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Department of Water Resources
Eastern Region

Counsel for Idaho Water Resources Board

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO.)
37-07842 IN THE NAME OF IDAHO)
WATER RESOURCES BOARD)
)

**IDAHO WATER RESOURCES
BOARD'S RESPONSE**

The Idaho Water Resources Board, by and through its Counsel of record submits the following response to Petitioners' Motion for Summary Judgment.

1. The Petitioners' Motion Must Be Denied Because There Are Material Disputed Issues of Fact.

Summary Judgment is not appropriate where there are genuine disputed issues of material fact. Here, Petitioners base their argument that the Idaho Department of Water Resources ("IDWR") erroneously approved the most recent extension of time on various factual allegations that the IWRB firmly disputes. For example, in their statement of facts, when explaining the second proof of beneficial use filed over a year after the first proof for permit no. 37-7842 was

accepted, Petitioners state that “On further review, the Department determined that the beneficial use field report was not acceptable.” *Petitioners’ Motion for Summary Judgment* (“Petitioners’ Motion”), at 4. This is a mischaracterization of the impetus for the second filing.

There is no evidence in the record that IDWR requested a second filing of proof because it found deficiencies in the original, approved proof of beneficial use submitted for permit no. 37-7842. Rather, the *permit holder* advised IDWR that the proof was mistakenly submitted only for permit no. 37-7842, when it was intended to have been submitted for *both* permit nos. 37-7842 and 01-7054. *Reinstatement Order*, December 1, 1993. In fact, the second proof of beneficial use submitted in November of 1993 clarified that the use indicated was for both permits, was nearly identical to the first, and was also found acceptable by IDWR after staff analysis.

The record shows that, in analyzing the second proof of beneficial use, IDWR determined that since the proof made in 1992 was intended to have been for both permits, permit no. 01-7054 should *also* have been reinstated as of August 1992. This is supported by the language of the Reinstatement Order issued for both permits in December 1993:

On July 27, 1992, the permit holder filed proof of beneficial use together with a field report completed by Gerald Martens, a certified water right examiner. The proof was identified as being for Permit No. 37-07842 with authorized sources of the Little Wood and Big Wood Rivers.

On August 12, 1993, the permit holder advised the department that the proof which was filed on July 27, 1992 was intended for both Permit Nos. 01-07054 and 37-07842.

The department’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 even though the proof was identified as being only for Permit No. 37-07842.

Reinstatement Order, December 1, 1993. The fact that IDWR accepted the second, nearly identical, iteration of the first proof, and reinstated permit no. 01-7054 based on that proof, while confirming the reinstatement of permit no. 37-7842, belies the Petitioners' argument that IDWR found the first proof unacceptable.

The IWRB also disputes a second allegation made by Petitioners in their motion: "the Department failed to advance the priority date in recognition of the continuing lapse." *Petitioners' Motion*, at 4. In fact, as evidenced by IDWR's first Reinstatement Order of July 1992, permit no. 37-7842 was not in a state of continuing lapse. The record shows that the second proof of beneficial use, filed in November 1993, was only necessary to ensure that the first proof filed in July 1992 was attributable to permit no. 01-7054 as well as permit no. 37-7842. Indeed, the Order cited above makes clear that IDWR considered the second proof to be a remedial filing to clarify the intent of the permit holder that the proof would apply to both rights. As a result, IDWR reinstated permit no. 01-7054 *as of the date that the first proof was filed in 1992*, and advanced the priority of that permit accordingly. The second Reinstatement Order reiterates that both permits were reinstated on the basis of "proof which was filed on July 27, 1992," *Reinstatement Order*, December 1, 1993, underscoring the fact that the second proof of beneficial use was a corrective measure to reflect the permit holder's original intent that the proof filed in 1992 be attributed to both permits.

Finally, the IWRB disputes Petitioners' contention that there has been no beneficial use made under permit no. 37-7842, or that the application for permit no. 37-7842 was deficient. There is evidence that beneficial use occurred under this permit in 1995, 1999, 2006, 2010, and 2011¹. IWRB anticipates these issues will be resolved by an evidentiary hearing should one be necessary following disposition of the pending summary judgment motions. The reliance of

¹ See *Affidavit of Dan Nelson*, at 3-4.

Petitioners on these and other disputed facts renders their arguments improper for summary judgment, and therefore Petitioners' Motion should be denied.

2. The Petitioners' arguments that IDWR erred in granting IWRB's extension of time fail as a matter of law and equity.

The Petitioners argue that IDWR erred in granting the recent request for extension of time because proof of beneficial use had already been filed and therefore a request for extension of time was improper. This argument is unavailing both as a matter of law and as a matter of equity because: 1) IWRB's previous requests for extension were granted without objection, and 2) Idaho Code § 42-204 explicitly allows the Director of IDWR to use discretion in extending the time for application of water to the "full beneficial use" under a permit.

a. Permit No. 37-7842 is a valid, active permit, and Petitioners' argument is unavailable as a matter of law.

IWRB filed its first request for extension of time in 2000, following its acquisition of the permits in 1999. There was no opposition to IDWR's approval of the request, and IWRB rightfully relied on the agency's determination that such an extension was appropriate. In 2004, the IWRB again filed a request for extension, which was again approved by IDWR with no opposition. The Petitioners argue that these should have been denied, and that any portion of the permit for which proof was not made in 1993 has lapsed and reverted to the State.

Even assuming for purposes of argument only that Petitioners contention is correct, this argument had to be raised at the time the first request was approved and is therefore now barred. In approving the most recent request for extension, IDWR Staff described its rationale in processing the request:

[P]ast orders and decisions of the Department reinstated the permit and provided extensions of time for additional development. Those past orders and decisions were not appealed by any party as provided under Section 42-1701A(3), Idaho Code. The pending extension request will be processed on the basis that the

permit is a valid, active permit, which can be extended pursuant to Section 42-204(4), Idaho Code.

Memorandum from Jeff Peppersack, dated September 2, 2010. Petitioners' motion, if granted, would penalize the IWRB for nearly twenty years of careful stewardship of this permit in reliance on the previously granted extensions. Petitioner's have waived any right to challenge the grant of the extensions by failing to file a timely objection to IWRB's request for an extension..

If, as Petitioners allege, it was necessary for IWRB to withdraw its proof of beneficial use before requesting an extension, this challenge should have been made at the time of the first request for extension filed in 2000. Likewise, Petitioners' never objected to IDWR's decision not to require a withdrawal of proof in 2000, 2004, or 2010. Even if it were determined that IWRB must withdraw its proof of beneficial use to correct a procedural error overlooked by alleged error by IDWR since 2000, the IWRB cannot be punished retroactively for a problem that IDWR failed to recognize and, in fact sanctioned, by approving the requests.

The relief that Petitioners request would wreak havoc with water appropriation processes. Petitioners seek a ruling that permit no. 37-7842 lapsed as of the proof due date in 1992, that the proof accepted by IDWR was insufficient, and that the water right reverted to the State at that point, some 20 years after the Departments' decision to the contrary. Parties should not be allowed to simply wait to raise such procedural objections in an administrative hearing. Based upon the lack of challenge at the time of the extension, IWRB has expended considerable resources and effort in developing these water rights².

b. The subject matter of the petition is beyond the scope of review authorized under Idaho law and the Department's Rules of Procedure and the remedies

² Over the years, IWRB has worked continuously to develop the permit to its full extent, seeking the funding, and federal approval needed, and leasing the water right to the water bank in order that the water diverted thereunder be available to the public until it can be fully utilized by the IWRB. Additionally, permit no. 37-7842 is and integral part of the CAMP process approved by the Idaho State Legislature in 2009.

being sought by the petitioners are not available under Idaho law and the Department's Rules of Procedure.

Idaho Code § 42-1701A(3) provides that any person aggrieved by any decision, determination, order or action of the Director of IDWR who has not previously been afforded an opportunity for hearing on the matter can file a petition contesting the action and requesting a hearing within 15 days of receipt of the action or order. This statute is incorporated in IDWR's Rules of Procedure.

As discussed above, the current petition does not address the sufficiency of the Request itself, but instead seeks a hearing on matters pertaining to IDWR actions occurring in 1992 and 1993. As such, the petition is outside the scope of review authorized by Idaho Code § 42-1701A(3) and IDWR's Rules of Procedure. Idaho Code § 42-1701A(3) affords affected persons the opportunity to be heard on a particular action, who have *not previously been afforded an opportunity for hearing on the matter*. In this case, Petitioners had an opportunity to be heard on the issues of adequacy of proof of beneficial use and the sufficient advancement of priority date for this permit in 1992, when the first reinstatement order was issued, and again in 1993 when the second reinstatement order was issued. Having chosen not to avail themselves of the opportunity to be heard at the time the relevant orders were issued, Petitioners may not use Idaho Code § 42-1701A(3) to be heard now³.

Petitioners argue that I.D.A.P.A.37.01.01.400 permits petitions for declaratory rulings at any time. Although there is not a time constraint on seeking a ruling as to the applicability of

³ The Director of IDWR has previously addressed this very issue: "[T]he Mitigation Plan was filed and published. Hearing was afforded in CM Rule 43.02 and Idaho Code 42-222(1). However, because no protests were filed, the Director, in reviewing the Mitigation Plan and in exercise of his discretion, determined that a hearing was not necessary...Therefore, SWC had an opportunity for hearing in the Mitigation Plan proceeding when the Mitigation Plan was published. *Because SWC failed to exercise its opportunity for hearing, Idaho Code § 42-1701A(3) does not provide the SWC an opportunity to now seek a hearing on the Order Approving Mitigation Plan.*" *Order Denying SWC Request for Hearing Regarding Order Approving Mitigation Plan*, June 8, 2010, at 2 (emphasis added).

certain statutes and agency rules to a specific matter, there is a time constraint for purposes of appeal of specific agency action. Petitioners may seek a declaratory ruling as to the applicability of certain statutes, but equity prevents such rulings from operating retroactively to harm the interests of water users acting in reliance on agency actions. Petitioners are seeking a de facto appeal of past IDWR actions in the form of a declaratory ruling.

Under Petitioners' theory, any person would have an infinite opportunity to challenge any determinations, actions or orders concerning any agency action, no matter how distant in time. A simple transfer proceeding could therefore open the door for challenges to any IDWR action taken in the course of processing a water right, beginning with the determination as to the sufficiency of the initial application. Furthermore, the use of declaratory rulings desired by the Petitioners would allow any person to retroactively attack the validity of any past agency action. This would set IDWR's permitting system on its head and remove any certainty for Idaho water users. The Petitioners' opportunity for hearing relates solely to the recent approval of the Request for Extension of Time. Anything else is beyond the scope of review afforded by the statute.

c. Permit No. 37-7842 is a valid, active permit, and Petitioners' argument is unavailable as a matter of equity.

The doctrine of laches bars Petitioners from seeking the relief detailed in their Motion. "Long and knowing acquiescence in another's use and enjoyment of property or privilege may preclude one from subsequently asserting his claim. . . . Courts of equity do not favor antiquated and stale demands and refuse to interfere where there has been gross laches in commencing the proper action..." *Hillcrest Irr. Dist. v. Nampa and Meridian Irr. Dist. et al*, 57 Idaho 403, 411-412, 66 P.2d 115, 118 (1937). In this case, Petitioners have been on notice for nearly 20 years of the active status of permit no. 37-7842, the acceptance of the proof of beneficial use, the number

of days by which priority was advanced, and the request and approval of subsequent extensions of time. Rather than protest any aspect of IDWR's actions concerning this permit, Petitioners have acquiesced to IWRB's continued use—including its lease of the water diverted under the permit to the water bank. Granting Petitioners' Motion would greatly prejudice the IWRB, which has worked diligently to seek the funding and authorizations necessary to develop the water right, most recently through the ESPA CAMP process.

d. Idaho Code § 42-204 explicitly allows the Director of IDWR to use discretion in extending the time for application of water to “full beneficial use” under a permit.

Idaho Code § 42-204(4) states that, for permits held by the United States or the IWRB, the Director of IDWR:

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 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.

This section of Idaho Code § 42-204 grants the Director broad discretion to approve extensions of indeterminate length based upon a showing that such extension is necessary for completion of works and application of the water to *full beneficial use*. IDWR's granting of IDWR's first request for extension of the “undeveloped portion” of the permit was therefore squarely within the discretion granted to the Director by Idaho Code § 42-204(4). The broad discretion provided by Idaho Code § 42-204(4) is one of the main reasons why the Lower Snake River Aquifer Recharge District assigned permit no. 37-7842 to IWRB. “It is our understanding that the Water Resource Board would be bound by less stringent time constraints in proving up these water rights.” *Letter* from Dan McFadden to the IWRB, dated December 30, 1998.

Petitioners state in their motion that IWRB should have withdrawn the proof of beneficial use before requesting an extension of time; yet, pursuant to the statute, the Director may extend the time for application of water to full beneficial use as he deems necessary. There is no statutory requirement that the discretion of the Director is constrained to situations where no proof of beneficial use has been filed, or where partial development has not been proven. The Director's discretion in this matter is limited only by the requirement that the IWRB (or the United States) make an application showing that the extension is required for the reasons listed in the statute. If the Director determines that such a showing has been made, he may approve the extension.

3. The September 2, 2010 Action of the Department, approving an extension of time to submit proof of beneficial use for Permit No. 37-7842, was consistent with Idaho Code §§ 42-204.

The Petitioners argue that IWRB's Request for Extension of Time in 2009 was improperly granted because it did not set forth sufficient reasons as to the status of plans, authorization, construction fund appropriation, construction, or any other arrangement found to be requisite to the completion of the works. IWRB disagrees.

The basis for the extension is described as the lack of sufficient flow to divert the full extent of the permitted diversion rate. This impacts the authorization to divert under the permit, as drought conditions have a direct impact on the ability of water masters to deliver water to all users within a priority system. It is common IDWR practice to contact water users if more information is needed to process a request for extension of time⁴. In this case, IDWR staff confirmed with IWRB that aquifer recharge under the permit is planned as part of the ESPA-CAMP process and that IWRB would be reviewing additional recharge locations as part of that process. *Memorandum* from Jeff Peppersack, dated September 2, 2010. The IWRB's

⁴ Affidavit of Shelley Keen, at 2.

anticipation of adding more recharge sites as part of the ESPA-CAMP process clearly falls under the “status of plans” language of the statute. Thus, the Request complies with the applicable provisions of the law. IDWR’s approval of the Request is therefore soundly within the discretion of the Director.

CONCLUSION

The Petitioners’ Motion relies upon factual allegations that are in dispute. Furthermore, Petitioners are barred by law and equity from challenging the validity of the proof of beneficial use submitted, and accepted, for permit no. 37-7842 and any other past IDWR actions for which the time for appeal has passed. As to the most recent request for extension of time, Petitioners have failed to show that the request was deficient such that the Director could not, in his discretion, approve a further extension. The Idaho Water Resources Board therefore requests that the Petitioners’ Motion be denied.

DATED this 21st of October, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2011, I caused a true and correct copy of the foregoing **IDAHO WATER RESOURCES BOARD'S RESPONSE** to be filed with the Court and served on the following parties by the indicated methods:

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