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DEPARTMENT OF
WATER RESOURCES

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

IN THE MATTER OF LICENSE NO. 37-7842 IN THE NAME OF THE IDAHO WATER RESOURCE BOARD	)	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR HEARING**

COMES NOW, licensee, the Idaho Water Resource Board ("IWRB"), by and through its counsel of record, hereby submits this Memorandum in Support of Motion to Dismiss Petition for Hearing in the above captioned matter.

FACTS

On June 30, 1980, Earl Hardy, Thorleif Rangen, John LeMoyne, and John W. Jones Jr. filed an application for permit 37-7842 with the Idaho Department of Water Resources ("IDWR") seeking to appropriate 800 cfs from the Little Wood River and Big Wood River for ground water recharge. On January 18, 1982, the application was assigned to the Lower Snake River Aquifer Recharge District ("LSARD"). On June 2, 1982, IDWR issued Permit 37-7842. Proof of beneficial use was due on or before June 1, 1987. On June 1, 1987, LSARD filed a Request for Extension of Time to Submit Proof of Beneficial Use. The request was approved by IDWR on Oct. 4, 1989 and a new deadline for proof of beneficial use was set for June 1, 1992. LSARD did not file proof of beneficial use by June 1, 1992. On June 5, 1992, IDWR notified LSARD that permit 37-7842 had lapsed. On July 27, 1992, LSARD filed proof of beneficial use for 300 cfs. On July 29, 1992, IDWR issued and Order of Reinstatement for Permit 37-7842. The Reinstatement Order advanced the priority date to August 25, 1980.

On April 28, 1999, LSARD assigned permit 37-7842 to the IWRB. On March 21, 2000, the IWRB passed a resolution requesting the Director extend the time for submitting proof of beneficial use for the undeveloped portion of Permit 37-7842. IDWR granted the IWRB's request and extended proof of beneficial use until June 1, 2004. On April 26, 2004, IWRB filed another Request for Extension of Time to Submit Proof of Beneficial Use for Permit 37-7842. IDWR granted the second request and extended the time within which to submit proof of beneficial use until June 1, 2009.

On June 1, 2009, the IWRB filed a third Request for Extension of Time to Submit Proof of Beneficial Use for Permit 37-7842. On September 2, 2010, IDWR approved the

request and extended the time within which to submit proof of beneficial use until June 1, 2014. On September 21, 2010, William Arkoosh, the Estate of Vernon Ravencroft, Koyle Hydro, Inc., Notch Butte Hydro Company, Inc., and Shorock Hydro Inc. filed a joint Petition for Hearing and Petition for Declaratory Ruling pursuant to I.C. § 42-1701A(3) seeking a hearing on the September 2, 2010 Order extending time within which to submit proof of beneficial use. The Petition argued that IDWR erred in approving the extension of time.

As a result of the Petition, IDWR initiated a contested case proceeding and a hearing date was set. On June28, 2011, the hearing officer issued a statement of legal issues to be addressed in summary judgment briefing. On November 30, 2011, the hearing officer issued a Recommended Order. The Recommended Order found that proof of beneficial use under Permit 37-7842 was limited to that submitted by LSARD on July 27, 1992 and that any undeveloped portion of Permit 37-7842 was relinquished. The hearing officer went on to find that all IDWR actions on the undeveloped portion of Permit 37-7842, including the orders granting IWRB's Requests for Extension of Time to Submit Proof of Beneficial Use were void. The Recommended Order was adopted by the Director of IDWR and a Final Order was issued February 28, 2012. No appeal was taken from the Final Order.

On July 17, 2017, IDWR issued a Preliminary Order Approving Water Right License 37-7842 for 250 cfs from the Little Wood River for ground water recharge. On July 31, 2017, the IWRB filed a Petition for Reconsideration of the Preliminary Order pursuant to I.C. § 67-5243(3), IDAPA 37.01.01.730.02.a. On August 1, 2017, William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro Inc., and Shorock Hydro Inc. ("Petitioners"), filed a Petition for Hearing and Petition for Declaratory Ruling pursuant to I.C. § 42-

1701A(3); IDAPA 37-01.01.400; IDAPA 37.01.01 *et. seq.* This Memorandum in Support of Motion to Dismiss addresses only the Petition for Hearing filed pursuant to I.C. § 42-1701A(3). The Petition for Declaratory Ruling filed pursuant to IDAPA 37.01.01.400 will be addressed under a separate motion and memorandum.

STANDARD OF REVIEW

The Petition for Hearing was filed pursuant to I.C. § 42-1701A(3). Idaho Code Section 42-1701A(3) provides:

> Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by 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.

Any aggrieved person "shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director . . . a written petition stating the grounds for contesting the action by the director and requesting a hearing." I.C. § 42-1701A(3).

The Rules of Procedure of the Idaho Department of Water Resources provide that Petitions filed with IDWR should include the facts on which they are based, refer to particular provision of law on which they are based, and state the desired relief. IDAPA 37.01.01.230. The rules also provide for filing of a motion to dismiss in response to a petition. IDAPA 37.01.01.260.03.

ARGUMENT

The Petition for Hearing should be dismissed as untimely. A petition for hearing under I.C. § 42-1701A(3) must be filed "within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice . . . ." The Petition for

Hearing states that it seeks a hearing: "*on its order dated September 2, 2010* granting an extension of time to submit proof of beneficial use." (emphasis added.) Thus, the timeliness of the Petition for Hearing should be calculated from the day Petitioners received written or actual notice of the September 2, 2010 order granting extension of time to submit proof of beneficial use ("September 2010 Order").

The record indicates that the Petitioners had actual or written notice of the September 2, 2010 Order, at the latest, by September 21, 2010. That was the date on which the Petitioners filed their original Petition for Hearing and Petition for Declaratory Ruling ("September 21, 2010 Petition for Hearing"), which sought "a hearing on [IDWR's] order dated September 2, 2010." Thus, the Petitioners must have received written or actual notice of the September 2010 Order at the time they filed the September 21, 2010 Petition for Hearing.

To be timely under I.C. § 42-1701A(3), the Petition for Hearing should have been filed within 15 days after the Petitioners received written or actual notice of the September 2010 Order. The current Petition for Hearing was filed on August 1, 2017. More than 15 days have elapsed between the date Petitioners received actual/written notice of the September 2010 Order (September 21, 2010) and the filing date of the current Petition for Hearing (August 1, 2017). Therefore, the Petition for Hearing is time barred and should be dismissed.

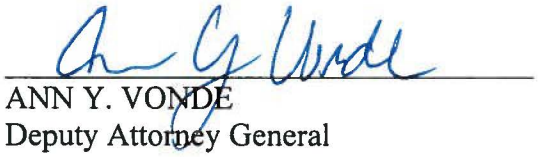
In addition, the Petitioner have already been afforded the opportunity for a hearing on the September 2010 Order. Idaho Code Section 42-1701A(3) provides opportunity for a hearing for those aggrieved persons who have "not previously been afforded an opportunity for a hearing on the matter . . . ." As noted above, Petitioners filed a Petition for Hearing on

the September 2010 Order on September 21, 2010. The September 21, 2010 Petition for Hearing was granted, a contested case was initiated, and a recommended and final order were issued finding the September 2010 Order was void. Thus, Petitioners have already been afforded an opportunity for hearing on the September 2010 Order and are precluded from seeking another one here.

CONCLUSION

The Petition for Hearing was filed pursuant to I.C. § 42-1701A(3) and seeks a hearing on the September 2010 Order issued in the above-captioned matter. The Petition for Hearing was not filed within 15 days of the Petitioner receiving written or actual notice of the September 2010 Order. In addition, Petitioners were already afforded an opportunity for a hearing on the September 2010 Order. Therefore, the Petition for Hearing should be dismissed.

DATED this 22nd day of August 2017.



ANN Y. VONDE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2017, I caused to be served a true and correct copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION FOR HEARING 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

Joseph F. James Brown & James 130 Fourth Avenue West Gooding ID 83330	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Email: ☐ Statehouse Mail
Water District #37 Kevin Lakey 107 W 1st Shoshone ID 83352	☒ U.S. Mail, postage prepaid ☐ Hand Delivery ☐ Federal Express ☐ Email: ☐ Statehouse Mail

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