



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

December 30, 2009

LIGHTFORCE USA INC

Represented by:
Scott L. Rose
300 W Main, STE 153
Boise, ID 83702

Re: Subcase Nos. 78-10286, 78-10287, 78-12327, 78-12328, 78-12341, 78-12329
Lightforce USA Inc.

Dear Scott,

In anticipation of a settlement conference with you and your water expert, I recently sat down with Carter Fritschle and Andrea Courtney to review your amended/late claims and subsequent objections. Basically, we compared what Lightforce asked for against what it received and then analyzed its subsequent objections. In doing so, it became apparent that there may be some basic misunderstandings concerning the process by which IDWR reviews the claims and determines the subsequent recommendations (aka director reports). I have done my best to sum up the discrepancies in this letter in the hope that you will share this information with your water expert before we sit down to discuss the issues on the table at a settlement conference. I believe that by doing so many of the issues will go away, and we can then take some time to regroup and look at the portions of Lightforce's objections that have merit which could possibly result in IDWR revising the recommendation(s).

The SRBA Court gives prima facie weight to IDWR's recommendations. Therefore it is the objector's burden to overcome the presumption. To do this, the objector needs to provide evidence. This evidence may be presented through a variety of different ways such as posted notices, affidavits, chains of ownership, etc. As we have discussed previously, IDWR will review any evidence your client would ask the Court to consider. Indeed, IDWR can consider documentation in support of a claim/objection that would often garner evidentiary objections at trial (i.e., affidavit with hearsay). Cooperating with IDWR ahead of trial can save claimants time and money because settlements with IDWR are often reached.

The water right recommendations in question are as follows:

- 78-10286
- 78-10287
- 78-12327 – Springs 1, 2, 4, and 9
- 78-12328
- 78-12341
- 78-12329

I will attempt to address each water right separately; however, due to the way some of the rights were claimed and objected to there may be some overlap.

1. 78-10286:

- a. Place of Use (“POU”) – Lightforce claimed a POU of T23N R01E S16 with 2 acres each in the SENW, NWSE, NESE, and SWNE quarter-quarters (“QQs”). The Department recommended the same. However, the objection now asserts the right should be T23N R01E S16, SENW, NWSW, NESE, and SWNE.

In general, the Department can recommend only as much as what is claimed. However, if there is no submitted proof to back up what is claimed, then the Department must rely on what evidence is otherwise available. Despite exchanging maps with the Department and having the benefit of a site visit, there is no evidentiary support for Lightforce’s objection as to the NWSW. It even appears from aerial photography that the POU description in the objection would put the POU on the opposite side of the highway of Lightforce’s property. It is fairly unusual for a claimant to object to receiving something that it requested and claimed. The Department’s position is that Lightforce’s objection to POU in this subcase is in error.

- b. Purpose of Use – Lightforce claimed domestic and stock. The Department recommended stock. The objection suggests that a domestic purpose be included because there is more than one house. Tax records indicate the house was built in 1982, and there is no evidence of a prior house on the POU. Since the house was not built until 1982, a domestic purpose of use associated with the house must bear a priority date of 1982 or later, which would require an application for permit to legally appropriate the water. After discussions with you and the site visit, the Department acknowledged Lightforce’s situation. To provide a water right for the house, subcase 78-12327 is an enlargement of the existing stockwater right with a domestic purpose of use. If you review the recommendation for subcase 78-12327, you will note that the house has been included in that recommendation. Furthermore, typically elements of a water right should only be claimed once and then are subsequently recommended once. If the house is claimed and recommended under one water right, it will not be considered in an additional water right.
- c. Priority Date – Lightforce claimed a priority date of 11-03-1905. The documentation Lightforce provided in support of its claims justifies a priority date of 11-28-1925. In order for the Department to reconsider the priority date provided on the

recommendation, Lightforce must provide additional evidence of priority (“EOP”). A 1925 deed does not prove a 1905 beneficial use. As stated above, the Department considers evidence from a wide variety of sources. If Lightforce plans to pursue the earlier priority date, it must produce appropriate evidence showing that beneficial use began on the date asserted and that the use has been continuous. If you have questions as to what would be acceptable evidence, contact Carter and he can provide suggestions as to specific items that he would consider before changing the priority date on this recommendation.

2. 78-10287:

- a. Priority Date – Lightforce claimed 01-17-1912. IDWR recommended 01-18-1922. The objection asserts that the priority date should be 01-17-1912. However, like subcase 78-10286, EOP is required to substantiate the claim. The evidence provided thus far shows an application for homestead in 1917 which was approved in 1922 with proof filed in 1927 and later deeded in 1930. Because of the extent of the claim, IDWR cannot revise the priority date without the proper documentation showing that water usage has continued back to the time in which it is being claimed. IDWR can and will recognize the approval date of the homestead application in 1922, but the documentation preceding that date, i.e., the application of homestead, does not provide showing of beneficial use.
- b. Source – Lightforce claimed Springs, Tributary to the Salmon River. IDWR recommended the same. The objection, however, asserts that two additional springs (springs 4 and 5) should be added. I direct you to the Points of Diversion (“POD”) section of the recommendation where springs 4 and 5 were recommended properly as PODs. The Department believes Lightforce’s objection as to source is in error.

3. 78-12327: As discussed above, this water right is an enlargement, designed to cover domestic purposes of the house from spring 1.

Strangely, Lightforce filed four separate late claims filed under the same water right number. Each late claim sought water from a different spring. The Department had suggested that new water right numbers be assigned for each spring but Lightforce rejected that suggestion. As a result, the Department worked with the four separate late claims, issued one recommendation to which Lightforce filed one objection. To add to the confusion, the late claims mention springs 1, 2, 4, and 9. The POU description for springs 1 and 2 in the objection match up with the POU description for springs 1 and 2 on the late claim. However, the objection to the POU description for spring 3 on the late claim does not match up with the POU description for springs 4 or 9. Again, it is unusual for a claimant to object to a recommendation for what was claimed. The recommendations for subcase 78-10286 and 78-10287 cover stockwater use from springs 2, 3 and 4. Lightforce should review its objections and determine which springs should be included if the uses are not already covered in another right and provide the correct POU descriptions. To the extent Lightforce seeks a right from spring 9 (perhaps an instream flow right from Grouse Creek), its claim is deficient.

4. 78-12328:

- a. Purpose of Use – Lightforce seeks a domestic right purpose of use in addition to the stockwater purpose for this right. There is no diversion works at the site, however, and no clear evidence of domestic use at the POU, suggesting strongly at least partial forfeiture of any domestic portion of the right.
- b. POD – This right is an instream flow right. Lightforce's objection to the POD misunderstands how instream flow rights are recommended and partially decreed. Additionally, the objection suggests points of diversion in two QQs not originally claimed and in one QQ that Lightforce does not appear to own.

5. 78-12341:

- a. Point of Diversion – Lightforce again received a recommendation for what was claimed. It is the Department's policy to narrow the POD and POU for springs down to a 10 acre tract unless the spring is right in the middle of the QQ.
- b. Source – The Department recommended the source as Springs tributary to Little Salmon River. Lightforce's objection seeks perhaps a legal description instead of a name. The Department uses the source names as shown on the USGS topographic map, if they are indeed named. The Department suggests Lightforce withdraw the source objection.
- c. Purpose of Use – See above (subcase 78-10286, -12327 and -12328) for explanation as to the Department's position about a domestic purpose of use.

6. 78-12329:

- a. The BLM objection has, in principle, been resolved. Lightforce admits that the POU described in the claim includes federal land and that the POU descriptions including the BLM land should be removed. The Parties discussed filing a stipulation; however, BLM has decided to wait for an SF5 to be distributed with the finalized water right before signing off on its objection.
- b. Priority Date – Lightforce claimed a priority date of 01-24-1917. The Department recommended 11-28-1925. Lightforce objected asserting three separate priority dates (all predating the claimed priority date) should be granted for three different locations. Lightforce's objection is unclear. The Department cannot reconsider the priority date without proper EOP, nor can it recommend a priority date better than that originally claimed.
- c. POD and Purpose of Use – Lightforce objected seeking one QQ and an additional purpose not originally claimed.

The issues outlined above are issues the Department believes can be easily remedied. It also includes information you can provide on your client's behalf to better assist the Department in fully understanding the basis of Lightforce's claims.

At the last status conference, both the Court and the Department strongly suggested you hire a water expert sometime before the scheduled trial. Ideally, we would like to meet with you and the water expert to talk through the issues outlined above well in advance of trial to facilitate settlement. As I explained to you on the phone and via e-mail when requesting available dates, this water expert should be someone that understands the process by which the claims are reviewed and how the final recommendations are determined. To clarify further, a water expert may be one of your expert witnesses but an expert witness is not necessarily a water expert. Also, please keep in mind that the calendars of Department staff are filling up quickly and so providing those available dates for yourself and your water expert sooner will allow Department staff to consider any additional information you may provide in plenty of time to hopefully have the trial in this matter vacated.

Should you have any questions please feel free to contact me at (208)287-4814.

Sincerely,


Renea Ridgeway
Paralegal