

ORIGINAL

LAWRENCE G. WASDEN
Attorney General

CLIVE J. STRONG (ISB No. 2207)
Deputy Attorney General
Chief, Natural Resources Division

SHASTA J. KILMINSTER-HADLEY (ISB No. 7889)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 854-8072

Counsel for Idaho Water Resources Board

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Department of Water Resources
Eastern Region

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

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

The Idaho Water Resources Board, by and through its Counsel of record hereby moves for summary judgment on legal issues pertaining to the Idaho Department of Water Resources' ("IDWR") approval of the Idaho Water Resources Board's ("IWRB") June 1, 2009 Request for Extension of Time to submit proof of beneficial use under Permit No. 37-07842. .

PROCEDURAL BACKGROUND

On June 30, 1980, Earl Hardy filed two applications to divert water for groundwater recharge purposes with IDWR; they were assigned application for Permit Nos. 37-07842 and 01-07054. Both applicant actions and IDWR actions have often referred to both permits, and this has led to some confusion in the backfiles as to the history of Permit No. 37-07842. For that

reason, the following factual narrative refers occasionally to Permit No. 01-07054 as well as Permit No. 37-07842. Two objections to the application were filed, and both were resolved in the following two years. On June 22, 1982, IDWR advised the applicants that the application for Permit No. 37-07842 had been approved. On June 1, 1987, the applicants filed a request for extension of time to submit proof of beneficial use for both permits, both of which were granted and extended the time to submit proof to June 1, 1992.

On June 5, 1992, IDWR issued lapse notices for both Permit no. 37-07842 and 01-07054. The applicant submitted proof of beneficial use under Permit no. 37-07842 on June 12, 1992, which was rejected as incomplete. The applicant then resubmitted proof of beneficial use on July 17, 1992, which was deemed acceptable upon analysis of IDWR staff, though the amount of water shown to be diverted was less than what the permit allowed. An order of reinstatement was issued for Permit no. 37-07842 on July 29, 1992, which advanced the priority date of the permit by 56 days, the number of days that elapsed between the date proof was due and the date that acceptable proof was received by IDWR.

A second Reinstatement Order was issued for Permit Nos. 37-07842 and 01-07054 on December 1, 1993. That Order stated that

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. Because the proof made on July 27, 1992 had been intended for both Permits, and was deemed acceptable by IDWR staff, the Order reinstated 01-07054 with the same adjusted priority date as 37-07842.

In 1999, the IWRB accepted assignment of the two permits, and in 2000, requested an extension of time to in which to submit proof of beneficial use for the undeveloped portions of the permits. The request was granted and the proof due date was set for June 1, 2004. There were no protests or petitions for hearing filed contesting approval of the Request for Extension of Time.

In April 2004, the IWRB filed a second Request for Extension of Time to submit proof of beneficial use for both permits on the basis of lack of funds and continuing efforts to meet federal agency requirements. This request did not specify that it was for “undeveloped portions” of the permits. The request was granted on August 25, 2004 and the new proof due date was set for June 1, 2009. There were no protests or petitions for hearing filed contesting approval of the Request for Extension of Time. Finally, in 2009, the IWRB filed its most recent Request for Extension of Time to submit proof of beneficial use for Permit No. 37-07842, citing drought conditions and lack of sufficient flows as the reason why it had been unable to put the full permitted diversion rate to beneficial use. The Request also stated that the extension of time was in the public interest as evidenced by the inclusion of aquifer recharge from the Wood Rivers system in the Eastern Snake Plain Aquifer Comprehensive Aquifer Management Plan, approved by the Idaho State Legislature in 2009. *Request for Extension*, June 1, 2009. The Request was granted on September 2, 2010, and the new proof due date was set for June 1, 2014. The pending Petition for Hearing and Declaratory Ruling was filed September 21, 2010.

ARGUMENT

1. **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 only question properly before the Department is whether IWRB's Request for Extension of Time in 2009 was properly granted. The review of prior determinations by IDWR as to the adequacy of proof made under this permit, reinstatement of this permit, or prior extensions of time to submit proof of beneficial use are outside the scope of this proceeding.

Idaho Code § 42-204(4) permits the Director of IDWR to extend the time for submitting proof of beneficial use on permits held by the United States or the IWRB

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 discretion to approve extensions of indeterminate length based upon a showing that such extension is necessary for completion of the project.

The Request filed by the IWRB complied with all requirements of Idaho Code § 42-204. The Request was filed on or before the proof due date of June 1, 2009. It concerns a permit held by the IWRB, for which the Director may extend the time, "for such additional period or periods of time as he may deem necessary." Idaho Code § 42-204 (4). 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. In addition, 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 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, on its face, 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.

The matter before the Hearing Officer is whether IDWR properly approved IWRB's Request, yet the Petitioners' have made no argument that the Request was untimely, incomplete or otherwise insufficient to merit approval from IDWR. Rather, the Petitioners argue that IDWR erred in granting the extension based on their belief that the permit should have lapsed many years ago, and that the proof of beneficial use deemed acceptable by IDWR in 1992 was, in fact, unacceptable. This contention has no place in the current proceeding.

Petitioners' argument that the current Request should not have been approved because IDWR erred 18 years ago in reinstating Permit No. 37-07842 is not only belied by the facts, it should be precluded as a matter of law and equity. Idaho Code § 42-1701A(3) and the IDWR Rules of Procedure allow for persons aggrieved by an IDWR action to contest the action and petition for a hearing on the matter, so long as such petition is filed within 15 days of receipt of the order. Petitioners had the opportunity to request a hearing on any of the multiple IDWR actions concerning this permit over the years, yet have chosen not to do so.

The Proof of Beneficial Use for Permit 37-07842 was accepted by IDWR in 1992, and the Reinstatement Order was issued the same year. Petitioners had 15 days after the Reinstatement Order was issued in which to petition for a hearing; they did not. When IDWR issued the second Reinstatement Order concerning this Permit, Petitioners had 15 days in which

to petition to be heard on the matter; they took no action. Petitioners were silent when the IWRB requested and received extensions of time in 2000 and again in 2004. The failure to raise concerns about the adequacy of proof of beneficial use under this water right permit until 17 years after its reinstatement precludes Petitioners' right to make such arguments in this proceeding as a matter of law.

Petitioners should also be barred from challenging the validity of Permit No. 37-07842 as a matter of equity. IDWR approved the proof of beneficial use proffered by IWRB's predecessor in 1992. IWRB should be able to rely on IDWR's Reinstatement Order once the period for requesting a hearing or petitioning for reconsideration of that order has expired. Without that certainty, a water user may never know if the proof submitted under his water right permit is acceptable or not. It would be unnecessary for IDWR to analyze and accept such proof, because the proof could be challenged at any later date. Furthermore, an attempt to validate a decades old proof would be exceedingly difficult in circumstances such as this, in which the water applied to the place of use is water that has been comingled from two distinct sources. In this case, IDWR accepted both the proof of beneficial use and the beneficial use field report and reinstated the right. Petitioners' opportunity to challenge that action was in the 15 days that followed it, not 18 years later in response to a request for extension of time.

The IWRB's Request for Extension of Time was properly approved pursuant to Idaho Code § 42-204. The Petitioners have made no showing that the Request was insufficient, incomplete or untimely such that it should have been denied. Arguments about IDWR actions concerning beneficial use under this right, or prior extensions of time are precluded as a matter of law and equity, and IDWR's action granting the extension should therefore be upheld.

2. The Petition for Hearing and Petition for Declaratory Ruling (received September 22, 2010), was untimely pursuant to Idaho Law and the Department's Rules of

Procedure (IDAPA 37.01.01). Additionally, the subject matter of the petition was beyond the scope of review authorized under Idaho law and the Department's Rules of Procedure and the remedies 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 with 15 days of receipt of the action or order. This statute is incorporated in IDWR's Rules of Procedure.

As discussed above, the 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 now.

IDWR has addressed this issue before, most recently in its June 8, 2010 *Order Denying SWC Request for Hearing Regarding Order Approving Mitigation Plan*. In that proceeding, the Surface Water Coalition ("SWC") filed a petition requesting hearing on an order approving a mitigation plan, pursuant to Idaho Code § 42-1701A(3). In denying the petition, the Director of IDWR stated in his order that:

[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). With the pending Petition, Petitioners seek to be heard on past IDWR actions that they failed to contest in a timely manner. To the extent that there was any opportunity for the Petitioners to be heard on those actions at the time, therefore, the provisions of Idaho Code § 42-1701A(3) are unavailable.

Viewed any other way, Idaho Code § 42-1701A(3) would provide an infinite opportunity for persons not previously parties to the permitting of a water right to challenge any determinations, actions or orders concerning the subject water right. A simple transfer proceeding could therefore open the door for challenges to any IDWR action taken in the course of processing a water right—no matter how distant in time the challenged action occurred. This would set IDWR's permitting system on its head and remove any certainty for Idaho water users. The Petitioners' opportunity for hearing pursuant to Idaho Code § 42-1701A(3) 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.

Finally, IDWR's approval of IWRB's Request for Extension of Time was issued on September 2, 2010. Petitioners filed their Petition for Hearing and Petition for Declaratory Ruling in this matter on September 21, 2010, 18 days after the Request was approved. As such, the Petition is untimely under Idaho law or the agency's Rules.

CONCLUSION

The Petitioners filed their petition for hearing and declaratory ruling in response to the approval of IWRB's Request for Extension of Time. The Petition is untimely pursuant to Idaho law and further, addresses matters well outside the scope of the current proceeding. Furthermore, Petitioners have made no showing that IDWR erred in approving the Request, challenging instead the validity of the permit and past IDWR actions that they are barred by law and equity from challenging at this late date. The Idaho Water Resources Board therefore requests that the Petition be either dismissed on procedural bases or denied as a matter of law.

DATED this 16th of September, 2011.

LAWRENCE WASDEN
Attorney General

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division



SHASTA KILMINSTER-HADLEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2011, I caused a true and correct copy of the foregoing **IDAHO WATER RESOURCES BOARD'S MOTION FOR SUMMARY JUDGMENT** to be filed with the Court and served on the following parties by the indicated methods:

Original:

IDWR - Eastern Region
James Cefalo
Water Resources Program Manager
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-1718

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☒ Facsimile:

Copy:

Joseph F. James
Brown & James
130 Fourth Avenue West
Gooding, ID 83330

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile: 208-934-4101


SHASTA KILMINSTER-HADLEY