

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

RECEIVED
SEP 19 2011
Department of Water Resources
Eastern Region

Attorneys For Petitioners

BEFORE THE DEPARTMENT OF WATER RESOURCE
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO.	)	MEMORANDUM IN SUPPORT OF
37-07842 IN THE NAME OF THE	)	PETITIONER'S MOTION FOR
IDAHO WATER RESOURCES	)	SUMMARY JUDGMENT
BOARD	)	
_____	)	

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

I
INTRODUCTORY SUMMARY

A. Summary of Facts:

An application was filed on July 2, 1980 seeking a permit to divert 800 cfs from the Little Wood and Big Wood Rivers for purposes of ground water recharge. (Application for Permit 37-07842). The application denoted the point of diversion as the SW¹/₄ of SE¹/₄ of Section 24, Township 4 S, Range 19 E, located within Lincoln County. *Id.* The application proposed diverting the water through the use of the Dietrich and Richfield canal systems. *Id.* It should be noted that neither the Little Wood nor the Big Wood Rivers flow through Section 24, Township 4 S, Range 19 E.

However, the Dietrich canal diverts from the Little Wood River in Section 25, Township 4 S, Range 19 E. The Department recognized these errors during an early review and made a note to the file indicating that the point of diversion on the application was in error, and that the only apparent source of water would be the Little Wood River. (Note to File 12-29-81). The applicants never sought to amend their application.

The application was incomplete as to the description of the proposed place of use, but did include a drawing indicating that the water would be diverted from the Little Wood River through the Dietrich Canal to the recharge site southeast of Richfield, Idaho. (Application for Permit 37-07842). The published notice of application for water right clarified that the possible recharge sites were located within Sections 15, 16, 21, 22 and 28, Township 5 S, Range 19 E, Lincoln County. (Affidavit of Publication). The application indicated that five years was required for completion of the works and application of the water for recharge. (Application for Permit 37-07842).

The subject application sought a permit to divert water from the Little Wood River through the Dietrich Canal for purposes of recharge southeast of Richfield. (Application for Permit 37-07842). The applicants filed another application on the same day seeking to divert water from the Snake River through the Milner-Gooding Canal for purposes of recharge northwest of Shoshone, Idaho. (Application for Permit 37-07842). This other application was ultimately assigned Permit No. 01-07054.

The subject application was approved on June 2, 1982, under Permit No. 37-07842, with a completion and submission of beneficial use deadline of June 1, 1987. (Application for Permit 37-07842). A request for extension of time was submitted on June 1, 1987. (Request for Extension 6-1-

87). The request was returned by the Department to the applicant on July 16, 1987, for additional information. (IDWR./Saxton ltr 7-16-87). Ultimately, the Department approved the request for extension on October 4, 1989, extending the completion and proof of beneficial use deadline to June 1, 1992. (Request for Extension 6-1-87).

The Department sent a notice of proof of beneficial use due on March 31, 1992, providing notice that proof of beneficial use had to be submitted no later than June 1, 1992. (Proof Due Notice 3-31-92). Proof of beneficial use was not timely submitted and the Department sent a lapsed notice on June 5, 1992. (Lapse Notice 6-5-92). The Department received proof of beneficial use on or about June 15, 1992. (IDWR./Gustafson ltr 6-15-92). The Department returned the proof of beneficial use form to the applicants on June 15, 1992, stating that the proof was unacceptable. *Id.* The Department further informed the permit holder that the permit was still lapsed, and that the priority date would be penalized one day for every day that the proof was not submitted. *Id.* On July 9, 1992, the Department received a beneficial use field report regarding the permit, but did not receive the original proof of beneficial use form. (IDWR/Gustafson ltr 7-9-92). The Department informed the permit holders that they could not continue licencing until it received the original proof of beneficial use form. *Id.* On July 23, 1992, the Department again provided notice that they could not process the permit without an original proof of beneficial use form. (IDWR/Gustafson ltr 7-23-92).

On July 27, 1992, the Department received the original proof of beneficial use form. (Proof Beneficial Use 37-07842). The form listed both Permit No. 37-07842 and Permit No. 01-07054. *Id.* The proof of beneficial use indicated a total of 300 cfs of ground water had been diverted from

the Snake River. *Id.* The beneficial use field report denoted the source as the Snake River, provided a point of diversion different from the application, as well as different place of use. *Id.* The beneficial use field report also denoted that the water was diverted through the Milner-Gooding Canal and not the Dietrich Canal. (Field Report 37-07842). The Department accepted the amended proof of beneficial use and beneficial use field report. The Department entered its order reinstating the permit and advancing the priority date to August 25, 1990 on the 29th day of July, 1992. (Order of Reinstatement 7-29-92).

On further review, the Department determined that the beneficial use field report was not acceptable. The applicants provided an amended beneficial use field report on October 19, 1993. (IDWR/Saxton ltr 10-21-93). The Department determined that the amended beneficial use field report was still not acceptable and returned it to the applicants on October 21, 1993. *Id.* On November 29, 1993, the Department received another amended beneficial field report denoting both Permit No. 01-07054 and Permit No. 37-07842 with a total diversion of 300 cfs. (Amended Field Report 37-07847). This time the beneficial use field report indicated the source as the Snake River/Big Wood River but did not include the Little Wood River. *Id.* Also, the field report indicated a diversion point distinct from application for permit. *Id.* Again, the total diversion rate was stated at 300 cfs. *Id.* The Department entered a reinstatement order regarding both permits on December 1, 1993. (Reinstatement Order). The Department failed to advance the priority date in recognition of the continuing lapse. *Id.*

There appears to be little activity in the file until 1999 when the permit holders were anticipating transferring legal ownership to the Idaho Water Resources Board. On March 19, 1999,

the Idaho Water Resources Board agreed to accept assignment of the permits. (IDWR/Hass ltr 3-22-99). In its review leading up to the acceptance of the assignment, the Department indicated that both Permit No. 01-07054 and Permit No. 37-07842 had filed proof of beneficial use for diversion rate of 300 cfs each. (Memo to File 1-14-99). This is incorrect. As noted above, the Proof of Beneficial Use form, as well as the Beneficial Use Field Report indicated a combined total of 300 cfs, with the water coming from the Snake River via the Milner-Gooding Canal.

The conclusion that a total of 300 cfs from the Snake River had been put to beneficial use is supported by the Department's own internal review of the permits. A Memo to the file in October 1999 indicated that recharge under Permit No. 01-07054 from the Snake River through the Milner-Gooding Canal could be confirmed and the license for that has been prepared for signature. (Memo to File 10-7-95). However, regarding Permit No. 37-07842 there did not appear to be any application toward beneficial use. Based on the Department's conversation with Dan McFadden of the Lower Snake River Aquifer Recharge District, no ground water recharge had ever taken place from the Little Wood River via the Dietrich Canal. *Id.* Also, based on the Department's conversation with Paul Castelin of the Technical Services Bureau, no recharge from the Little Wood or Big Wood River had taken place. *Id.* The Department concluded that there has been no beneficial use to date and that the permit should be routed for extension or reinstatement processing. *Id.* This conclusion was further supported by the correspondence from the Big Wood Canal Company and American Falls Reservoir District #2 of November 1999, which clarified that all recharge water from 1986 through 1995 was Snake River water delivered via the Milner-Gooding Canal. (Oneida ltr 11-99).

Though the Department's file contains a proof of beneficial use form and beneficial use field report, which has not been withdrawn, the Idaho Water Resources Board adopted a resolution asking the Director to extend the proof date regarding the "undeveloped" portion of the permit. (WRB Resolution 3-21-00). An order was entered on April 3, 2000 extending the proof date for the permit until June 1, 2004. (IDWR 4-3-00). On August 25, 2004, the Idaho Water Resources Board again requested for an extension of time to submit proof of beneficial use resulting in another extension to June 1, 2009. (Request for Extension 8-25-04). On June 1, 2009, the Department received another request for extension of time to submit proof of beneficial use. (Request for Extension 6-1-09). On March 19, 2010, while the request for extension of time was pending, the Director indicated "[It] 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 request for extension was granted on the 2nd day of September 2010 and the time within which to submit proof of beneficial use was extended to June 1, 2014. (Request for Extension 6-1-09).

B. Course of Proceedings:

Petitioners filed a Petition for Hearing, and Petition for Declaratory Ruling on September 22, 2010. The Department issued its order allowing discovery on April 5, 2011. Pursuant to the stipulation of the parties, the Department vacated the hearing and set a briefing schedule on June 14, 2011. The Department issued its Statement of Legal Issues on June 28, 2011 and instructed the parties to file their initial Motion for Summary Judgment no later than August 26, 2011. Pursuant to the stipulation of the parties, the deadlines for filing summary judgment motions and initial briefs was extended to September 16, 2011.

II LEGAL STANDARD

A. Motion for Summary Judgment:

Pending motions for summary judgment are controlled by I.D.A.P.A 37.01.01 - Rules of Procedure of the Idaho Department of Water Resources. The Department's Rules of Procedure do not adopt the standard set forth in Rule 56 of the Idaho Rules of Civil Procedure. See I.D.A.P.A. 37.01.01.052. However, it is anticipated, like those proceedings governed by I.R.C.P. 56, summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See I.R.C.P 56(c).

III ARGUMENT

A. 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 Not Proper Given the Relevant Legal Provisions.

"On or before the date set for the beneficial use of water appropriated under the provisions of this chapter, permit holder shall submit a statement that he has used such water for the beneficial purpose allowed by the permit." I.C. § 42-217. Such proof of beneficial use must be submitted upon the forms furnished by the Department. *Id.* It is the responsibility of the holder of the permit, or its authorized representative, to submit the proof of beneficial use and to provide for the timely submission of the completed field report acceptable to the Director. I.D.A.P.A. 37.03.02.025.02. When the proof of beneficial use, field report, and drawings are filed by the water right examiner on behalf of the permit holder, evidence of authority must be filed with the Department. I.D.A.P.A 37.03.02.025.01.

The Department shall require that the water be put to full beneficial use within a period of five (5) years from the date of approval of the application for permit. I.C. § 42-204. Generally, the Department may grant one (1) extension of time of not more than five (5) years beyond the date originally set for application of the water for beneficial use. *Id.* When the United States, or the Idaho Water Resources Board, is the permit holder the Department may extend the time to submit proof of beneficial use for such additional periods as the Director may deem necessary upon an application showing that the addition of time is required for reasons of status of plans, authorization, construction fund appropriation, construction, or any arraignments which are found to be requisite to completion of the construction of such works. *Id.* An extension of time to submit to proof of beneficial use shall not exceed the maximum time allowed pursuant to Section 42-204 of the Idaho Code. I.C. § 42-218. The Department may not grant an extension at time to submit proof of beneficial use unless the request is filed prior to the date upon which the proof of beneficial use was required to be made under the original terms of the permit. “A permit upon which the proof of beneficial use is 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.” I.C. § 42-218a.

Under the statutory scheme, a permit holder can not submit both proof of application to beneficial use, and request for an extension of time to submit such proof. The instructions regarding the forms furnished by the Department regarding proof of beneficial use, and applications for extensions of time, state as follows:

In no case should a Proof of Beneficial Use form and a Request for Extension of Time form both be submitted. If your water development project is complete, the proof of beneficial use form should be completed and filed. If the project is started, but not finished, then the Request for Extension of Time form should be completed

and returned in compliance with the guidelines above. If the project has not been initiated, and does not fit into any of the exceptions listed above, then neither form should be filed with the department and the permit will lapse and shall become of no further force nor effect.

Form No. I-204 1/08.

In the present matter, permit holder received an initial extension of time which extended the completion of proof of beneficial use deadline to June 1, 1992. (Request for Extension 6-1-87). Pursuant to I.C. § 42-204, the permit holder at the time proof of beneficial use was due could not ask for another extension of time. The permit holder submitted proof of beneficial use initially on or about June 15, 1992. (IDWR/Gustafson ltr 6-15-92). The proof of beneficial use was unacceptable and returned by the Department. *Id.* The Department finally received proof of beneficial use which was acceptable to the Department on November 29, 1993 and issued a reinstatement order on December 1, 1993. (Reinstatement Order). Each proof of beneficial use form submitted by the permit holder included the following: "The above information is my true statement of the extent to which the above numbered permit has been developed and I relinquish my undeveloped portion of the permit to the State of Idaho." The proof of beneficial use regarding Permit No. 37-7842 has never been withdrawn. Accordingly, the Department erred in approving the request for extension of time to submit proof of beneficial use.

Additionally, the request for extension of time submitted on June 1, 2009 describes work that was completed regarding diversion of waters from the Snake River through the Milner-Gooding Canal, but does not address any work completed regarding diversion of water from the Little Wood River through the Dietrich Canal. (Request for Extension 6-1-09). Of note, the request for extension of time is submitted June 1, 2009 lists the same construction and diversion works and the same

expenditure in the amount of \$85,000.00 as listed in the request for extension submitted June 1, 1987. (Request for Extension 6-1-87; Request for Extension 6-1-09). The request for extension submitted on June 1-2009 did not sufficiently set forth the reasons such as status of plans, authorization, construction fund appropriation, construction, or any other arraignment that was found to be requisite for the completion of the works. Accordingly, request for extension failed to meet the requirements set forth in I.C. § 42-204 and the Department erred in approving their request for extension.

B. Upon Denial of Respondents' Request for Extension of Time to Submit Proof for Beneficial Use, the Department Should Proceed with an Examination of the Proof of Beneficial Use Submitted.

The Idaho Code provides in part: "Upon receipt by the Department of Water Resources of all evidence in relation to such final proof, it shall be the duty of the Department to carefully examine the same, and if the Department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the Department shall issue to such user or users a license confirming such use." I.C. § 42-219(1).

In the present matter, for the reasons stated above, the Department's action of September 2, 2010 approving an extension of time to submit proof of beneficial use was not proper. Accordingly, the Department should have entered its order denying the request. Following entry of an order denying the request for extension of time, and proof of beneficial use having previously been accepted, the Department should proceed with the examination process set forth in I.C. § 42-219.

C. The Petition for Hearing and Petition for Declaratory Ruling Was Filed in a Timely Manner.

Petitioners have requested a hearing on the Department's order dated September 2, 2010

granting an extension of time to submit proof of beneficial use under Permit No. 37-07842. The Idaho Code provides that any person aggrieved by the action of the Director shall be entitled to a hearing before the Director to contest the action. I.C. 42-1701A(3). “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.” *Id.* The Department’s Rules of Procedure provides as follows:

Whenever statute, these or other rules, order, or notice requires an act to be done within a certain number of days of a given day, the given day is not included in the count, but the last day of the period so computed is included in the count. If the day the act must be done is Saturday, Sunday, or a legal holiday, that may be done on the first day following that is not Saturday, Sunday, or a legal holiday.

I.D.A.P.A. 37.01.01.056. The Department has established a regional office in Twin Falls, Idaho at which documents may be filed. I.D.A.P.A. 37.01.01.007.02

In the present case, Petitioner’s attorney received a copy of a correspondence from Emalee Rushing to the Idaho Water Resource’s Board via regular mail on September 7, 2010 which included as an enclosure the order approving request for extension of time.¹ (James Aff. ¶ 2). The written notice provided by Ms. Rushing was the first notice received on behalf of Petitioners. (James Aff. ¶ 3). The petition was filed with the Department’s Twin Falls Office on September 22, 2010. (James Aff. ¶ 4). The petition was filed with the Department within fifteen (15) days from the receipt of notice of the Department’s order granting an extension of time to submit proof of beneficial use. Therefore the request for hearing was timely.

The Petition included the request for ruling on applicability of Idaho statutes, administrative

¹ September 6, 2010 was Labor Day. There was no mail delivery on Labor Day. Mail delivery resumed on September 7, 2010.

rules and administrative orders on the subject permit. The Idaho Code provides that any person may petition an agency for declaratory ruling as to the applicability of any statutory provision, or any rule administered by the agency, as well as any order issued by the agency. I.C. § 67-5255; § 67-5232. See also, I.D.A.P.A. 37.01.01.400. The applicable statute and rules do not require that a petition for declaratory ruling be filed within a certain time limit. Accordingly, the request for a ruling on the applicability of Idaho Statutes, Administrative Rules and Administrative Orders contained in the petition is timely.

D. 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.

As noted above, upon acceptance of proof of beneficial use, the Department is required to conduct an examination to determine if the law has been fully complied with. I.C. § 42-219(1). “In the event that the Department shall find that the application is not fully complied with the law and the condition of the permit, any issuance of license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit.” I.C. § 42-219(8). Provisions of law are generally defined as the state or federal constitution, any state or federal statute, or rule, or decision of the court. See I.D.A.P.A. 37.01.01.18. Further, the Idaho Code provides that any person may petition an agency to declaratory rulings as to the applicability of any statutory provision, or any rule administered by the agency, as well as any rule issued by the agency. I.C. §§ 67-5255; 67-5232.

Petitioners have previously set forth above how the Department erred in approving an extension of time to submit proof beneficial use on September 2, 2010. Applying the legal provisions set forth above, the Department should enter its ruling regarding Permit No. 37-07842

that it was error to approve any request for extension of time to submit proof of beneficial use after the proof of beneficial use had been accepted.

An application for a permit to divert water must set forth all facts necessary to show the location, nature and amount of use of water and specifically must set forth the source of the water supply, location of the point of diversion, a description of the ditch, channel, or other diversion work. I.C. § 42-202(1). See also, I.D.A.P.A.37.03.08.03. An application must be accompanied by a plan and a map of the proposed works and showing the proposed place of use. I.C. § 42-202(4). The application in the present matter sought a permit to divert 800 cfs from the Little Wood and Big Wood rivers. (Application for Permit 37-07842). The application denoted the point of diversion as the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 24 Township 4S, Range 19 E, located within Lincoln County. *Id.* The application proposed diverting water through the use of the Dietrich and Richfield canal systems. *Id.* Neither the Little Wood nor Big Wood rivers flow through Section 24, Township 4S, Range 19E, Lincoln County. The Dietrich Canal diverts water from the Little Wood River. The Department should enter its ruling, regarding Permit No. 37-07842, that based upon the application of I.C. § 42-202, the subject application was deficient.

“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.” I.C. § 42-217. The subject application sought a permit to divert water from the Little Wood River through the Dietrich Canal for purposes for recharge Southeast of Richfield. (Application for Permit 37-07842). The proof of beneficial use and beneficial field report accepted by the Department denotes both Permit No. 01-07054 and Permit No. 37-07842 with a total diversion of 300 cfs. (Amended Field Report 37-07842). As set forth above,

the sole source of water was the Snake River and not the Little Wood River. The field report accepted by the Department indicated a diversion point distinct from the application for permit. The total diversion rate was stated at 300 cfs. *Id.* At the time of the submission of the proof of beneficial use, no water had been diverted and put to use under Permit No. 37-07842. Applying the legal provisions set forth above, the Department should enter its ruling regarding Permit No. 37-07842 the water was not put to beneficial use in the prescribed period.

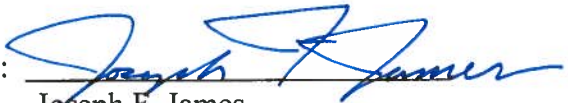
When reinstating a lapsed permit, and in the case when satisfactory proof is received by the Department within sixty (60) days from the lapse of the permit, the Department must advance the priority date of the permit by an amount equal to the difference between the date proof of beneficial use was due, and the date proof of beneficial use was received. I.C. § 42-219(4). The proof of beneficial use must be satisfactory to the Department. *Id.* When reinstating a lapsed permit, and when the case of satisfactory proof is received by the Department after sixty (60) days of the lapse of the permit, the Department may, upon a showing of reasonable cause reinstate the permit. I.C. § 42-218a. In reinstating the permit, in the case when satisfactory proof is received by the Department after sixty (60) days of the lapse, the Department must advance the priority date of the permit to the date of proof of beneficial use was received. *Id.* Applying the legal provisions set forth above, the Department should enter its ruling regarding 37-07842 that the priority date should be advanced to November 29, 1993.

IV CONCLUSION

For the reasons stated herein, Petitioners respectfully requests that the Director enter his order granting summary judgment in favor of the Petitioners.

DATED this 16TH day of September, 2011.

BROWN & JAMES

By: 
Joseph F. James

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2011, I served a true and correct copy of the foregoing document upon the following persons in the manner indicated:

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

X 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

X 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

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

D. Wilkins