminary Order Issuing Water Right License 37-7842, the Petitioners essentially challenged both the Application to Amend the Permit and the license at the hearing in this matter. They were able to put on evidence that the changes to the permit made in the Application to Amend the Permit and reflected in the license would “result in the diversion and use of more water than originally permitted” and that the “rights of others will . . . be adversely affected thereby.” I.C. § 42-211. Thus, the Petitioners will not be prejudiced should an additional Application to Amend the Permit (for Licensing Purpose) be filed for water right permit 37-7842 based on the outcome of this hearing.

7. Proof of Beneficial Use Submitted under I.C. § 42-217 does not Preclude Submission of Additional Proof of Beneficial Use under I.C. § 42-219.

When a water right application is approved as a permit, it will include a date by which proof of beneficial use of water under the permit must be submitted to IDWR, usually within 5 years of the date the permit is issued. The submission of proof of

beneficial use at this stage of the permitting process is governed by I.C. § 42-217 and IDAPA 37.03.02. Proof of beneficial use filed under I.C. § 42-217 must be filed by the permit holder “on or before the date set” on the permit. The permit holder may submit a proof of beneficial use form and include a fee so that IDWR can examine the proof of beneficial use. I.C. § 42-217(.6), 42-221(K), IDAPA 37.03.02.025.02, IDAPA 37.03.02.050.01. Or the permit holder may submit a proof of beneficial use form and hire their own water rights examiner who may submit a beneficial use field exam to IDWR. I.C. § 42-217(.6), IDAPA 37.03.02.025.02, IDAPA 37.03.02.035, IDAPA 37.03.02.050.02.

After IDWR receives, either the Proof of Beneficial Use Form and a fee or the Proof of Beneficial Use Form and a Beneficial Use Field Exam Report conducted by a certified water rights examiner, IDWR must review the information provided for sufficiency. IDAPA 37.03.02.035.01.a. If the data or information provided is insufficient for some reason, IDWR may request additional information or an amendment of the proof until it has all the information it needs. Even if additional clarification of the proof submitted is needed, the proof is still deemed acceptable for the purposes of tolling a lapse of the permit under I.C. § 42-218a. *See* IDAPA 37.03.02.035.02.c, *see also* TR p.126 ln.10–23. In this case, the proof of beneficial submitted on July 27, 1992 was deemed acceptable for purposes of tolling the lapse of the permit, even though IDWR requested additional information regarding the proof after that date and the proof forms were amended several times. *See* IWRB Exhibit 108, IWRB00003092. Thus, the proof submitted by the LSARD in this matter was acceptable under I.C. § 42-217 and 42-218a.

Once proof of beneficial use has been filed and found acceptable, the department of water resources must examine the proof and “the person making such examination shall prepare and file a report of the investigation.” I.C. § 42-217(.6), (.2). As mentioned above, there is no timeframe or deadline by which IDWR must issue a license after receiving proof of beneficial use under I.C. § 42-217.

The licensing process is governed by I.C. § 42-219 which provides:

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department 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 department shall issue to such user or users a license confirming such use. (emphasis added).

The Beneficial Use Examination Rules further provide that “for any prior examination, whether conducted by a certified water rights examiner or by department staff, the department may conduct a supplemental examination on its own initiative at any time.” IDAPA 37.03.02.050.01.b. Thus, both I.C. § 42-219 and IDAPA 37.03.02 require IDWR to examine and investigate the proof of beneficial use that is submitted by the permittee under I.C. § 42-217. IDWR is not limited by the proof that is submitted under I.C. § 42-217, but may make any further investigation into proof of beneficial use that it deems necessary to properly license the water right. I.C. § 42-219; *see also* TR p. 127 ln. 22–pg. 128 ln.17.

That is not to say that there are no limits on the changes that may be made to proof of beneficial use at the time of licensing. Under I.C. § 42-211, the place, period, and purpose of use listed on a water right permit may be modified. However, modification to these elements are limited to changes that will not adversely affect the rights of others.

Id. The Director has discretion to provide notice of changes to a permit. *Id.* To the extent changes to the place, period, or purpose of use are made to a permit that go beyond what was originally advertised and that have the potential to affect other water users, advertisement or notice of those changes is likely.

In addition, the quantity of water that is licensed must be “limited to the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works or the amount beneficially used prior to submitting proof of beneficial use, including any statutory limits of the duty of water.” IDAPA

37.03.02.035.01.o. Thus, while I.C. § 42-219 does not limit the proof of beneficial use that may be considered at the licensing stage to only the proof that was submitted under I.C. § 42-217, it is not an open ended invitation to consider any and all additional evidence.

a. Additional Evidence of Beneficial Use Presented at the Hearing was Appropriate under I.C. § 42-219.

In this matter, the IWRB presented additional evidence regarding proof of beneficial use that occurred during the development period between 1982 and 1992. The proof submitted at the hearing made modifications to the quantity of water and the point of diversion. IWRB Exhibit 108; TR pg. 103 ln. 17–18. The additional evidence regarding the quantity of water showed that 634 cfs was put to beneficial use under the right during the development period. This quantity is well within the original permitted amount of 800 cfs. *See* IDAPA 37.03.02.035.01.o. The change in the point of diversion corrected an error in the POD that was recognized early in the water right’s development. Exhibit 108, Appendix H, IWRB 00003194–3195. No evidence was presented suggesting that the “rights of others” would be “adversely affected” by changing the point of diversion.

The places of use and period of use for water right 37-7842 remain the same as were authorized under the permit and as were originally advertised. Thus, while the additional evidence of beneficial use presented at the hearing went beyond what was submitted by LSARD under I.C. § 42-217, it did not exceed the limits of the permit/advertisement or attempt to expand the development period. Therefore, it was acceptable for the IWRB to present this evidence a part of the “final proof” that is required by I.C. § 42-219.

b. The Quantity of Water in Excess of 300 cfs was Not Relinquished by the IWRB.

The issue of relinquishment of any undeveloped portion of permit 37-7842 was raised in the context of a request for extension of time filed by the IWRB in 2009. In that matter, the IWRB requested an extension of time in which to prove beneficial use under water right permit 37-7842. In other words, the IWRB sought to go outside the original proof of beneficial use period (1982–1992) and demonstrate beneficial use that had occurred after 1992. That request was challenged by the Petitioners in this matter.

In his Recommended Order, the hearing officer relied heavily on the statements on the bottom of the proof of beneficial use form in which the permittee affirmed they were relinquishing “any undeveloped portion of the permit to the state of Idaho.” Petitioners Exhibit 201. The hearing officer found: “The Department does not have the power to overcome or reverse the relinquishment of a water right *through the approval of an Extension of Time to Submit Proof of Beneficial Use*. . . . All Department actions on the undeveloped portion of Permit 37-7842 *occurring after July 27, 1992* are void.” *Final Order adopting Recommended Order Granting Petitioner’s Motion for Summary Judgment and Rescinding Extension of Time*, In the Matter of Permit No. 37-7842 in the

Name of the Idaho Water Resource Board at 7 (Feb. 28, 2012). The hearing officer went on to find:

The extent of beneficial use occurring under Permit 37-7842 during the development period is clearly a disputed issue of fact. As part of its filings, IWRB provided affidavits and other data regarding historic diversions under the permit. However, determining the extent of beneficial use taking place under Permit 37-7842 is not required to resolve the current Petition. ***The Department will investigate the extent of beneficial use occurring prior to June 1, 1992 as part of the licensing process.*** If IWRB or the Petitioners disagree with the Department's determination of beneficial use occurring within the authorized development period, ***the proper venue to raise arguments regarding the true extent of beneficial use would be within the licensing process.***

Id. at 7 (emphasis added). Thus, while the hearing officer denied the IWRB the opportunity, in the context of a request for extension of time, to put on additional information regarding proof of beneficial use occurring *outside* the development period, he specifically recognized that IWRB could, within the context of licensing, put on additional evidence regarding proof of beneficial use occurring *during* the development period.

The hearing in this matter is exactly the hearing that was contemplated by the Final Order. *Id.* Thus, while the quantity of water exceeding 300 cfs might have been relinquished for the purposes of a Request for Extension of Time that sought to go beyond the development period of the right, it was not relinquished if it could be shown that 300 cfs underestimated the amount of water put to beneficial use during the development period.

c. The Beneficial Use Rules Contemplate Reexamination of Proof of Beneficial Use After Submission of Proof under I.C. § 42-217.

The IWRB's evidence demonstrated that the original proof of beneficial use filed under I.C. § 42-217 underestimated the amount of recharge occurring under permit 37-

7842 during the development period. Petitioners themselves have recognized that it is appropriate for a permittee to submit additional evidence of beneficial use if it is determined that the original proof underestimated the amount of water put to use in the development period. In their Petition contesting the IWRB's 2009 Request for Extension of Time, the Petitioners asked the hearing officer to "[rule] that [IDWR] cannot consider additional proof of beneficial use ***unless the initial proof of beneficial use is withdrawn upon a showing that the submitted proof underestimated the amount of water put to use in the prescribed period . . .***" *Id.* at 2.

This position is supported by the Beneficial Use Examination Rules which provide for the "re-examination" of "permits which have been examined but the license has not been issued due to a request for re-examination by the permit holder." IDAPA 37.03.02.009.03. If, after submission of proof under I.C. § 42-217 but prior to licensing, a permittee discovers that the original proof of beneficial use was in error, the rules allow the permittee to request that the proof be modified. The only logical reason a permittee would ask for re-examination of proof under the permit is if they believed the proof had underestimated or misrepresented the proof that had actually occurred during the development period. Thus, the rules contemplate additional proof of beneficial use may be submitted and considered at the licensing stage.

In this case, the IWRB considers the evidence presented at trial to be a request for re-examination of the beneficial use occurring under water right 37-7842. The expert report submitted at trial encapsulates the IWRB's assessment of the errors contained in the original proof of beneficial use that was submitted by Gerald Martens under I.C. § 42-217. IWRB Exhibit 108. To the extent the original proof of beneficial use must be

“withdrawn” or the request for re-examination formalized in some way the IWRB would be happy to provide that documentation.

Thus, the IWRB is not limited by the proof of beneficial use that was filed for water right permit 37-7842 under I.C. § 42-217 and it is appropriate for IDWR to consider the additional proof of beneficial use submitted at the hearing for the purpose of determining beneficial use under I.C. § 42-219.

Conclusion

The IWRB’s evidence demonstrated that water in the amount of 634 cfs was beneficially used for the purpose of recharge from both the Big and Little Wood Rivers in the Richfield Canal, at the Dietrich Recharge site, and at the Shoshone Recharge site under water right permit 37-7842 between 1982 and 1992. It was appropriate for the IWRB to put on additional evidence of beneficial use under I.C. § 42-219.

DATED December 7, 2018.



ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE

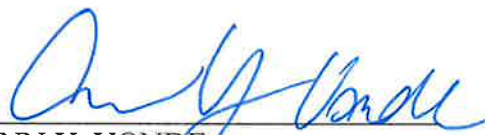
I HEREBY CERTIFY that on this 7th day of December 2018, I caused to be served a true and correct copy of the foregoing IWRB'S POST HEARING BRIEF by placing a copy thereof in the manner listed below:

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 Brown and James 125 Fifth Avenue West Gooding ID 83330	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Facsimile: _____ ☒ Email: joe@brownjames.com
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ANN Y. VONDE
Deputy Attorney General