

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT	)	RECOMMENDED ORDER GRANTING
NO. 37-7842 IN THE NAME OF THE	)	PETITIONERS' MOTION FOR
IDAHO WATER RESOURCE BOARD	)	SUMMARY JUDGMENT AND
	)	RESCINDING EXTENSION OF TIME

BACKGROUND

The Idaho Water Resource Board ("IWRB") is the listed owner of Permit 37-7842. On June 1, 2009, IWRB filed a Request for Extension of Time to Provide Additional Time in Which to Submit Proof of Beneficial Use for a Water Right Permit ("2009 Request for Extension of Time"). On September 2, 2010, the Idaho Department of Water Resources ("Department") approved the 2009 Request for Extension of Time ("2010 Order"). On September 22, 2010, a joint Petition for Hearing, and Petition for Declaratory Ruling ("Petition") was filed by William Arkoosh, the Estate of Vernon Ravenscroft, Koyle Hydro, Inc., Notch Butte Hydro Company, Inc., and Shorock Hydro, Inc. ("Petitioners"). The Petitioners are represented in this matter by Joseph F. James. The Petitioners argue that the Department erred in approving the 2009 Request for Extension of Time.

As a result of the Petition, the Department initiated a contested case proceeding. Shasta Kilminster-Hadley, from the Idaho Attorney General's Office, represents IWRB in this matter. A pre-hearing conference was held on February 24, 2011. As the parties discussed the matter, it became apparent there were few, if any, disputed issues of fact. The primary questions raised in the Petition are questions of law and statutory interpretation. Therefore, the Department asked the Parties to file summary judgment motions, discussing the contested legal issues.

On June 28, 2011, the Department issued a Statement of Legal Issues, summarizing the legal questions to be addressed by the Parties in their respective filings. Motions for summary judgment and response briefs were filed by IWRB and the Petitioners. Based on the undisputed facts and relevant legal provisions, the Department finds, concludes, and orders as follows:

JURISDICTION / STANDARD OF REVIEW

Timeliness of the Petition

Before evaluating the merits of the Petition, the Department must first determine whether the Petition was filed in a timely manner. Idaho Code § 42-1701A(3) states, in pertinent part:

Unless the right to a hearing before the director . . . is otherwise provided by statute, any person aggrieved by any action of the director, including any

decision, determination, order or other action, including action upon any application for a permit . . . 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. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing.

In this case, the Department action being challenged is the issuance of the 2010 Order. Even though there have been many past actions of the Department relating to Permit 37-7842, the Petitioners have not previously been afforded an opportunity for hearing on the 2010 Order. Therefore, the petition does not fail due to a previous opportunity for a hearing.

IWRB asserts the Petition was not timely because it was filed on September 21, 2010, eighteen days after the 2010 Order was issued. Idaho Code § 42-1701A sets a fifteen day deadline for filing a petition for hearing, which begins to run from the “receipt of written notice of the action issued by the director” On May 8, 2009, Mr. James, on behalf of the Petitioners, sent a letter to the Department, requesting direct notice of any future decisions of the Department regarding Permit 37-7842. Interim Director, Gary Spackman, responded to the letter on March 19, 2010. His letter stated:

“Based on your request you will be provided notice of the Department’s action in the IWRB’s pending request for extension of time to file proof of beneficial use under permit no. 37-7842. If your clients are aggrieved by the Department’s action on the request for extension of time, they are entitled to request a hearing before the director to contest the action pursuant to section 42-1701A(3), Idaho Code.”

On September 2, 2010, the Department sent a notice of the 2010 Order to IWRB and a copy of the order to Mr. James. As part of this proceeding, Mr. James provided an affidavit stating that the notice from the Department was sent via regular mail and was received by his office on September 7, 2010. Given these facts, the Petitioners should have filed their Petition on or before September 22, 2010 (fifteen days from the receipt of written notice). The Petition was filed on September 21, 2010. Therefore, the current Petition is timely.

Scope of Review

In addition to challenging the 2010 Order, the Petition asks the Department to “[determine] that water under Permit No. 37-07842 was not put to beneficial use in the prescribed period and lapsed; . . . [rule] that it 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; . . . [and rule] that the priority date of Permit No. 37-07842 was not accurately advanced following lapse and [reinstatement].” The Petitioners also challenged the adequacy of the Proof of Beneficial Use filed for Permit 37-7842. All of these issues are beyond the scope of review of the current

proceeding. These issues cannot be challenged as part of this proceeding because they represent past decisions and actions of the Department that are well beyond the petition period set forth in Idaho Code § 42-1701A.

Summary Judgment

The Department's Rules of Procedure (IDAPA 37.01.01) do not specifically set forth a process for filing motions for summary judgment. Administrative hearings before the Department are not governed by Rule 56 of the Idaho Rules of Civil Procedure. (IDAPA 37.01.01.052) Rule 564 of the Department's Rules of Procedure gives the presiding officer the authority to request briefs or statements of position from the parties. Generally, summary judgment is only appropriate in cases where the material facts of the case are not in dispute. Because it appeared that there were few, if any, disputed material facts in this case, the Department asked the parties to file summary judgment motions setting forth their respective positions. Although IWRB, in its response brief, identified certain facts that are still in dispute regarding the extent of beneficial use occurring under Permit 37-7842, none of the facts identified by IWRB are material to the outcome of this proceeding. Therefore, summary judgment is appropriate.

FINDINGS OF FACT

The following facts are not in dispute:

1. On June 30, 1980, Earl Hardy, Thorleif Rangen, John LeMoyne, and John W. Jones Jr. filed an application for permit with IDWR, seeking to appropriate 800 cfs from the Little Wood River and Big Wood River for ground water recharge. The application was assigned number 37-7842.
2. A similar application, 01-7054, was filed at the same time by the same individuals, seeking to appropriate water from the Snake River for ground water recharge. The two applications, 37-7842 and 01-7054, have followed a similar course and are referenced together throughout many of the documents contained in the respective water right files.
3. On January 18, 1982, Application for Permit 37-7842 was assigned by Hardy, Rangen, LeMoyne, and Jones to the Lower Snake Aquifer Recharge District ("LSARD").
4. On June 2, 1982, the Department issued Permit 37-7842, authorizing 800 cfs to be diverted from the Big Wood River and Little Wood River for ground water recharge. Proof of beneficial use for Permit 37-7842 was due on or before June 1, 1987.
5. On June 1, 1987, LSARD filed a Request for Extension of Time to submit Proof of Beneficial Use. The 1987 Request for Extension of Time was approved on October 4, 1989. The deadline for filing proof of beneficial use for Permit 37-7842 was extended to June 1, 1992.

6. LSARD did not file proof of beneficial use on or before 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 Permit 37-7842. The Proof of Beneficial Use form filed by LSARD stated: "Total rate and/or volume for which proof is submitted _300_ cfs."

7. The Proof of Beneficial Use form also included the following clauses: 1) "The Idaho Department of Water Resources considers this form a statement that the permit holder(s) has/have completed all development that will occur under this permit" and 2) "The above information is my true statement of the extent to which the above numbered permit has been developed and I relinquish any undeveloped portion of the permit to the state of Idaho." The Proof of Beneficial Use form was signed by Gerald Martens, project engineer for LSARD.

8. Included with the Proof of Beneficial Use was a beneficial use field report (dated July 6, 1992) prepared by Gerald Martens, a certified water rights examiner (#001). An amended beneficial use field report (dated November 24, 1993) was filed by Mr. Martens on November 29, 1993.

9. On July 29, 1992, the Department issued an Order of Reinstatement for Permit 37-7842. The 1992 Reinstatement Order stated: "[T]he permit holder has provided a reasonable showing why the permit should be reinstated by submitting proof of beneficial use on July 27, 1992." The 1992 Reinstatement Order advanced the priority date of Permit 37-7842 to August 25, 1980.

10. On December 1, 1993, the Department issued another Reinstatement Order, confirming the earlier reinstatement of Permit 37-7842. The 1993 Reinstatement Order stated: "The [D]epartment's review of the completed field examination and supporting data shows that the permit holder diverted water from both the Snake River and the Big and Little Wood Rivers" The 1993 Reinstatement Order confirmed the advancement of the priority date for Permit 37-7842 to August 25, 1980.

11. On April 28, 1999, Dan McFaddan, representing LSARD, assigned Permit 37-7842 to IWRB. On May 13, 1999, IWRB and LSARD signed an "Agreement Conveying Legal Title to Water Rights from [LSARD] to [IWRB]." The agreement specifically identified Permit 37-7842 and stated that LSARD conveyed legal title and all ownership rights and interests in Permit 37-7842 to IWRB.

12. On March 21, 2000, IWRB passed a Resolution requesting the Director of the Department to extend the time for submitting proof of beneficial use for the undeveloped portion of Permit 37-7842. On April 3, 2000, the Department approved IWRB's request and extended the proof due date for Permit 37-7842 to June 1, 2004.

13. On April 26, 2004, IWRB filed a Request for Extension of Time to submit Proof of Beneficial Use for Permit 37-7842. The 2004 Request for Extension of Time was granted by the Department on August 25, 2004, extending the time within which to submit proof of beneficial use to June 1, 2009.

14. On June 1, 2009, IWRB filed another Request for Extension of Time to submit Proof of Beneficial Use for Permit 37-7842. The 2009 Request for Extension of Time was approved by the Department on September 2, 2010 (2010 Order), extending the time within which to submit proof of beneficial use to June 1, 2014. This action of the Department, approving the 2009 Request for Extension of Time, is the basis for the current petition.

APPLICABLE STATUTES, RULES, AND FORMS

1. Idaho Code § 42-217 states, in pertinent part: “On or before the date set for the beneficial use of waters appropriated under the provisions of this chapter, the permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit.”

2. Idaho Code § 42-218a states, in pertinent part: “A permit upon which the proof of beneficial use has not been submitted, or a request for extension of time has not been received on or before the date set for such proof, shall lapse and be of no further force nor effect.”

3. Idaho Code § 42-218a (as it existed in 1992) sets forth the remedies available for lapsed permits:

Notice of said lapsing shall be sent by the department to the applicant at the address of record by regular mail provided:

- 1) That within sixty (60) days after such notice of lapsing the department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof;
- 2) That upon receipt of proof of beneficial use after sixty (60) days after such notice of lapsing, the director shall require sufficient evidence to be submitted by the permit holder to clearly establish the extent of beneficial use made during the time authorized by the permit and any extensions of time previously approved. Upon finding that beneficial use had occurred during the authorized period and upon a showing of reasonable cause for filing a late proof of beneficial use, the director may reinstate the permit with the priority date advanced to the day that proof of beneficial use was received;
- 3) The original priority date of a lapsed permit shall not be reinstated except upon a showing of error or mistake of the department.

4. Idaho Code § 42-204 states, in pertinent part:

“The department shall require that actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of such approval, but may limit the permit to a less period than is named in the application, and the permit shall set forth the date when beneficial application of the water to be diverted by such works shall be made.”

5. Idaho Code § 42-204(5) states that, except for certain specific situations (which did not apply to Permit 37-7842 in 1992), “the [D]epartment may grant one (1) extension of time, not exceeding five (5) years beyond the date originally set for completion of works and application of the water to full beneficial use, upon request for extension received on or before the date set for completion, provided good cause appears therefor.”

6. Idaho Code § 42-204(4) states, in pertinent part:

In connection with permits held by the United States, or the Idaho water resource board, whether acquired as the original applicant, by assignment or otherwise, the director of the department of water resources may extend the time for completion of the works and application of the water to full beneficial use for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, construction, or any arrangements which are found to be requisite to completion of the construction of such works.

ANALYSIS

1. Although Permit 01-7054 (for ground water recharge from the Snake River) has followed a similar course to Permit 37-7842 and is referenced in many of the supporting documents, the validity of Permit 01-7054 has no bearing on the outcome of this proceeding.

2. Proof of beneficial use under Permit 37-7842 was due by June 1, 1992. LSARD did not file proof of beneficial use on or before June 1, 1992. Therefore, Permit 37-7842 lapsed. On June 5, 1992, the Department notified LSARD that Permit 37-7842 had lapsed. Because LSARD had already been granted a 5-year extension of time to submit beneficial use, and LSARD did not qualify for additional extensions of time under Section 42-204, the only way to remedy the lapse was to file proof of beneficial use.

3. LSARD chose to remedy the lapse by filing proof of beneficial use for Permit 37-7842. LSARD did not file a separate extension of time for the undeveloped portion of 37-7842. Pursuant to Idaho Code § 42-204, any request for an extension of time on the undeveloped portion of the Permit 37-7842 would have been denied.

4. According to the terms and declarations contained LSARD’s July 27, 1992 Proof of Beneficial Use, LSARD completed all development that was to occur under Permit 37-7842 and relinquished the remaining undeveloped portion of the permit to the state of Idaho. When the Department reinstated permit 37-7842 on July 29, 1992, and again on December 1, 1993, the only portion of the permit in existence at that time was the portion that had been developed prior to June 1, 1992. The remainder of the permit (the undeveloped portion) had been relinquished through the signed declaration of the permit holder. The Department does not have the statutory authority to reinstate permits, or portions of permits, that have been relinquished.

5. When Permit 37-7842 was assigned to IWRB in 1999, the only portion of the permit that was still valid was the portion that had been developed prior to June 1, 1992. In March 2000, when IWRB first requested an extension of time to submit proof of beneficial use for the undeveloped portion of Permit 37-7842, there was no valid undeveloped portion remaining under the permit. The undeveloped portion of the permit had been relinquished in 1992. 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. Therefore, the Department's approval of the 2000 Request for Extension of Time was beyond its statutory authority and was void. Similarly, the Department's approval of the 2004 Request for Extension of Time was beyond its statutory authority and was void.

6. IWRB argues that the current Petition constitutes an impermissible collateral attack on previous Department actions. IWRB is correct that the Department cannot re-evaluate previous decisions, actions, and orders relating to a water right each time the right is involved in an administrative process. To allow such retroactive review of previous Department decisions would create uncertainty for all water rights and would prejudice water right holders. However, in instances where an administrative agency acts beyond its statutory authority, the agency action is void, and may be attacked by a person adversely affected by the action at any time. *Wernecke v. St. Maries Joint School Dist. #401*, 207 P.3d 1008, 1017 (Idaho 2009).

7. The Department did not have the statutory authority to reinstate the relinquished portion of Permit 37-7842. Therefore, the Department's 2000, 2004 and 2010 orders approving extensions of time for the undeveloped (relinquished) portion of Permit 37-7842 were void. The Department cannot create a valid permit through an extension of time (or series of extensions of time) where no valid permit exists.

8. 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.

CONCLUSIONS OF LAW

1. Pursuant to the terms and declarations in the Proof of Beneficial Use filed by LSARD on July 27, 1992, the undeveloped portion of Permit 37-7842 was relinquished to the state of Idaho. The Department does not have statutory authority to reinstate a relinquished portion of a permit. All Department actions on the undeveloped portion of Permit 37-7842 occurring after July 27, 1992 are void.

2. The 2010 Order issued by the Department, granting IWRB an extension of time within which to submit proof of beneficial use for the undeveloped portion of Permit 37-7842, has no meaning and no legal effect. The only portion of Permit 37-7842 that remains valid today is that portion of the permit put to beneficial use prior to June 1, 1992. Proof of beneficial use was filed on the developed portion of Permit 37-7842 on July 27, 1992. No further extensions of time are needed for the portion of the permit developed prior to June 1, 1992.

3. The Department erred in granting an extension of time in the 2010 Order.

ORDER

IT IS HEREBY ORDERED that the Petitioner's Motion for Summary Judgment is GRANTED to the extent described in this Order and IWRB's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that the September 2, 2010 Order granting an extension of time within which to submit proof of beneficial use is RESCINDED. The Department shall conduct an investigation of Permit 37-7842 for licensing purposes and issue a license consistent with its findings.

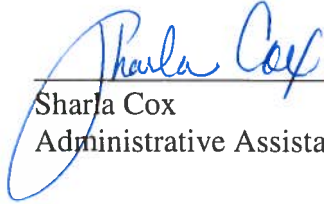
Dated this 30th day of November, 2011.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of November 2011, I mailed a true and correct copy, postage prepaid, of the foregoing **RECOMMENDED ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND RESCINDING EXTENSION OF TIME** to the person(s) listed below:



Sharla Cox
Administrative Assistant

US MAIL

Shasta Kilminster-Hadley, Deputy AG
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**EXPLANATORY INFORMATION
TO ACCOMPANY A
RECOMMENDED ORDER**

(Required by Rule of Procedure 720.02)

The accompanying order is a "**Recommended Order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

Any petition for reconsideration or other motion to the hearing officer shall be served upon all other parties to the proceeding. All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.