

Keen, Shelley

From: Joe [joe@brownjameslaw.com]
Sent: Friday, April 04, 2014 11:43 AM
To: Keen, Shelley
Subject: Permit No. 37-7842
Attachments: History.pdf, Exhibits.pdf

Dear Mr. Keen:

I write in follow up to our recent telephone conversation regarding Permit No. 37-07842 and the Department's investigation for licensing. I have attached a history regarding the subject water right. The history raises several concerns regarding licensing on the permit.

However, we do have a couple of primary concerns. First, the Department may not be aware that it is impossible to divert water from the Little Wood River through the Gooding Milner Canal at the denoted diversion structure when the Gooding Milner Canal already contains water. For your review, I have attached a couple of exhibits which were included with the Beneficial Use Field Report submitted to the Department in November 1993. The first page of exhibit is a map which shows the measuring stations, diversion structure, and recharge site regarding both permit number 01-07054 and 37-07842. The second page of the exhibit is a Summary of Recharge Records, again, under both permits.

The Field Report appears to indicate that the waters were comingled at the point of the diversion structure where the Gooding Milner Canal crosses the Little Wood River commonly referred to as "the Bifurcation." It is possible to divert water from the Little Wood River into the Gooding Milner Canal at the Bifurcation. However, in order to do so it is necessary to back up the water in the Little Wood River to force the water to go up gradient into the Gooding Milner Canal system. This can only be done when the Gooding Milner Canal is empty. Otherwise the water from the Gooding Milner Canal would simply dump into the Little Wood River.

This fact is recognized by the managers of the Big Wood Canal Company in American Falls Reservoir District #2. This fact provides support for the comments in the Department's file indicating that no recharge took place from the Little Wood River prior to June 1, 1992.

In reviewing the Summary of Recharge Records shows several errors. Some rather obvious. As an example, the columns denoting max possible recharge from Big Wood and max possible recharge from Snake River, appear to be in error in that the numbers under the columns should be in the opposite column based on the formula provided. Also, there is simply straight forward errors such as on April 8, 1986, where it denotes 260cfs was measured at Measuring Station No. 57 resulting in 260cfs recharge possibly from the Big Wood River. When in actuality Measuring Station No. 57 is beyond the recharge site. It would appear to be prudent to review the canal company records directly to determine what recharge occurred prior to June 1, 1992.

Another issue of primary concern is whether the priority date should be advanced to November 29, 1993, the date when satisfactory proof of beneficial use was received by the Department. The record indicates that the permit lapsed and in the case when satisfactory proof was received by the Department following 60 days of a lapse of the permit, the Department may, upon a showing of reasonable cause reinstate the permit, but in reinstating the permit the Department must advance the priority date of the permit to the date the proof of beneficial use was received. In this case, November 29, 1993.

Please review the issues raised in the provided history. If you have any questions, please feel free to give me a call.

Thanks for your time and consideration.

Joe

RECEIVED

APR 07 2014

Department of Water Resources

History
Permit 37-07842

An application was filed on July 2, 1980 seeking a permit to divert 800 cfs from the Little Wood and Big Wood Rivers for purposes of ground water recharge. (Application for Permit 37-07842). The application denoted the point of diversion as the SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 24, Township 4 S, Range 19 E, located within Lincoln County. *Id.* The application proposed diverting the water through the use of the Dietrich and Richfield canal systems. *Id.* It should be noted that neither the Little Wood nor the Big Wood Rivers flow through Section 24, Township 4 S, Range 19 E. However, the Dietrich canal diverts from the Little Wood River in Section 25, Township 4 S, Range 19 E. The Department recognized these errors during an early review and made a note to the file indicating that the point of diversion on the application was in error, and that the only apparent source of water would be the Little Wood River. (Note to File 12-29-81). The applicants never sought to amend their application.

The application was incomplete as to the description of the proposed place of use, but did include a drawing indicating that the water would be diverted from the Little Wood River through the Dietrich Canal to the recharge site southeast of Richfield, Idaho. (Application for Permit 37-07842). The published notice of application for water right clarified that the possible recharge sites were located within Sections 15, 16, 21, 22 and 28, Township 5 S, Range 19 E, Lincoln County. (Affidavit of Publication). The application indicated that five years was required for completion of the works and application of the water for recharge. (Application for Permit 37-07842).

The subject application sought a permit to divert water from the Little Wood River through the Dietrich Canal for purposes of recharge southeast of Richfield. (Application for Permit 37-07842). The applicants filed another application on the same day seeking to divert

water from the Snake River through the Milner-Gooding Canal for purposes of recharge northwest of Shoshone, Idaho. (Application for Permit 37-07842). This other application was ultimately assigned Permit No. 01-07054.

The subject application was approved on June 2, 1982, under Permit No. 37-07842, with a completion and submission of beneficial use deadline of June 1, 1987. (Application for Permit 37-07842). A request for extension of time was submitted on June 1, 1987. (Request for Extension 6-1-87). The request was returned by the Department to the applicant on July 16, 1987, for additional information. (IDWR./Saxton ltr 7-16-87). Ultimately, the Department approved the request for extension on October 4, 1989, extending the completion and proof of beneficial use deadline to June 1, 1992. (Request for Extension 6-1-87).

The Department sent a notice of proof of beneficial use due on March 31, 1992, providing notice that proof of beneficial use had to be submitted no later than June 1, 1992. (Proof Due Notice 3-31-92). Proof of beneficial use was not timely submitted and the Department sent a lapsed notice on June 5, 1992. (Lapse Notice 6-5-92). The Department received proof of beneficial use on or about June 15, 1992. (IDWR./Gustafson ltr 6-15-92). The Department returned the proof of beneficial use form to the applicants on June 15, 1992, stating that the proof was unacceptable. *Id.* The Department further informed the permit holder that the permit was still lapsed, and that the priority date would be penalized one day for every day that the proof was not submitted. *Id.* On July 9, 1992, the Department received a beneficial use field report regarding the permit, but did not receive the original proof of beneficial use form. (IDWR./Gustafson ltr 7-9-92). The Department informed the permit holders that they could not continue licencing until it received the original proof of beneficial use form. *Id.* On July 23,

1992, the Department again provided notice that they could not process the permit without an original proof of beneficial use form. (IDWR/Gustafson ltr 7-23-92).

On July 27, 1992, the Department received the original proof of beneficial use form. (Proof Beneficial Use 37-07842). The form listed both Permit No. 37-07842 and Permit No. 01-07054. *Id.* The proof of beneficial use indicated a total of 300 cfs of ground water had been diverted from the Snake River. *Id.* The beneficial use field report denoted the source as the Snake River, provided a point of diversion different from the application, as well as different place of use. *Id.* The beneficial use field report also denoted that the water was diverted through the Milner-Gooding Canal and not the Dietrich Canal. (Field Report 37-07842). The Department accepted the amended proof of beneficial use and beneficial use field report. The Department entered its order reinstating the permit and advancing the priority date to August 25, 1990 on the 29th day of July, 1992. (Order of Reinstatement 7-29-92).

1989
not
1990 *ms*

On further review, the Department determined that the beneficial use field report was not acceptable. The applicants provided an amended beneficial use field report on October 19, 1993. (IDWR/Saxton ltr 10-21-93). The Department determined that the amended beneficial use field report was still not acceptable and returned it to the applicants on October 21, 1993. *Id.* On November 29, 1993, the Department received another amended beneficial field report denoting both Permit No. 01-07054 and Permit No. 37-07842 with a total diversion of 300 cfs. (Amended Field Report 37-07847). This time the beneficial use field report indicated the source as the Snake River/Big Wood River but did not include the Little Wood River. *Id.* Also, the field report indicated a diversion point distinct from application for permit. *Id.* Again, the total diversion rate was stated at 300 cfs. *Id.* The Department entered a reinstatement order regarding

both permits on December 1, 1993. (Reinstatement Order). The Department failed to advance the priority date in recognition of the continuing lapse. *Id.*

There appears to be little activity in the file until 1999 when the permit holders were anticipating transferring legal ownership to the Idaho Water Resources Board. On March 19, 1999, the Idaho Water Resources Board agreed to accept assignment of the permits. (IDWR/Hass ltr 3-22-99). In its review leading up to the acceptance of the assignment, the Department indicated that both Permit No. 01-07054 and Permit No. 37-07842 had filed proof of beneficial use for diversion rate of 300 cfs each. (Memo to File 1-14-99). This is incorrect. As noted above, the Proof of Beneficial Use form, as well as the Beneficial Use Field Report indicated a combined total of 300 cfs, with the water coming from the Snake River via the Milner-Gooding Canal.

The conclusion that a total of 300 cfs from the Snake River had been put to beneficial use is supported by the Department's own internal review of the permits. A Memo to the file in October 1999 indicated that recharge under Permit No. 01-07054 from the Snake River through the Milner-Gooding Canal could be confirmed and the license for that has been prepared for signature. (Memo to File 10-7-95). However, regarding Permit No. 37-07842 there did not appear to be any application toward beneficial use. Based on the Department's conversation with Dan McFadden of the Lower Snake River Aquifer Recharge District, no ground water recharge had ever taken place from the Little Wood River via the Dietrich Canal. *Id.* Also, based on the Department's conversation with Paul Castelin of the Technical Services Bureau, no recharge from the Little Wood or Big Wood River had taken place. *Id.* The Department concluded that there has been no beneficial use to date and that the permit should be routed for extension or reinstatement processing. *Id.* This conclusion was further supported by the

correspondence from the Big Wood Canal Company and American Falls Reservoir District #2 of November 1999, which clarified that all recharge water from 1986 through 1995 was Snake River water delivered via the Milner-Gooding Canal. (Oneida ltr 11-99).

Though the Department's file contains a proof of beneficial use form and beneficial use field report, which has not been withdrawn, the Idaho Water Resources Board adopted a resolution asking the Director to extend the proof date regarding the "undeveloped" portion of the permit. (WRB Resolution 3-21-00). An order was entered on April 3, 2000 extending the proof date for the permit until June 1, 2004. (IDWR 4-3-00). On August 25, 2004, the Idaho Water Resources Board again requested for an extension of time to submit proof of beneficial use resulting in another extension to June 1, 2009. (Request for Extension 8-25-04). On June 1, 2009, the Department received another request for extension of time to submit proof of beneficial use. (Request for Extension 6-1-09). On March 19, 2010, while the request for extension of time was pending, the Director indicated "[It] does not appear the beneficial use of water for recharge purposes has occurred under this permit to date, despite the confusion in the record on this issue." (IDWR./Spackman ltr 3-19-10). The request for extension was granted on the 2nd day of September 2010 and the time within which to submit proof of beneficial use was extended to June 1, 2014. (Request for Extension 6-1-09).

My clients filed a Petition for Hearing, and Petition for Declaratory Ruling on September 22, 2011. In November of 2011, the Hearing Officer issued a Recommended Order wherein he found the Department's actions in granting a series of extensions void and rescinded the Department's order of September 2nd 2010 granting an extension of time within which to submit proof of beneficial use. The hearing officer noted that "The Department will investigate the extent of beneficial use occurring prior to June 1, 1992 as part of the licensing process." (Rec.

Order 11-30-11). 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 the licensing process." *Id.*

Accordingly, the Hearing Officer ordered: "The Department shall conduct an investigation of Permit 37-7842 for licensing purposes and issue a license consistent with its findings." *Id.* The Director adopted the Recommended Order as his Final Order on February 28, 2014. (Final Order 2-28-12)

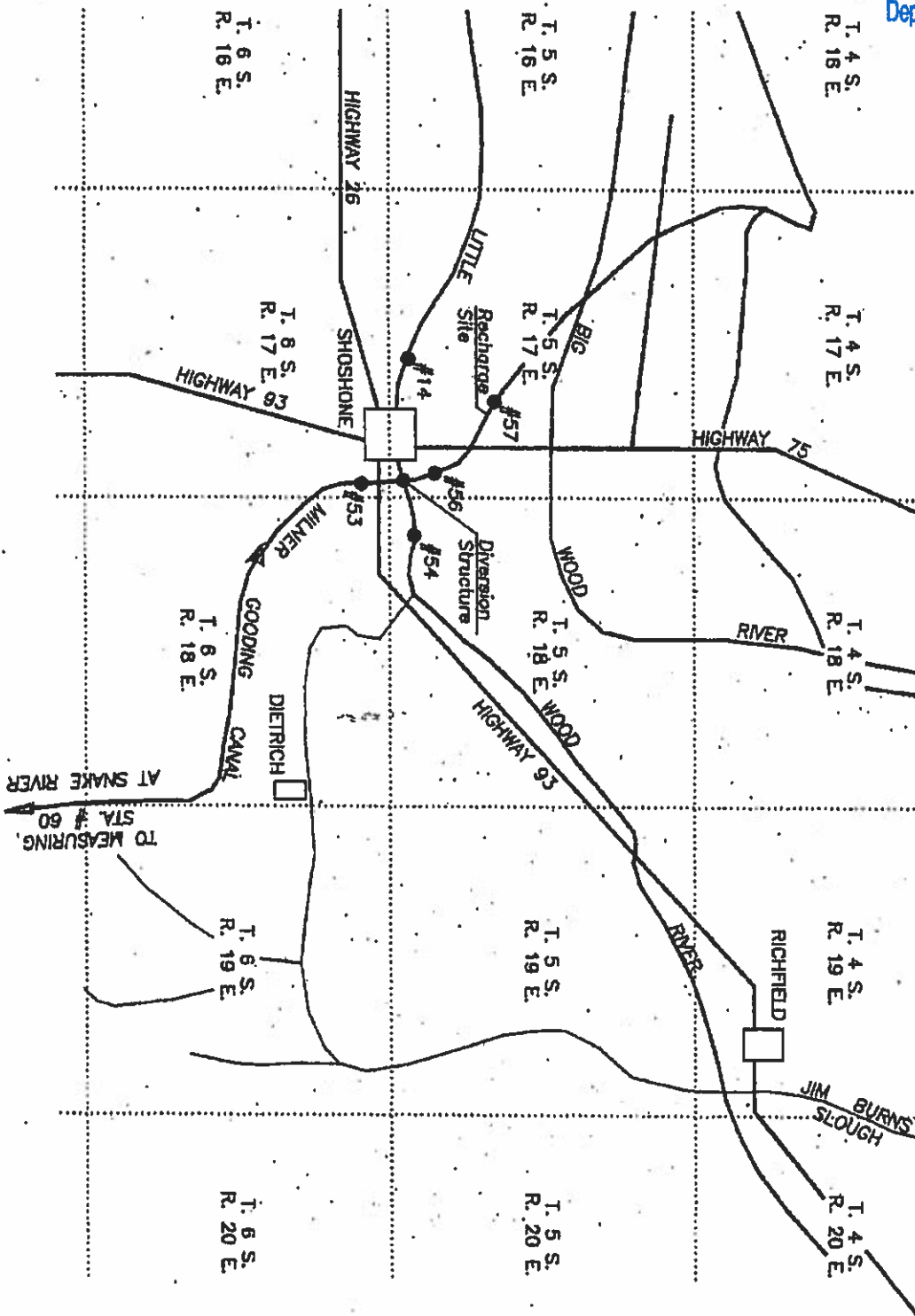
RECEIVED

APR 07 2014

Department of Water Resources

Exhibit For Lower Snake River Aquifer Recharge

Permit No's. 01-07054 & 37-07842



RECEIVED

APR 07 2014

Department of Water Resources

Summary of Recharge
Records for
Lower Snake River Recharge
Permit No. 01-07054 & 37-07842

DATE	JBS	MEASURING STAT ON					RECHARGE	MAX POSSIBLE RECHARGE FROM BIG WOOD	MAX POSSIBLE RECHARGE FROM SNAKE RIVE
		14	53	54	56	57			
04-07-86			220		252	252	0		
04-08-86						260	260	260	
04-09-86		646	425		432	260	172	172	
04-10-86			401		448	265	183	183	
04-11-86	97	692	472		460	265	195	195	97
04-12-86	57		472			261	261	261	57
04-13-86	62					270	270	270	62
04-14-86	66	717	486	787	486	275	211	211	66
04-15-86	52	681	485	721	482	252	230	230	52
04-16-86	57	659	479	689	470	239	231	231	57
04-17-86	43	636	405	674	496	223	273	273	43
04-18-86	40	604	614	628	632	310	322	322	40
04-19-86	73	556	596	564	618	342	276	276	73
04-20-86	142		596	563			---	---	142
04-21-86	141	615	596	651	618	342	276	276	141
04-22-86	50	526	585	544	604	350	254	254	50
04-23-86	221	454	566	544	580	360	220	220	
04-24-86	213	596	572	636	586	396	190	190	220
04-25-86	168	560	563	585	580	394	186	186	190
04-26-86	181	500	644	524	654	340	314	314	168
04-27-86	172		644	530				---	181
04-28-86	165	615	696	537	648	466	182	182	172
04-29-86	158	580	670	503	626	465	161	161	165
04-30-86	142	506	661	420	616	459	157	157	158
									142

JBS - Jimmy Byrnes Slough
All flows in CFS as recorded by Bigwood Canal Co.
Recharge = 56-57
Max Recharge (from Snake River): Total discharge but not to exceed flow at M.S. 53. M.S.
Max Recharge (from Big Wood River): Total discharge from JBS but not to exceed total
discharge.
Measuring stations 14+56 should approximately total measuring stations 53+54

