

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

IN THE MATTER OF APPLICATION     )  
FOR PERMIT NO. 75-14954 IN THE     )  
NAME OF BRYAN A. YENTER AND/OR    )  
CYNTHIA J. YENTER                    )  
\_\_\_\_\_ )

**ORDER ON EXCEPTIONS;  
FINAL ORDER AMENDING  
PERMIT APPROVAL**

**PROCEDURAL HISTORY**

On March 3, 2020, the Idaho Department of Water Resources (“Department”) issued a preliminary order (“Order”) approving Application for Permit No. 75-14954 (“Permit”) in the name of Bryan A. Yenter and/or Cynthia J. Yenter (“Permit Holders”). On March 9, 2020, the Department served a copy of the Permit to the Permit Holders. The Permit authorizes the Permit Holders to divert 0.10 cubic feet per second (“cfs”) of ground water for irrigation of five acres within the NE¼SE¼ of Section 31, T23N, R22E, B.M. The Permit included the following approval condition:

The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of lands within the authorized place of use for this right. The right holder may divert ground water under this right to irrigate land with appurtenant surface water rights when the surface water supply is not reasonably sufficient to irrigate the place of use for this water right or is not available due to drought, curtailment by priority, or the seasonal startup and shutoff or maintenance schedule for canal company deliveries. The right holder shall not divert ground water for irrigation purposes under this right if use of the surface water supply is intentionally discontinued or reduced (for example abandoned, forfeited, sold, disallowed by court decree, or leased to the Water Supply Bank), or is not deliverable due to non-payment of annual assessments, without an approved transfer pursuant to Idaho Code § 42-222 or other Department approval.

This condition is hereafter referred to as the “surface water first condition.”

On March 19, 2020, the Permit Holders petitioned for reconsideration of the Order. The Department denied the petition for reconsideration on April 9, 2020.

On April 20, 2020, the Permit Holders filed their *Exception to Order Denying Petition for Reconsideration* (“Exceptions”).

## EXCEPTIONS TO PRELIMINARY ORDER

The Permit Holders take exception with the surface water first condition and want the condition removed from the Permit. The Permit Holders assert:

1. The surface water first condition is “unduly restrictive and not warranted in a basin which is open for new appropriation.” *Exceptions* at 1.
2. “The local aquifer in the Permit area is not of pristine quality and is not sought after by other users.” *Id.* at 2.
3. “[Water] Resource management in the Upper Salmon Basin River seeks to protect surface water resources, not ground water resources.” *Id.* “Conversion from surface water to ground water irrigation for certain acres is a water conservation practice which supports the management goals of the Salmon River Basin, and is in the local public interest.” *Id.* at 4.
4. “Water right conditions must not be ambiguous.” *Id.* at 3. “[T]he surface water first condition may look good on paper, but it is impossible to consistently administer because the definition of ‘reasonably sufficient’ is unknown.” *Id.* at 4.
5. “Conservation of water resources is addressed and injury to other rights is minimized under a new permit, if duty of water is not exceeded and if enlargement in use does not occur when the permit is used in combination with underlying rights.” *Id.*

## ANALYSIS

Article XV, Section 3, of the Idaho Constitution states, “The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied . . . .” Idaho law requires the Department to “refuse issuance of a permit . . . or . . . grant a permit upon conditions” if the proposed water use “will conflict with the local public interest as defined in section 42-202B, Idaho Code” or if it “is contrary to conservations of water resources within the State of Idaho.” Idaho Code § 42-203A(5).

### **Exception 1: Surface water first condition is not necessary in an area open to ground water appropriation**

Ground water levels in certain areas of Idaho decline without incidental recharge from surface water irrigation. In many cases, incidental recharge from surface water distribution systems is a critical mechanism for maintaining a water supply sufficient for existing and new ground water uses that cannot be accomplished cost-effectively with surface water. The surface water first condition serves the local public interest in such locations by conserving ground water for those new uses that cannot be accomplished with surface water. As a general practice, the Department applies the surface water first condition unless conserving ground water is not necessary for the local public interest.

In the case of this Permit, as the Permit Holders state at page 2 of the *Exceptions*, water users in the vicinity of the proposed appropriation do not rely heavily on the shallow ground water to meet substantial needs, such as municipal water uses. The Permit point of diversion and place of use is approximately eight miles north of the City of Salmon (“City”) in rural eastern Idaho. The City is the closest urban area to the Permit diversion and place of use. The City holds 31 water rights for various beneficial uses including municipal use, 22 surface water rights totaling 34.263 cfs and nine ground water rights totaling 1.93 cfs. All of the City’s municipal use water rights are surface water rights. The City’s surface water rights authorize diversion from the Salmon River, the Lemhi River, Jesse Creek, Chipps Creek, Pollard Canyon Creek, and waste water. Approximately 95% of the City’s authorized water right diversion rate comes from surface water.

The Director concludes that appropriation of the requested amount of shallow ground water does not conflict with the local public interest in conserving the ground water supply for existing or new water uses.

### **Exception 2: Ground water in the local area is not high quality**

The surface water first condition conserves Idaho’s ground water resources, which are a limited resource and generally of a higher quality in certain areas. Conserving ground water can be important, especially in urban areas where large volumes of water need to be treated, because treating surface water to improve the water quality can cost more than treating ground water. *See Order Addressing Exceptions and Amending Transfer Approval in the Matter of Application for Transfer No. 79778 in the Name of City of Meridian* (October 4, 2016), at 4. The Permit Holders assert, “[g]round water in some areas has been found to contain levels of dissolved solids which exceed EPA drinking water standards.” *Exceptions*, at 2. The United States Geological Survey publication cited in page 2 of the *Exceptions* supports this assertion. The Permit Holders further assert, “the [Salmon Valley] aquifer is utilized primarily by rural residential wells because it is the only available source of domestic water, even though ground water often must be treated to reach desirable aesthetic quality.” *Id.* The Permit Holders also assert, “The City of Salmon does not use ground water for municipal supply, drawing instead from Jesse Creek and its tributaries.” *Id.*

The City’s predominant reliance on surface water rights, along with the Permit Holders’ exceptions noted above, infers ground water in the Permit area is not relied upon as a higher-quality water resource. The Director agrees with the Permit Holders that the surface water first condition is not necessary on the Permit to conserve higher quality ground water in this case.

### **Exception 3: Surface water preservation is a local area water resource management goal**

In the Salmon River Basin, water users, government entities, and others work to improve surface water habitat for Endangered Species Act (“ESA”)-listed fish species. For example, the Idaho Water Transactions Program (“IWTP”) facilitates surface water conservation measures to enhance stream flow for anadromous fish habitat in the upper Salmon River drainage. The IWTP mission is “to support innovative, voluntary, grassroots water transactions that improve flows to tributary streams and rivers in the Upper Salmon River Basin.” *Idaho Water Transactions Program Progress Report: Overview and Accomplishments 2003-2012* at 1. The Permit Holders assert their

proposed use of ground water instead of surface water “is likely to create only an infinitesimal enhancement to stream flow in the Salmon River”, but the stream flow will benefit if the Permit Holders use ground water rather than surface water. *Exceptions* at 3. If the Permit Holders’ proposed use of ground water replaces their use of surface water, the Permit Holders’ assertion is reasonable. The Director agrees with the Permit Holders that the established public policy objective of enhancing surface water for ESA-listed fish species recovery outweighs the need for ground water conservation when issuing this Permit.

**Exception 4: The surface water first condition is ambiguous**

In this instance, requiring the use of surface water first is not necessary to protect the local public interest and conserve ground water. The Director does not need to address assertions of ambiguity in the surface water first condition because the Permit will not include the surface water first condition on the Permit.

**Exception 5: Water resources are conserved if the irrigation duty of water is not exceeded and enlargement of use does not occur**

The Permit Holders characterize their proposed ground water use as a “conversion project” exchanging the use of surface water for ground water. *Exceptions* at 5. The Permit Holders assert the Permit condition limiting the diversion rate and volume of the Permit in combination with other water rights to a standard duty of water addresses the conservation of water resources “if enlargement in use does not occur when the permit is used in combination with underlying rights.” *Id.* at 4. To prevent enlargement, the Permit Holders propose a permit condition stating:

If the portion of water rights 75-14847 or 75-14848 which are appurtenant to the place of use are sold, transferred, leased, or used on any other place of use, right no 75-14954 shall not be used.

*Id.*

The Director agrees that a condition limiting the diversion of water to the amount necessary to accomplish the irrigation beneficial use is appropriate to conserve Idaho’s water resources. The Director will continue to include permit approval condition no. 3, which states:

This right when combined with all other rights shall provide no more than 0.03 cfs per acre nor more than 3.5 af per acre at the field headgate for irrigation of the place of use.

The Director also agrees that a condition to prevent enlargement or unstacking of the surface water and ground water uses is necessary. Instead of the Permit Holders’ suggested condition, however, the Director approves the following:

Rights 75-14847, 75-14848, and 75-14954 when combined shall not exceed the irrigation of 20 acres.

## CONCLUSIONS OF LAW

The Department should remove the surface water first condition from the Permit because it is not necessary to protect the local public interest in the ground water resource or to conserve water resources in Idaho in this case. The Department should add an approval condition limiting the total number of acres irrigated by the combination of Rights 75-14847, 75-14848, and the Permit.

## ORDER

IT IS HEREBY ORDERED that Permit No. 75-14954 is APPROVED with amended conditions as shown in the accompanying approval document.

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

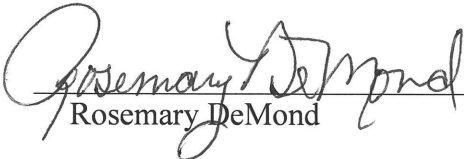


GARY SPACKMAN  
Director

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10<sup>th</sup> day of June 2020, the above and foregoing, was served by the method indicated below, and addressed to the following:

|                                                                          |                                                                                                                                                                                                                                                                                                                                                                         |                                     |                            |                          |               |                          |                |                          |           |                                     |       |
|--------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------|----------------------------|--------------------------|---------------|--------------------------|----------------|--------------------------|-----------|-------------------------------------|-------|
| <p>Bryan A and Cynthia J Yenter<br/>662 HWY 93 N<br/>Carmen ID 83462</p> | <table><tr><td><input checked="" type="checkbox"/></td><td>U.S. Mail, postage prepaid</td></tr><tr><td><input type="checkbox"/></td><td>Hand Delivery</td></tr><tr><td><input type="checkbox"/></td><td>Overnight Mail</td></tr><tr><td><input type="checkbox"/></td><td>Facsimile</td></tr><tr><td><input checked="" type="checkbox"/></td><td>Email</td></tr></table> | <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid | <input type="checkbox"/> | Hand Delivery | <input type="checkbox"/> | Overnight Mail | <input type="checkbox"/> | Facsimile | <input checked="" type="checkbox"/> | Email |
| <input checked="" type="checkbox"/>                                      | U.S. Mail, postage prepaid                                                                                                                                                                                                                                                                                                                                              |                                     |                            |                          |               |                          |                |                          |           |                                     |       |
| <input type="checkbox"/>                                                 | Hand Delivery                                                                                                                                                                                                                                                                                                                                                           |                                     |                            |                          |               |                          |                |                          |           |                                     |       |
| <input type="checkbox"/>                                                 | Overnight Mail                                                                                                                                                                                                                                                                                                                                                          |                                     |                            |                          |               |                          |                |                          |           |                                     |       |
| <input type="checkbox"/>                                                 | Facsimile                                                                                                                                                                                                                                                                                                                                                               |                                     |                            |                          |               |                          |                |                          |           |                                     |       |
| <input checked="" type="checkbox"/>                                      | Email                                                                                                                                                                                                                                                                                                                                                                   |                                     |                            |                          |               |                          |                |                          |           |                                     |       |

  
Rosemary DeMond

State of Idaho  
Department of Water Resources

**AMENDED      Permit to Appropriate Water      AMENDED**  
**No. 75-14954**

**Priority:** July 17, 2019

**Maximum Diversion Rate:** 0.10 CFS

This is to certify that

BRYAN A YENTER AND/OR  
CYNTHIA J YENTER  
662 HWY 93 N  
CARMEN ID 83462-4505

has applied for a permit to appropriate water from:

**Source :** GROUND WATER

and a permit is APPROVED for development of water as follows:

**Beneficial Use**

IRRIGATION

**Period of Use**

04/01 to 10/31

**Rate of Diversion**

0.10 CFS

**Location of Point(s) of Diversion**

GROUND WATER L7 ( NE¼ SE¼), Sec. 31, Twp 23N, Rge 22E, B.M. LEMHI County

**Place of Use:** IRRIGATION

| Twp | Rng | Sec | NE |    |    |    | NW |    |    |    | SW |    |    |    | SE  |    |    |    | Totals |
|-----|-----|-----|----|----|----|----|----|----|----|----|----|----|----|----|-----|----|----|----|--------|
|     |     |     | NE | NW | SW | SE | NE | NW | SW | SE | NE | NW | SW | SE | NE  | NW | SW | SE |        |
| 23N | 22E | 31  |    |    |    |    |    |    |    |    |    |    |    |    | 5.0 |    |    |    | 5.0    |
|     |     |     |    |    |    |    |    |    |    |    |    |    |    |    | L7  |    |    |    |        |

Total Acres: 5.0

**Conditions of Approval**

1. Proof of application of water to beneficial use shall be submitted on or before **March 01, 2025**.
2. Subject to all prior water rights.
3. Rights 75-14847, 75-14848, and 75-14954 when combined shall not exceed the irrigation of 20 acres.
4. This right when combined with all other rights shall provide no more than 0.03 cfs per acre nor more than 3.5 afa per acre at the field headgate for irrigation of the place of use.
5. Prior to diversion of water under this right, the right holder shall install a lockable device, subject to the approval of the Department, in a manner that will provide the watermaster suitable control of the diversion.
6. The right holder shall install or construct a straight length of conduit or ditch suitable for installation of a device for measuring the entire flow of water being diverted in connection with this right. If the right holder uses conduit, the straight length of conduit shall be at least fifteen times the diameter of the conduit and shall be above ground or otherwise easily accessible.

State of Idaho  
Department of Water Resources

**AMENDED Permit to Appropriate Water AMENDED**

No. 75-14954

7. Upon specific notification by the Department, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion, in accordance with Department specifications.
8. When notified by the Department or by a watermaster with regulatory authority over this right, the right holder shall report the amount of water diverted in connection with this right. The report shall be submitted in the manner and frequency specified by the Department or the watermaster.
9. Right holder shall comply with the drilling permit requirements of Idaho Code § 42-235 and applicable Well Construction Rules of the Department.
10. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.

This permit is issued pursuant to the provisions of Idaho Code § 42-204.

Signed this 10<sup>th</sup> day of June, 20 20.



GARY SPACKMAN

Director

State of Idaho  
Department of Water Resources  
**Attachment to Permit to Appropriate Water**  
75-14954

This map depicts the IRRIGATION place of use boundary for this water right at the time of this approval and is attached to the approval document solely for illustrative purposes.



-  Point of Diversion
-  Place Of Use Boundary
-  Townships
-  PLS Sections
-  Quarter Quarters

0 0.035 0.07 0.14 Miles



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

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

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4), Idaho Code.

### **REQUEST FOR HEARING**

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

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

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.



State of Idaho

**DEPARTMENT OF WATER RESOURCES**

322 E Front Street, Suite 648 • PO Box 83720 • Boise ID 83720-0098

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BRAD LITTLE  
Governor

GARY SPACKMAN  
Director

June 10, 2020

BRYAN A YENTER  
CYNTHIA J YENTER  
662 HWY 93 N  
CARMEN ID 83462-4505

RE: Amended Permit to Appropriate Water

Dear Permit Holder:

I have enclosed the Amended Permit to Appropriate Water issued in connection with the June 10, 2020 final order amending your permit approval. If you have any questions regarding this matter, please call me at 208-287-4942.

This Amended approval was not included with the final order mailed to you on June 10, 2020.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Jean Hersley', is written over a horizontal line.

Jean Hersley  
Technical Records Specialist II

Enclosure