

**HOFSTETTER LAW OFFICE, LLC**

608 West Franklin Street

Boise, Idaho 83702

Phone: (208) 424-7800

Fax: (208) 424-8774

E-Mail: Dana@IdahoWaterLaw.com

**FAX COVER SHEET**

**DATE:** May 6, 2004

**TO:** Shelley Keen

**FAX:** 327-7866

**CC:** Susan Hamlin

327-5400

**FROM:** Dana Hofstetter

**RE:** Water Right No. 65-7461

*The information contained in this facsimile may be confidential information or attorney work product or both and is for the exclusive use of the intended recipient listed above. Any reading, disclosure, use or reproduction of this communication other than by the intended recipient is prohibited. If you have received this communication in error, please notify us by collect telephone call immediately and return the communication to us by U S. Mail.*

NUMBER OF PAGES BEING TRANSMITTED (INCLUDING THIS PAGE) = 6

IF ALL PAGES ARE NOT RECEIVED, PLEASE CALL (208) 424-7800.

ORIGINAL BY MAIL: YES X NO

## HOFSTETTER LAW OFFICE

---

608 West Franklin Street  
Boise, Idaho 83702

Dana@IdahoWaterLaw.com

Dana L. Hofstetter  
Attorney at Law

Telephone: (208) 424-7800  
Facsimile: (208) 424-8774

May 6, 2004

*Via Facsimile and U.S. Mail*

Shelley Keen  
Idaho Department of Water Resources  
P.O. Box 83720  
Boise, Idaho 83720-0098

Re: Amendment to License No. 65-07461

Dear Mr. Keen:

Enclosed is the signed Application for Amendment for Water Right No. 65-07461. As you will note, the Application is based on the draft that you previously provided with only revisions to the quantity figures. The revised quantities are based on Associated Earth Sciences, Inc.'s (Harley Noe) Hubble analysis report dated October 1, 2003 which was undertaken with the guidance of the Idaho Department of Water Resources ("IDWR"). Harley Noe, Scott King and Ron Howerton conducted a field examination and, based on this field examination, determined the appropriate variables for the Hubble analysis that is reflected in the October 1, 2003 report. Accordingly, the enclosed Application for Amendment is based on IDWR standards and the particular factual circumstances involved in this case. A copy of the October 1, 2003 report should be in the water right file. Please let me know if you need an additional copy of this report.

Shelley Keen

May 6, 2004

Page 2

The Hubble report identified the total quantity of 8.57 cubic feet per second ("cfs") for 152 acres under Water Right No. 65-07461. This figure was composed of a 6.63 cfs field headgate requirement and 1.94 cfs for conveyance losses. Due to a clerical error in the *Payette Adjudication*, Water Right No. 65-11261 was decreed in that adjudication for only 0.13 cfs for ten acres. However, the October 1, 2003 Hubble report identifies a total quantity of 0.80 cfs as being necessary for those ten acres. Since those ten acres also are covered under the Application for Amendment that you prepared, the difference between 0.8 and the 0.13 cfs decreed (or 0.67 cfs) has been added to the 8.57 cfs identified in the Hubble report for the other 142 acres under 65-07461. Thus, the revised quantity of 9.24 cfs on the Application for Amendment is based on 8.57 cfs plus 0.67 cfs. The revised total diversion volume was determined by a proportional increase to the standard 4.5 acre feet per acre. Since the total quantity of 9.24 cfs represents approximately 3 miner's inches per acre, the 4.5 acre feet quantity times three was used to derive the total diversion volume of 2079 acre feet for 152 acres. Please let Harley, Terry Scanlan or me know if you have any questions about these calculations or the Hubble analysis.

A question has arisen as to the authority for amending the License in this instance. IDWR's *Magic West* decision which also involved a license amendment, was very similar to the current situation. As documented by the Hubble report, the quantity required for surface irrigation of the acreage under 65-07461 is in excess of the amount licensed. In fact, it appears that the quantity actually necessary is even greater than the amount in the Hubble report because IDWR allowed no more than 12 hour set times for the Hubble analysis, although some of the fields are actually set up for 24 hour sets. At the time the License was issued in 2000, IDWR had adopted the revised Hubble analysis for surface irrigated lands and regularly was applying this standard in the *Snake River Basin Adjudication* ("SRBA"). However, the Hubble standard was not applied in the licensing process although the duty of water issue had not been resolved in the *Payette Adjudication* and remained pending in the SRBA for the bulk of the Birding Island Ranch property. Further, the Hubble quantity of 9.24 cfs is less than the quantity that was in the original Application for Permit and in the published Notice of the Application for Permit and, therefore, could have been licensed without the need for further publication.

Additionally, there appears to have been an error in the diversion volume authorized under the License, as this figure appears to account only for a 1 miner's inch

Shelley Keen

May 6, 2004

Page 3

per acre duty of water on the field, plus the additional quantity necessary for conveyance loss. Thus, the licensed volume does not appear to take into account the 1-1/2 miner's inch per acre field headgate quantity authorized under the License. Although the licensed diversion rate authorizes a 1-1/2 miner's inch per acre on the field, the License's diversion volume limitation would proscribe this. This consideration also provides a sufficient and justifiable basis for License amendment consistent with IDWR policies.

Thank you for your attention to this matter. If you have any questions or need additional information, please contact me, Terry Scanlan or Harley Noe.

Sincerely,

HOFSTETTER LAW OFFICE, LLC



Dana L. Hofstetter

Enclosure

cc: Susan Hamlin with enclosure  
Scott King with enclosure  
Jan Shurtle with enclosure  
Harley Noe with enclosure  
George Colwell with enclosure

D:4001.1/5837

05/05/2004 07:58 12082785294

COLWELL RANCHES

PAGE 01

Sent By: HOFSTETTER LAW OFFICE;

208 424 8774,

May-3-04 5:43PM;

Page 7/10

State of Idaho  
Department of Water Resources  
**APPLICATION FOR AMENDMENT**

(For Licensing Purposes)

WATER RIGHT NO. 05-07461

Date of Priority: April 08, 1975

Maximum Diversion Rate:

Maximum Diversion Volume:

9.24  
5.0 CFS  
9.0 AF  
2079

Comes now GEORGE E COLWELL  
PO BOX 251  
NORTH POWDER OR 97867-0251

And

CHERYL F COLWELL  
3888 HWY 52

PAYETTE ID 03861 and represents to the Director of the Idaho Department

of Water Resources that he is the owner and holder of Permit to appropriate the Public Waters of the State of Idaho No. 05-07461, and requests that the permit be changed as follows:

Source: PAYETTE RIVER

Tributary: SNAKE RIVER

**BENEFICIAL USE**

IRRIGATION

**PERIOD OF USE**

03/01 to 11/15

**RATE OF DIVERSION**

5.0 CFS

**ANNUAL VOLUME**

9.0 AF

**LOCATION OF POINT OF DIVERSION:**

PAYETTE RIVER SWY/SE1/4 Sec. 35 Twp 08N Rge 04W B.M. PAYETTE County

**PLACE OF USE: IRRIGATION**

| Twp Rge Sec | NE  |     |     |     | NW  |      |      |      | SW |    |     |    | SE  |    |      |      | Totals |
|-------------|-----|-----|-----|-----|-----|------|------|------|----|----|-----|----|-----|----|------|------|--------|
|             | NE  | NW  | SW  | SE  | NE  | NW   | SW   | SE   | NE | NW | SW  | SE | NE  | NW | SW   | SE   |        |
| 08N 04W 17  |     |     |     |     |     |      |      |      |    |    | 5.0 |    |     |    | 5.0  |      | 11.0   |
| 08N 04W 18  | 3.0 |     |     |     |     |      |      |      |    |    |     |    |     |    | 3.0  |      | 3.0    |
|             | L1  |     |     |     |     |      |      |      |    |    |     |    |     |    |      |      |        |
| 08N 04W 20  | 8.0 | 3.0 |     | 2.0 | 4.0 | 30.0 | 14.0 | 7.0  |    |    |     |    |     |    |      |      | 74.0   |
|             | L7  | L7  |     | L1  |     | L8   | L6   | L6   |    |    |     |    |     |    |      |      |        |
| 08N 04W 21  |     |     | 1.0 |     |     | 6.0  |      | 12.0 |    |    |     |    | 1.0 |    | 17.0 | 17.0 | 54.0   |
|             |     |     | L2  |     |     | L4   |      | L5   |    |    |     |    | L1  |    | L8   |      |        |
| 08N 04W 27  |     |     |     |     | 1.0 |      |      | 9.0  |    |    |     |    |     |    |      |      | 10.0   |

Total Acres: 152

Permit holder asserts that no one will be injured by such change and that such change will be made at permit holder's own risk. Signed this 30 day of MAY 2004

*George E. Colwell*  
(Signature)

Page 2

State of Idaho  
Department of Water Resources  
**APPLICATION FOR AMENDMENT**

(For Licensing Purposes)

WATER RIGHT NO. 65-07461

## FOR DEPARTMENT USE ONLY

Preliminary check by \_\_\_\_\_ Fee = \_\_\_\_\_ Received by \_\_\_\_\_ # \_\_\_\_\_ Date \_\_\_\_\_

## ACTION OF THE DEPARTMENT OF WATER RESOURCES

I, Karl J. Dreher, of the Department of Water Resources hereby approve the  
above Application for Amendment for Permit No. 65-07461 with the following:

## CONDITIONS OF APPROVAL

1. Upon specific notification by the Department, the right holder shall install a lockable device of a type acceptable to the Department in a manner that will provide the watermaster suitable control of the diversion.
2. Rights 65-03617, 65-05921, 65-08627, 65-11255 & 65-11261 are also diverted through the point of diversion described above.
3. The portion of Right 65-07461 used for conveyance losses is ~~1.34~~ <sup>1.99</sup> cfs 9.24
4. Rights 65-11211 & 65-07461 when combined shall not exceed a total diversion rate of ~~5.00~~ <sup>20.79</sup> cfs, a total annual maximum diversion volume of ~~86,400~~ af at the field headgate, and the irrigation of 152 acres.

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_ 2004.

\_\_\_\_\_  
KARL J. DREHER  
Director