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MAY 29 2018
DEPARTMENT OF
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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	)	**MEMORANDUM IN SUPPORT OF IWRB'S MOTION FOR SUMMARY JUDGMENT**

The Idaho Water Resource Board ("IWRB"), by and through its attorneys of record, pursuant to IDAPA 37.01.01.260 and 37.01.01.565 and I.C.R.P. 56, hereby submits this memorandum in support of IWRB's Motion for Summary Judgment and Affidavit of Ann Y. Vonde filed concurrently herewith. Petitioners cannot, as a matter of

law, demonstrate under I.C. § 42-1701A(3), that they are "aggrieved" by the issuance of the License for Water Right 37-7842. Therefore, their Petition for Hearing and Petition for Declaratory Ruling should be dismissed.

Standard of Review

Although motions for summary judgment are not expressly provided for by the IDAPA 37.01.01 *et. seq.*, the IDWR rules do provide that: "the presiding officer may consider and decide prehearing motions with or without oral argument or hearing." IDAPA 37.01.01.565. Summary judgment should be granted if the document, affidavits, admissions, interrogatory answers, and other materials show that there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56; *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990). The burden is on the moving party to prove the absence of genuine issues of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1960). In turn, the non-moving party's case must be based on more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue of material fact. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990). Summary judgment "is a proper procedural method for dismissing a claim based on lack of standing" when it "presents matters outside the pleadings and not excluded by the court." *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002).

Argument

Petitioners have not and cannot as a matter of law demonstrate they are "aggrieved" by the issuance of License for Water Right 37-7842. Therefore, Petitioners' First Amended Petition for Hearing, and Petition for Declaratory Ruling dated September 8, 2017 ("Petition") should be dismissed.

Idaho Code Section 42-1701A(3) provides:

> Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, *any person aggrieved by any action of the*

> *director, including any decision*, determination, order or other action, approval, registration, or similar form of permission required by law to be issued by the director, *who is aggrieved by the action of the director*, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. (emphasis added).

The term "aggrieved" is not well defined within the Idaho Code or the Idaho Administrative Procedure Act. *Order Denying Idaho Power's Petition for Hearing*, In the Matter of Distribution of Water to Various Water Rights Held by or for the Benefit of A&B Irrigation District, American Falls Reservoir District, Burley Irrigation District, Milner Irrigation District, Minidoka Irrigation District, North Side Canal Company, and Twin Falls Canal Company at 6, July 22, 2005 ("Order Denying Hearing"). However, the term is used throughout the code and IDAPA to refer to a person's right to appeal an administrative action. *Id.* Idaho Code Section 67-5270(3) provides that a party "aggrieved by a final order in a contested case is entitled to judicial review," I.C. § 28-1-201 states that an "aggrieved party means a party entitled to pursue a remedy," and I.C. § 42-222 provides that an "aggrieved party is one whose application for a change in their water right has been denied." *Id.* Black's Law Dictionary (8th ed.) defines the term aggrieved "as a person or entity having legal rights that are adversely affected, having been harmed by an infringement of legal rights." *Id.*

Idaho Courts have defined the term "aggrieved" as: "a party injuriously affected by a judgment" *Ex parte Blades*, 59 Idaho 682, 685, 86 P.2d 737, 738 (1939); *Roosma v. Moots*, 62 Idaho 450, 455, 112 P.2d 1000, 1002 (1941); *Federal Land Bank of Spokane v. Parson*, 116 Idaho 545, 547, 777 P.2d 1218, 1221 (Ct. App. 1989). Idaho courts have further noted that:

> Broadly speaking, a party or person is aggrieved by a decision when, and only when, it operates directly and injuriously upon his personal, pecuniary, or property rights. The mere fact that a person may be hurt in his feelings, or be disappointed over a certain result, or be subjected to inconvenience, annoyance or discomfort, or even expense, does not constitute him a party 'aggrieved,' since he *must be aggrieved in a legal sense*. To render a party aggrieved by an order, so as to entitle him to appeal therefrom, the right invaded must be immediate not merely some possible, remote consequence, or mere possibility arising from some unknown and future contingency . . .

> . The test as to whether a party is aggrieved or not is: Would the party have had the thing if the erroneous judgment had not been entered? If the answer be yea, his is a party aggrieved.

Application of Fernan Lake Village, 80 Idaho 412, 415, 331 P.2d 278, 279–280 (1958) (internal quotations marks and citations omitted, emphasis added).

Petitioners have failed to provide even a scintilla of evidence demonstrating how they will be "injuriously affected" by the issuance of the License for Water Right 37-7842. The burden is on Petitioners to bring forth evidence demonstrating how they are injured by the issuance of the License of Water Right 37-7842. *McCoy v. Lyons*, 120 Idaho 765, 770, 820 P.2d 360, 365 (1991) ("It is well established that a party against whom a motion for summary judgment is sought may not merely rest on allegations contained in his pleadings, but must come forward and produce evidence by way of deposition or affidavit to contradict the assertions of the moving party and establish a genuine issue of material fact."). The IWRB's Interrogatory No. 5 asked: "Please describe how, pursuant to I.C. § 42-1701A(3), you are "aggrieved" by the issuance of water right license 37-7842 including every fact and every document that supports, contradicts, or in any material way pertains to it." *Vonde Aff.* Exhibit B at 6. In answer, Petitioners simply rested on the assertions in their Petition. *Id.* Exhibit C at 9. The only further statements offered to demonstrate their status as "aggrieved" persons was that: "The Department's actions, in issuing Water Right License No. 37-7842, will result in *damages and injuries* to Petitioners." *Id.* at 9, 11 (emphasis added). The Petitioners provided no evidence to support these assertions. Such conclusory statements of "damages and injury"[1] are insufficient to demonstrate Petitioners' status as an "aggrieved" persons and do not create a genuine issue of material fact.

In the Order Denying Hearing, the hearing officer analyzed whether Idaho Power Co. provided sufficient evidence to demonstrate that it was "aggrieved" under I.C. § 42-

[1] It is unclear what is meant by the Petitioners' assertion of "damages." Without documentary evidence, Petitioners bare assertion of "damages" does not constitute even a scintilla of evidence showing their status as an "aggrieved" persons. Further, Petitioners' assertion of "damages" fails as a matter of law to demonstrate their status as "aggrieved" persons. The Director of IDWR is not authorized to provide "damages" as a remedy in this matter. *See* I.C. §§ 42-1701B, 67-5201 *et. seq.*

1701A(3). Idaho Power Co. filed a petition for hearing under I.C. § 42-1701A(3) on an order regarding the Surface Water Coalitions' delivery call against ground water users on the ESPA ("May 2 Order"). The May 2 Order found that "ground water depletions under junior priority rights in Water District No. 120 and No. 130 were causing material injury to senior natural flow and storage rights. As a result the Director instructed the holders of junior ground water rights . . . to either curtail the diversion and use of ground water . . . [or] provide replacement water to the members of the Surface Water Coalition ("May 2 Order"). Order Denying Petition at 3.

Idaho Power Co. argued it had standing to challenge the May 2 Order under I.C. § 42-1701A(3) "because ground water withdrawals are depleting the river above Milner with significant impact on Idaho Power's contract rights with the USBR at American Falls . . . [and] the May 2 Order does not sufficiently curtail junior priority ground water rights or require adequate mitigation to address the injuries to Idaho Power. And that Idaho Power . . . has a direct interest in the adequate administration of water rights occurring in the Snake River." *Id.* at 6–7. The hearing officer found, however, that Idaho Power Co. failed to make an adequate showing that it was aggrieved by the May 2 Order:

> Idaho Power's rights were not at issue under the May 2 Order, and were therefore not considered because the delivery call being addressed in this proceeding does not implicate Idaho Power's Water rights. Idaho Power has not shown a direct interest in the outcome of this proceeding. Idaho Power has not made a delivery call for its water rights. *Idaho Power has not demonstrated that its water rights will be directly affected by the outcome of this proceeding. Id.* (emphasis added).

In addition, the hearing officer found Idaho Power Co.'s argument that it was an "aggrieved party under the May 2 Order because of the need to assure that the general law of prior appropriation is followed is also . . . a generalized concern shared by all water users if not all citizens of the State. Generalized concerns do not rise to the level of standing." *Id.*

Unlike Idaho Power Co., Petitioners have failed to provide *any* evidence that "its water rights will be directly affected by the outcome of this proceeding." *Id.* Even their

Petition fails to make a direct statement regarding their status and "aggrieved" persons. The Petition does not allege that the Petitioners' are persons "aggrieved" by the July 17, 2017 Preliminary Order issuing water right license 37-7842. Rather, the Petition merely states:

> Petitioners are *interested* in this matter as owners of permits and water rights for hydropower purposes on the Little Wood River or Malad River downstream from the point of diversion for Permit No. 37-7842. William Arkoosh is the owner of WR No. 37-7943 and Permit No. 37-21297. The Estate of Vernon Ravenscroft is the owner of WR No. 37-7857, WR No. 37-7865, and WR No. 37-7922. Koyle Hydro, Inc. is the owner of WR No. 37-7889, and WR No. 37-7916. Koosh Inc. is the owner of WR No. 37-8096, and WR No. 37-8251. Shorock Hydro, Inc. is the owner of WR No. 37-7863, WR No. 37-7911, Permit No. 37-8113, and Permit No. 37-8262.

Affidavit of Ann Y. Vonde (May 29, 2018) ("*Vonde Aff.*") Exhibit A at 1–2 (emphasis added). Being "interested" in a matter is not the same as being "aggrieved" in a legal sense. *Application of Fernan Lake Village*, 80 at 415, 331 P.2d at 279–280.

Further, the water rights listed in the Petition do not, as a matter of law, provide a basis for Petitioners to claim to be injuriously affected by the issuance of a License for Water Right 37-7842. Petitioners' water rights are burdened by subordination conditions which preclude their rights from being injuriously affected by the issuance of the new water rights. The subordination conditions found on the Petitioners' water rights provide that each of the listed water rights are "junior and subordinate to all rights for the use of water other than hydropower, with the state of Idaho that are initiated later in time than the priority of this right and *shall not give rise to any right or claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this right*." *Vonde Aff.* Exhibits D–M (emphasis added). In their Response to the IWRB's Requests for Admission No. 1–13, the Petitioners admitted that each of the listed water rights "includes a condition of approval that the rights for the use of water confirmed in the license shall be junior and subordinate to all rights for the use of water other than hydropower, within the State of Idaho that are

initiated later in time than the priority of the right."[2] *Id.* Exhibit C at 26–32. Thus, the undisputed facts demonstrate that the water rights owned by Petitioners are subordinated to all future uses, except hydropower.

Petitioners' subordinated water rights do not enjoy "the customary total priority of right but, rather, [are] inferior to future upstream depletion." *Idaho Power Co. v. State, By and Through the Dept. of Water Res.*, 104 Idaho 575, 579, 661 P.2d 741, 745 (1983). Idaho Code Section § 42-203B(6) clearly provides that: "A subordinated water right for power use *does not give rise to any claim against, or right to interfere with, the holder of subsequent upstream rights established pursuant to state law*." (emphasis added). The conditions on the face of Petitioners' water rights also makes clear that the water rights do not "*give rise to any right or claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated late in time then the priority of this right*." *Vonde Aff.* Exhibit D–M (emphasis added).

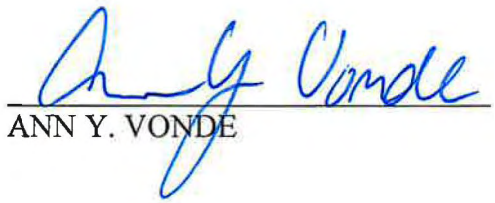
Petitioners could not use their subordinated water rights as a basis to protest a new water right application under I.C. § 42-203(5)(a) on the basis of injury. *See* § 42-203B(6). Petitioners could not make a delivery call against junior water users under I.C. § 42-602 and IDAPA 37.03.11. *Id.* Because their rights are subordinate, Petitioners cannot, as a matter of law, be "aggrieved" or "injuriously affected" by the issuance of *any* new water right. *See Ex Parte Blades*, 59 Idaho at 685, 86 P.2d at 738; *Application of Fernan Lake Village*, 80 Idaho at 415, 331 P.2d at 279–280. Thus, Petitioners are not "entitled to pursue a remedy" against water right 37-7842, nor can they demonstrate that there has been "an infringement of [their] legal rights." Order Denying Hearing at 6. Thus, as a matter of law, Petitioners cannot be "aggrieved" by the issuance of the License for Water Right 37-7842.

Conclusion

[2] The IWRB's Request for Admission No. 10 contained a typographical error. It incorrectly listed water right 37-7869. The correct water right, which was listed in the Petition, is 37-7863. Petitioners denied Request for Admission No. 10. *Vonde Aff.* Exhibit C at 30. Nevertheless, the undisputed facts demonstrate that water right 37-7863 is also subordinated to all future uses except hydropower. *Vonde Aff.* Exhibit K.

Petitioners have failed to make any legally cognizable arguments or provide any other evidence demonstrating they are "aggrieved" by the issuance of Water Right License 37-7842. The mere fact that Petitioners may be disappointed, annoyed, or even put to additional expenses is insufficient to demonstrate grievance. *Application of Fernan Lake Village*, 80 Idaho at 415, 331 P.2d at 279–280. Rather, they must be "aggrieved in a legal sense." *Id.* Petitioners have failed to meet their burden showing such a grievance. Therefore, the IWRB respectfully requests that this motion for summary judgment be granted and the Petition for Hearing, and Petition for Declaratory Ruling be dismissed.

DATED this 29th day of May 2018.



ANN Y. VONDE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of May 2018, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF IWRB'S MOTION FOR SUMMARY JUDGMENT by placing a copy thereof in the manner listed below:

1. Original to:

Director Spackman
Idaho Department of Water Resources
PO Box 83720
Boise ID 83720-0098

- ☐ U.S. Mail, postage prepaid
- ☒ Hand Delivery
- ☐ Federal Express
- ☐ Email:
- ☐ Statehouse Mail

2. Copies to

Joesph F. James
Brown and James
125 Fifth Avenue West
Gooding ID 83330

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Email: joe@jamesmvlaw.com

Water District #37
Kevin Lakey
107 W 1st
Shoshone ID 83352

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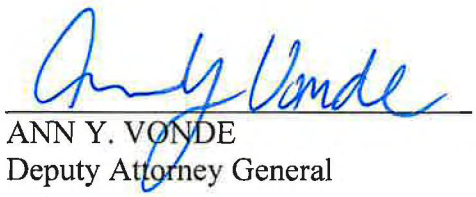

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