

JOSEPH F. JAMES
BROWN & JAMES
130 Fourth Avenue West
Gooding, Idaho 83330
Telephone: (208) 934-8185
Facsimile: (208) 934-4101
Idaho State Bar No. 5771

Attorneys For Petitioners

RECEIVED
OCT 24 2011
Department of Water Resources
Eastern Region

BEFORE THE DEPARTMENT OF WATER RESOURCE
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO.	)	PETITIONERS' MEMORANDUM IN
37-07842 IN THE NAME OF THE	)	RESPONSE TO RESPONDENTS'
IDAHO WATER RESOURCES	)	MOTION FOR SUMMARY JUDGMENT
BOARD	)	
_____	)	

COME NOW, the Petitioners, by and through Joseph F. James, of Brown & James, their attorneys of record, and respectfully submits this Petitioners' Memorandum in Response to Respondents' Motion for Summary Judgment.

I
INTRODUCTORY SUMMARY

Petitioners have previously filed a Memorandum in Support of Petitioners' Motion for Summary Judgment. (Hereinafter "Petitioners' Initial Brief"). Said brief sets forth the facts giving rise to Petitioners' petition, and outlines the course of prior proceedings.

II LEGAL STANDARD

A. Motion for Summary Judgment:

Petitioners' Initial Brief sets forth the applicable legal standard pertaining to summary judgment motions in that summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

III ARGUMENT

A. The Department's Action in Approving an Extension of Time to Submit Proof of Beneficial Use for Permit No 37-7842, Was Not Proper, and the Petition for Hearing and Petition for Declaratory Ruling Was Filed in a Timely Manner.

Petitioners' Initial Brief sets forth the basis for the determination that the Department erred in approving the request for extension of time to submit proof of beneficial use. Further, Petitioners' Initial Brief sets forth a basis for the determination that Petitioners request for hearing was timely.

B. The Subject Matter, and the Remedies Being Sought, Are Within the Scope of Review Authorized Under Idaho Law and the Department's Rules of Procedure.

Petitioners' Initial Brief sets forth the basis for the determination that the subject matter and remedies being sought are within the scope of review. However, Respondent in its Motion for Summary Judgment, cites additional authority warranting further response.

Respondent asserts that the Order Denying SWC Request for Hearing Regarding Order Approving Mitigation Plan, issued by the Director and dated June 8, 2010, supports the proposition that Petitioners are not entitled to the remedy sought. This assertion is misplaced in that the Director's decision regarding the Surface Water Coalition's request for hearing is distinguishable

from the present matter. Different procedural rules were applicable in each circumstance. The Director's decision regarding the Surface Water Coalition's request for hearing was based on procedures set forth under the Department's Conjunctive Management Rules, and the Idaho Statute addressing procedures regarding changes in points of diversion, places of use, periods of use and/or nature of use. See I.D.A.P.A. 37.03.11.000-050; and I.C. § 42-222(1). Said procedures provide for notice and a opportunity for hearing. *Id.* Regarding the Surface Water Coalition's request for hearing, notice was provided via publication.

The present request for hearing is governed by the Department's Rules of Procedure and Idaho Code § 42-171A(3). In the present matter, the Petitioners did not receive notice of the Department's prior actions. Years later, when the Petitioners became aware of the potential diversion of water under Permit No. 37-7842, and the Department's prior actions, they contacted the Director. (James ltr. 5-8-09). The Petitioners pointed out the Department's prior actions, the apparent lapse of the permit, and specifically asked the Director if any administrative remedies were available at that time. *Id.* The Interim Director responded that "[I]t 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 Interim Director further instructed that no administrative remedies were presently available. *Id.* However, the Interim Director did note that there was presently pending a request for extension of time to file proof of beneficial use under the subject permit and that Petitioners would be provided notice of the Department's action. *Id.* The Interim Director further informed Petitioners that if they were aggrieved by the Department's

action on the request for extension of time, that they were entitled to request a hearing before the Director to contest the action pursuant to I.C. § 42-1701A(3). *Id.*

IV CONCLUSION

For the reasons stated herein, Petitioners respectfully requests that the Director enter his order denying Respondents' Request for Summary Judgment.

DATED this 21st day of October, 2011.

BROWN & JAMES

By: _____

Joseph F. James

CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of October, 2011, I served a true and correct copy of the foregoing document upon the following persons in the manner indicated:

Shasta Kilminster-Hadley
Natural Resources Division
P.O. Box 83720
Boise, ID 83720-001

☒
☐
☐
☐

United States Mail, Postage Prepaid
Express overnight delivery
Hand delivered
Via facsimile transmission

David I. Stanish
Natural Resources Division
P.O. Box 83720
Boise, ID 83720-001

☒
☐
☐
☐

United States Mail, Postage Prepaid
Express overnight delivery
Hand delivered
Via facsimile transmission

Sharla Cox-Administrative Assistant
I.D.W.R.
900 N. Skyline Dr., Ste. A
Idaho Falls, ID 83402

☒
☐
☐
☐

United States Mail, Postage Prepaid
Express overnight delivery
Hand delivered
Via facsimile transmission


