

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION )	
FOR PERMIT NO. 75-14951 IN THE )	
NAME OF CHRISTOPHER H. AND )	<b>PRELIMINARY ORDER DENYING</b>
<u>AMY J. STENLUND</u> )	<b>APPLICATION FOR PERMIT</b>

This matter having come before the Idaho Department of Water Resources (“Department”) as an application for permit to appropriate the public waters of the state of Idaho, the Department finds, concludes and orders:

**FINDINGS OF FACT**

1. On June 28, 2019, Christopher H. Stenlund and Amy J. Stenlund (“Stenlunds”) filed Application for Permit No. 75-14951 (“Application”) with the Department, seeking a permit to divert 0.04 cubic feet per second (cfs) of water from Little Fourth of July Creek (“LFJC”) for domestic purposes within the SE¼NE¼ of Section 25, Township 24N, Range 21E, B.M. Lemhi County. The Application proposes a year-round season of use.
2. The Department published notice of the Application in the Recorder Herald on August 1 and 8, 2019. The deadline to submit a protest against the application was August 19, 2019.
3. On August 30, 2019, the Department received a protest notice (“Notice”) from Cindy and Robert Hallen (“Hallens”). The Department rejected the Notice, because it was not filed timely. On August 30, 2019, the Department also received an email from the Hallens expressing their concerns about the sufficiency of the water supply in LFJC, the risk of injury to their senior downstream water rights, and overall objection to any new diversions on LFJC.
4. On September 6, 2019, the Department received an affidavit from Nicole Schuler and Daniel Schuler (“Schulers”)(“Schulers’ Affidavit”) and an affidavit from Arne Vetrhus (“Vetrhus”)(“Vetrhus’ Affidavit”), expressing concerns that there is not enough water in LFJC to support existing or new water rights.
5. Schulers’ Affidavit states: “We believe the creek’s volume of water flow does not support any new water user...There is not enough water in the creek to support the new Water Right #75-14951.” *Schulers’ Affidavit* at 1.
6. Schulers’ Affidavit states the Schulers were updating their inefficient irrigation system *Id.* at 1. As a result, the Schulers were not diverting any water from LFJC at the time they wrote their affidavit (September 6, 2019). *Id.* at 1. The Schulers’ planned to finish the updates to their irrigation distribution system by April of 2020 and resume their beneficial use of water from LFJC. *Id.* at 1.

7. Vetrhus' Affidavit states: "This season (2019), like past seasons I am not using my water rights...for conservation reasons, as there is not enough water volume in the creek to support the amounts current water rights, much less any new water user." *Vetrhus' Affidavit* at 1.
8. According to current Department records, the following six water rights authorize diversion from LFJC:

Water Right	Priority	Rate	Water Use	Current Owner
75-2003	5/20/1913	0.110	IRRIGATION, REC STORAGE, STOCKWATER	HALLEN, ROBERT R
75-4011	5/22/1913	1.080	IRRIGATION	JESKE, KENNETH; VETRUS, ARNE; VETRUS, PATRICIA; VETRUS, STEVEN
75-7027	6/5/1972	1.380	IRRIGATION	JESKE, KENNETH; VETRUS, ARNE; VETRUS, PATRICIA; VETRUS, STEVEN
75-10433	8/13/1913	0.060	IRRIGATION	SWEANEY, PAMELA A; SWEANEY, STANLEY P
75-11627	5/22/1913	0.170	IRRIGATION	ANICH, DALE A; ANICH, SUZANNE M
75-14821	5/22/1913	0.130	IRRIGATION	SCHULER, DANIEL CARL; SCHULER, NICOLE ANN

9. The six existing water rights on LFJC authorize a combined total diversion rate of 2.94 cfs of water.
10. Water rights 75-4011, 75-7027, 75-11627, and 75-14821 authorize a combined total diversion rate of 2.76 cfs of water from points of diversion upstream of the Stenlunds' proposed points of diversion.
11. Water rights 75-2003 and 75-10433 authorize a combined total diversion rate of 0.17 cfs of water from points of diversion downstream of the Stenlunds' proposed points of diversion.
12. Mr. Vetrhus owns water rights 75-4011 and 75-7027 authorizing a combined total diversion rate of 2.46 cfs of water from LFJC. The points of diversion for water rights 75-4011 and 75-7027 are upstream of the Stenlunds' proposed points of diversion.
13. The Schulers' own water right 75-14821 authorizing a total diversion rate of 0.13 cfs of water from LFJC. The point of diversion for water right 75-14821 is upstream of the Stenlunds' proposed points of diversion.
14. Two water rights authorizing diversion from LFJC list points of diversion downstream of the Applicants' proposed points of diversion; water right 75-2003 and 75-10433. These water rights authorize a total combined diversion rate 0.17 cfs of water.
15. The proposed water use is within the Department's Administrative Basin 75. Currently, there is no established water district in Basin 75 to administer LFJC water rights by priority.
16. On September 10, 2019, the Department requested the Stenlunds submit additional information per IDAPA 37.03.08.040.05.c.i and iii to assist in the Department's evaluation of potential reduction to the quantity of water under existing water rights. In addition, in the same letter, the Department requested the Stenlunds submit additional information per IDAPA 37.03.08.040.05.d.i and ii to assist in the Department's evaluation of the sufficiency of the water supply.
17. On September 30, 2019, the Department received the Stenlunds response to the additional information request ("Additional Information Response").

18. The Stenlunds propose to divert at a rate of five gallons per minute (0.01 cfs) from May through October to fill a 30-gallon tank on a recreation vehicle or a 500-gallon storage tank while they occupy the Application place of use property. The Stenlunds estimate diversion of this volume would take between “6 minutes up to 1 ½ hours per day of use per diversion.” *Additional Information Response* at 1.
19. Stenlunds’ Additional Information Response states: “Only Robert and Cindy Hallen would be affected, the other parties [Schulers and Vetthus] would not be affected as they are upstream from our proposed water rights.” *Id.* at 1.
20. The Additional Information Response includes LFJC flow measurements of 0.43 cfs and 0.48 cfs taken by Chris Gaughan (Project Planner with the Upper Salmon Basin Watershed Program) on September 23, 2019. Mr. Gaughan took the flow measurements at two locations in LFJC within 150 feet of the Stenlunds’ proposed points of diversion. The flow measurements were taken downstream of the points of diversion for water rights 75-4011, 75-7027, 75-11627, and 75-14821 and upstream of the points of diversion for water rights 75-2003 and 75-10433. Based on these flow measurements, the Stenlunds assert there is sufficient flow in LFJC to support their proposed diversion. *Id.* at 1. The Stenlunds did not submit measurements or a hydrograph demonstrating stream flow quantities in LFJC at times of the year other than September.

## EVALUATION CRITERIA

Idaho Code § 42-203A(5) states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such: (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated... the director of the department of water resources may reject such application and refuse issuance of a permit therefor...

IDAPA 37.03.08.040.04 states the applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5).

The Department applies the criteria in IDAPA 37.03.08.045.01 in evaluating whether an application for permit should be approved, denied, approved for a smaller quantity, or approved with conditions.

IDAPA 37.03.08.045.01.a sets forth the criteria used to evaluate whether the proposed use will reduce the quantity of water under existing water rights. An application will be found to reduce the quantity of water if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.045.01.b sets forth the criteria for determining whether the water supply is insufficient for the proposed use. The water supply will be determined to be insufficient if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible, unless there are noneconomic factors that justify application approval.

## ANALYSIS

The Stenlunds provided September 2019 flow measurements of LFJC to demonstrate that sufficient water is available for their proposed year-round use. Then the Stenlunds' measurements were taken, Mr. Vetrhus was not diverting the 2.46 cfs authorized by his upstream water rights in the 2019 season nor in recent past seasons due to an insufficient volume of water in LFJC to support existing water rights. *Vetrhus Affidavit* at 1. The Schulers were not diverting the 0.13 cfs authorized by their upstream water right in September of 2019 while they were improving the efficiency of their distribution system. The Schulers' planned to resume diversion of their water right by April of 2020, once the updates to their irrigation system were finished. *Schulers' Affidavit* at 1. The 0.43 cfs and 0.48 cfs September 2019 flow measurements provided by the Stenlunds' were collected when Mr. Vetrhus and the Schulers were not diverting their upstream water rights that authorize a combined total diversion rate of 2.59 cfs. Unless there are sources of water that flow into LFJC between Mr. Vetrhus' and the Schulers' upstream points of diversion and the Stenlunds' proposed points of diversion, there is not a sufficient supply of water in LFJC for the Stenlunds' proposed diversion when Vetrhus and the Schulers divert water from LFJC pursuant to their water rights in September. The Stenlunds' did not provide information regarding sources of water that flow into LFJC.

From the information provided by Mr. Vetrhus and the Schulers', there is an insufficient supply of water in LFJC to satisfy the Application at least during certain times of the year. There may be higher flows in LFJC during other times of the year, such as in the spring from snowmelt and runoff, but the Stenlunds' did not demonstrate there is an adequate amount of water in LFJC to make their project feasible year-round.

When a water supply is insufficient to support existing water rights, authorization of a new appropriation allowing additional diversion of water could deplete the water supply available for existing water users. There are two water rights authorizing a combined total of 0.17 cfs downstream from the Stenlunds' proposed points of diversion. The lowest September 2019 flow rate measurement provided by the Stenlunds' was 0.43 cfs. If the Stenlunds' diverted the Application proposed flow rate of 0.04 cfs, this would leave 0.39 cfs in LFJC to satisfy the downstream water rights total combined diversion rate of 0.17 cfs.

However, as previously mentioned, Mr. Vetrhus and the Schulers were not diverting their water rights authorizing a combined total diversion are of 2.59 cfs from their points of diversion upstream of the Stenlunds' proposed points of diversion when the September 2019 measurements were collected. If all upstream water users were diverting at the time of the September 2019 measurements, the additional diversion of 0.04 cfs from LFJC proposed by the Application would deplete the amount of water available for downstream water users. The

Stenlunds' did not demonstrate their proposed diversion would not deplete the water supply available for existing water rights.

### CONCLUSION OF LAW

The Stenlunds failed to establish that their proposed diversion of water would not reduce the quantity of water available to existing water rights. The Stenlunds also failed to establish that there is a sufficient water supply for their proposed use. The Stenlunds did not satisfy their burden of proof for the elements of review set forth in Idaho Code § 42-203A(5)(a) and Idaho Code § 42-203A(5)(b). Therefore, the Department should deny the Application.

### ORDER

IT IS HEREBY ORDERED that Application for Permit No. 75-14951 in the name of Christopher H. Stenlund and Amy J. Stenlund is **DENIED**.

Dated this 10<sup>th</sup> day of NOVEMBER, 2020.

A handwritten signature in blue ink, appearing to read "Angela M. Grimm", is written over a horizontal line.

Angela Grimm  
Water Rights Section Manager

## CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2020, I mailed a certified true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER DENYING APPLICATION FOR PERMIT** to the person (s) listed below:

**RE: PERMIT NO 75-14951**

CHRISTOPHER H STENLUND  
AMY J STENLUND  
1009 BRYAN AVE  
SALMON ID 83467

ROBERT HALLEN  
CINDY HALLEN  
PO BOX 243  
CARMEN ID 83462

ARNE VETRUS  
34 COINER RD  
SALMON ID 83467

DANIEL CARL SCHULER  
NICOLE ANN SCHULER  
PO BOX 1361  
SALMON ID 83467



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**Jean Hersley**  
**Technical Records Specialist II**



## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

### **REQUEST FOR HEARING**

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

### **CERTIFICATE OF SERVICE**

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

### **FINAL ORDER**

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

### **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.