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AUG 31 2009

DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case 39576

A. Subcase 63-31418

(Insert water right number)

STANDARD FORM 1
OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Basin and Range Resource Company, LLC

Address: 3480 GS Richards Boulevard, Suite 101

Carson City, Nevada 89703

Daytime Phone: (775) 885-5000

Name & Address of Attorney, if any:

Dana L. Hofstetter

Hofstetter Law Office, LLC

608 West Franklin Street

Boise, Idaho 83702

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: Basin and Range Resource Company, LLC

Address: 3480 GS Richards Boulevard, Suite 101

Carson City, Nevada 89703

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)):

1. ☐ **Name and Address**
Should be: _____
2. ☐ **Source**
Should be: _____
3. ☒ **Quantity**
Should be: See Amended License No. 63-7354. Remark should not refer to "lands above."
4. ☐ **Priority Date**
Should be: _____
5. ☐ **Point of Diversion**
Should be: _____
6. ☐ **Instream Flow Beginning and Ending Point**
Should be: _____
7. ☐ **Purpose(s) of Use**
Should be: _____
8. ☐ **Period of Year**
Should be: _____
9. ☒ **Place of Use**
Should be: 120 acres, including any accomplished transfer acres in the vicinity as described the the Affidavit of Steve Hannula filed in this Subcase.

11. I object because:

- ☐ This water right should not exist.
- ☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION(S): See Amended License No. 63-7354 and associated November 5, 2008, Preliminary Order Correcting License. (Copies attached hereto.)

F.

VERIFICATION (Must be Completed)

State of Idaho)
) ss.
County of Ada)

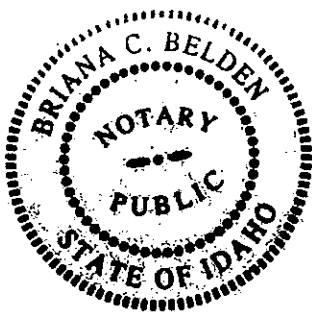
Dana L. Hofstetter, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

Signature of person filing objection

Dana Hofstetter
Attorney signing in representative capacity

Subscribed and sworn to before me on: August 28, 2009



Briana C. Belden
Notary Public for the State of Idaho
Residing at: Meridian
My Commission expires: 01/16/13

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. **FAX filings will not be accepted.** You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on August 28, 2009, I filed the original with the SRBA Court and mailed copies of this Objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court (*via Hand Delivery*)
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

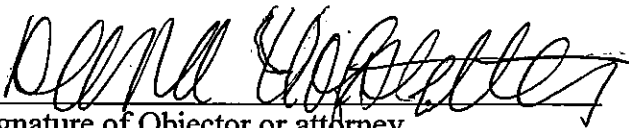
Name: Basin and Range Resource Company, LLC
Address: 3480 GS Richards Boulevard, Suite 101
Carson City, Nevada 89703

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

Chief, Natural Resources Division
Office of the Attorney General
PO Box 44449
Boise, ID 83711-4449

United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, MCS 033
Boise, ID 83724



Signature of Objector or attorney
mailing on Objector's behalf

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF WATER RIGHT)
LICENSE NO. 63-7354)
_____)

**PRELIMINARY ORDER
CORRECTING LICENSE**

This matter having come before the Department of Water Resources (Department) as a result of the filing of a petition to correct a water right license, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On December 27, 1991, the Department issued Water Right License 63-7354 (license) to Joseph W. Roberts (right holder) for the diversion of 2.26 cfs from ground water for the irrigation of 113 acres in Section 34, Township 6 North, Range 4 West, B.M.
2. The license was based on Permit 63-7354, which was issued by the Department on September 23, 1970, and reinstated on February 14, 1990. Permit 63-7354 authorized the establishment of a water right for up to 4.80 cfs from ground water for the irrigation of up to 240 acres.
3. The licensed elements of Water Right 63-7354 were based on a Beneficial Use Field Report prepared by a Department field examiner in 1990.
4. The capacity of the right holder's diversion and distribution system, as reported on the license, was 2.30 cfs. The license was limited to 2.26 cfs in accordance with Idaho Code § 42-202(6), which limits irrigation water rights to 1.0 cfs per 50 acres of land, which equates to 0.02 cfs per acre, unless it is demonstrated to the Department that more is necessary for proper irrigation. The license was also limited to a total annual diversion volume of 508.5 acre-feet, or 4.5 acre-feet per acre, pursuant to standard irrigation requirements recognized by the Department.
5. The Snake River Basin Adjudication (SRBA) is a lawsuit commenced in 1987 for the purpose of confirming the elements of water rights in existence at that time in the Snake River Basin geographic area of Idaho. Right 63-7354 was claimed in the SRBA, and the Department has recommended that the SRBA court decree Water Right 63-7354 in the name of Basin and Range Resource Company, LLC.

6. On August 20, 2008, Basin and Range Resource Company, LLC, through its attorney Dana L. Hofstetter of Boise, submitted the following items to the Department:

- A. A petition to correct License 63-7354 (petition) to show a place of use of 123.8 acres and "associated water right quantities."
- B. A Motion for Summary Decision and Memorandum in Support (motion) in the Matter of License No. 63-7354.
- C. An affidavit from consulting engineer Steve Hannula (affidavit) explaining the basis for the petition and the motion.

For brevity, the petition, motion, and affidavit collectively are called "the filings" in the rest of this document.

7. The filings assert that the license should be corrected because, "it appears that the license examiner completely overlooked an 8.3 acre irrigated field identified on the license examination plat and mistakenly calculated the size of other fields."

8. The Department's current practice when defining places of use for irrigation water rights is to round to the nearest two significant digits. An area of fewer than ten acres would be rounded to the nearest tenth of an acre; an area of ten acres or more would be rounded to the nearest whole acre.

9. The licensed place of use included 18 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 34, Township 6 North, Range 4 West, B.M.

10. The field examiner's map depicts approximately 25 acres, rounded to the nearest whole acre, irrigated in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 34, Township 6 North, Range 4 West, B.M.

11. The field examiner did not have a computer-based Geographic Information System (GIS) available for interpretation of the aerial photography used to confirm the number of acres irrigated in accordance with Permit 63-7354.

12. The discrepancy between the irrigated area outlined on the field examiner's map in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 34, Township 6 North, Range 4 West, B.M., and the number of acres licensed for that 40-acre tract is seven acres, rounded to the nearest whole acre, not eight acres.

13. The place of use changes sought by the petitioner in the remaining 40-acre tracts listed in the place of use on the license would result in increases of less than an acre in every tract except the NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 34, Township 6 North, Range 4 West, B.M., where an increase of 1.3 acres from 14.5 acres to 15.8 acres is sought.

14. The filings also assert that the licensed diversion rate and volume should be increased to match the requested increase in irrigated acreage. The field examiner estimated the capacity of the diversion and distribution system used by the right holder for irrigation purposes at 2.3 cfs if the pumping lift is 190 feet and 2.60 cfs if the pumping lift is 160 feet. The affidavit from consulting engineer Steve Hannula includes an attached pump installation report showing that the pump was set at 160 feet.

15. Section 42-219, *Idaho Code*, includes the following directive to the Department:

Upon receipt by the department of water resources of all the 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.

ANALYSIS

The 1987 NAPP aerial photography shows that by the time the Department's field examiner prepared his report confirming beneficial use, the right holder irrigated 25 acres of land in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 34, Township 6 North, Range 4 West, B.M., including the eight-acre field identified in the filings. The omission of a whole field is clearly an error akin to a clerical error, and it should be corrected.

The other place of use adjustments described and requested in the filings are variations caused by the application of different technologies and methods for interpreting aerial photography to quantify irrigated acres. The Department does not require an expensive survey to determine the number of acres irrigated in connection with a permit to appropriate water. Instead, the Department interprets aerial photography to determine the number of acres irrigated.

When the field examiner verified the place of use for Permit 63-7354, he did not have a computer-based Geographic Information System (GIS) available to assist with the interpretation of aerial photography. Consequently, his method for determining the number of irrigated acres in each 40-acre tract was different than modern methods. It does not follow that the field examiner's interpretations were wrong. Except for the omitted field, the field examiner's place of use determination is consistent with interpretation methods employed at the time the field report was prepared. Other than the omitted field, the Department's place of use determination for the license was not in error.

CONCLUSIONS OF LAW

1. The Motion for Summary Decision and Memorandum in Support submitted among the filings serves the same purpose as the Petition to Correct License and will be treated as an addendum to the petition.

2. Under Section 42-219, *Idaho Code*, the Department has a statutory obligation to issue a water right license that accurately portrays the extent of beneficial use of water developed in accordance with the permit.

3. Water Right License 63-7354 omitted the irrigation of seven acres established by the right holder in connection with the permit.

4. The Department should correct the place of use description on the license to authorize the irrigation of 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 34, Township 6 North, Range 4 West, B.M., for a total authorized place of use of 120 acres.

5. The capacity of the diversion and distribution developed in accordance with Permit 63-7354 was 2.6 cfs.

6. The Department should correct the licensed diversion rate for irrigation purposes to 2.40 cfs, or 0.02 cfs per acre.

7. The Department should correct the licensed annual diversion volume to 540.0 AF, or 4.5 AF per acre.

8. The Department did not err in its determination of the irrigated acreage in the other 40-acre tracts comprising the licensed place of use.

9. Ownership of the right is being determined in the SRBA process and should not be changed on the license at this time.

ORDER

IT IS HEREBY ORDERED that the place of use for Water Right License 63-7354 is **CORRECTED** to show 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 34, Township 6 North, Range 4 West, B.M., for a total authorized place of use of 120 acres.

IT IS FURTHER HEREBY ORDERED that the diversion capacity for Water Right License 63-7354 is 2.60 cfs, the maximum diversion rate is 2.40 cfs, and the maximum diversion volume is 540.0 AF.

IT IS FURTHER HEREBY ORDERED that the Department shall issue an Amended Water Right License on this date in conjunction with this order.

IT IS FURTHER HEREBY ORDERED that this order corrects the license to what it should have been when it was issued in 1991. In the ongoing SRBA, issuance of this order and the amended license should not preclude the opportunity to review the right with respect to events in the years since 1991 and to determine the elements of the right accordingly.

Dated this 5th day of November, 2008.



GARY SLACKMAN

Administrator, Water Management Division

State of Idaho
Department of Water Resources

Amended

Water Right License

Amended

WATER RIGHT NO. 63-07354

Priority: March 28, 1974

Maximum Diversion Rate: 2.40 CFS
Maximum Diversion Volume: 540.0 AF

It is hereby certified that JOSEPH W ROBERTS
2724 S GOSHEN WAY
BOISE ID 83709-8506 has complied with the terms and
conditions of the permit, issued pursuant to Application for Permit dated July 29, 1970; and has
submitted Proof of Beneficial Use on July 7, 1980. An examination indicates that the works have a
diversion capacity of 2.60 cfs of water from:

SOURCE

GROUND WATER

and a water right has been established as follows:

BENEFICIAL USE

IRRIGATION

PERIOD OF USE

03/15 to 11/15

DIVERSION RATE

2.40 CFS

**ANNUAL
DIVERSION VOLUME**

540.0 AF

LOCATION OF POINT(S) OF DIVERSION:GROUND WATER SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec 34, Twp 06N, Rge 04W, B.M. PAYETTE County**PLACE OF USE:** IRRIGATION

Twp Rge Sec	NE				NW				SW				SE				Totals
06N 04W 34	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
	3.0	24.0			14.5			12.5					25.0	23.0		18.0	120.0

Total Acres: 120

CONDITIONS OF APPROVAL

1. The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can actually be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.
2. This water right is appurtenant to the described place of use.
3. This right is subject to all prior water rights and may be forfeited by five years of non-use.
4. Modifications to or variance from this license must be made with the limits of Section 42-222, Idaho Code, or the applicable Idaho law.

State of Idaho
Department of Water Resources

Amended

Water Right License

Amended

WATER RIGHT NO. 63-07354

CONDITIONS OF APPROVAL CONTINUED

5. This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 4.5 afa per acre for irrigation of the lands above.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code.

Signed and sealed this 5th day of November, 2008.


DAVID R. TUTHILL, JR.
Director

