

**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 DENYING PETITION  
FOR RECONSIDERATION**

This matter having come before the Department of Water Resources ("Department") as a petition to reconsider a preliminary order approving a permit application, the Department finds, concludes, and orders as follows:

**FINDING OF FACTS**

1. On March 3, 2020, the Department signed 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").
2. On March 9, 2020, the Department served a true and correct copy of the Permit to the Permit Holders.
3. The Permit authorizes the Permit Holders to divert 0.10 cubic feet per second of ground water for irrigation of five acres within the NESE of Section 31, T23N, R22E, B.M.
4. The Permit Holders own two water rights authorizing the diversion and use of surface water to irrigate their land. Water right 75-14847 authorizes use of Salmon River water for irrigation purposes within the Permit's place of use. Water right 75-14848 authorizes use of spring and waste water for irrigation purposes within the Permit's place of use.
5. Condition no. 4 of the Permit (hereafter referred to as the "surface water first condition") states:

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.

6. On March 16, 2020, the Permit Holders emailed a petition for reconsideration of the Order

("Petition") to the Department. On March 19, 2020, the Department received the original Petition in the mail.

7. In the Petition, the Permit Holders request the Department revise the Permit to allow the use of ground water for irrigation without consideration of whether surface water from water rights 75-14847 or 75-14848 is available. Specifically, the Permit Holders request the Department revise the surface water first condition to state, "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." Petition at paragraph six.
8. The Petition states the surface water first condition is "...unduly restrictive in a basin which is open for new appropriation." Petition at paragraph two.
9. The Petition states, "[T]he ambiguity of the phrase 'not reasonably sufficient' [in the surface water first condition] does not guarantee the Permit Holders will be able to develop the Permit to the full extent allowed by law." Petition at paragraph two.
10. The Petition states, "[R]equiring use of surface water before ground water under this permit is an arbitrary requirement for this area that is not warranted by local water supply conditions, and which is simply not necessary for the conservation of water resources in the Salmon River basin." Petition at paragraph eight.

### ANALYSIS

Idaho's ground water resources are limited in certain areas and are generally of a higher quality than available surface water. Requiring the use of surface water, when available, conserves the ground water resources for times when surface water is not available and for purposes dependent upon water quality. The Department applies the surface water first condition to reduce reliance on ground water where full beneficial use can be achieved with a combination of surface water and ground water.

The Permit Holders assert that the appropriation of ground water in Administrative Basin 75 is not subject to a moratorium, that the surface water first requirement is "not warranted by local water supply conditions", and that the surface water first requirement "is simply not necessary for the conservation of water resources in the Salmon River basin." Petition at paragraph eight. However, the Permit Holders did not submit data to support their assertions about local water supply conditions. In fact, they acknowledge the importance of maintaining water in the local aquifer: "Incidental ground water recharge from irrigation water delivery and return flow is important in the Salmon River valley to maintain the shallow aquifer." Petition at paragraph four. The Idaho Code § 42-203A(5) requirement to conserve Idaho's water resources applies statewide, not just in moratorium areas. On a case-by-case basis, the Department can consider whether the surface water first conservation strategy is appropriate for a particular permit. However, site-specific hydrogeologic or local public interest information supporting removal of the surface water first condition has not been presented in this case.

The Permit Holders also assert that the surface water first requirement is not necessary, because

incidental ground water recharge from their surface water irrigation practices will not diminish once they commence the proposed ground water use. "Permit Holders are not proposing to convert all their irrigated acres to primary ground water supply. Irrigation with surface water will continue under existing rights on approximately 15 acres, and there will be no reduction of incidental recharge." Petition at paragraph four. "Conversion of five (5) surface irrigated acres to ground water irrigation is not likely to diminish ground water supply in the area or injure downstream water rights." Petition at paragraph five. These statements imply that when the Permit Holders are irrigating the five acres with ground water, they will continue to divert surface water, which will result in incidental ground water recharge to offset the new ground water pumping. This premise is not consistent with the Permit Holder's surface water rights 75-14847 and 75-14848, which authorize the diversion of water for irrigation, not for ground water recharge. Moreover, diverting more water than is needed to accomplish the beneficial use of 15 acres of irrigation is not consistent with the conservation of water resources in Idaho.

Finally, the Permit Holders assert the surface water first condition is "unduly restrictive" and that "[t]he ambiguity of the phrase 'not reasonably sufficient' does not guarantee that the Permit Holders will be able to develop the Permit to the full extent allowed by law." Petition at paragraph two. "Further, the ambiguous language in condition no. 4 [surface water first condition] may penalize the Permit Holders because it invites differences in interpretation about when the permit can and cannot be exercised." Petition at paragraph eight. The words "not reasonably sufficient" may lack specificity, but the circumstances vary when surface water may not be reasonably sufficient. Possibilities include droughts and priority cuts, as stated in the condition. The Department does not view the language as ambiguous simply because the surface water first condition does not contain a comprehensive list of every circumstance when surface water may not be reasonably sufficient for an irrigation practice. It is not clear what the Permit Holders mean by "develop the Permit to the full extent allowed by the law." Petition at paragraph two. The Permit itself defines the full extent to which water can be diverted and beneficially used. As an integral element of the Permit, the surface water first condition helps to define the manner in which the Permit Holders are authorized to divert water under the Permit.

In summary, authorizing the full beneficial use proposed by the Permit Holders while remaining consistent with the conservation of water resources in Idaho is achieved by restricting ground water diversions to those times when the surface water rights are unavailable or are reduced such that augmentation with ground water is necessary. The Department should consider not including the condition only when facts (such as specific hydrogeologic or local public interest information) justifies not including the condition. The alternative condition language proposed in the Petition (Petition at paragraph six) does not sufficiently address the requirement to use surface water first for irrigation purposes to ensure conservation of water resources. The Department should deny the petition and keep the surface water first condition in its original form.

## **CONCLUSIONS OF LAW**

1. Pursuant to IDAPA 37.01.01.300, an original of all documents intended for filing must be submitted to the Department. A facsimile transmission may be submitted, but the original must be mailed or physically delivered to the Department the next working day. The

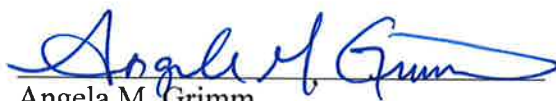
Department received a copy of the Petition via email on March 16, 2020. The Department received the original Petition by mail on March 19, 2020, three days later. The record is insufficient to confirm when the original Petition document was mailed. Therefore, the Department will recognize March 19, 2020, as the Petition filing date.

2. Pursuant to IDAPA 37.01.01.730.02.a, the March 19, 2020, filing of the Petition was timely.
3. Pursuant to IDAPA 37.03.08.040.04.c, the applicant bears the ultimate burden of persuasion regarding all the factors set forth in Idaho Code § 42-203A.
4. Pursuant to Idaho Code § 42-203A(5)(f), the Department cannot approve a permit to appropriate water if the intended use is contrary to conservation of water resources within the state of Idaho.
5. IDAPA 37.03.08.050.01 states that the Director may issue permits with conditions to ensure compliance with the criteria of Idaho Code § 42-203A.
6. Requiring the use of surface water to the extent it is available to achieve the proposed beneficial use is consistent with the conservation of water resources in Idaho.
7. The surface water first condition ensures surface water irrigation continues to conserve the ground water resources.
8. The surface water first condition does not prevent development of the Permit.
9. The Permit Holders have not met their burden of persuasion regarding their request for a change to the Permit conditions.
10. The Department should deny the Petition pursuant to IDAPA 37.01.01.730.02.

### **ORDER**

IT IS HEREBY ORDERED that the Petition is **DENIED** pursuant to IDAPA 37.01.01.730.02.

Dated this 9<sup>th</sup> day of April, 2020.



Angela M. Grimm  
Water Rights Section Manager

## **CERTIFICATE OF SERVICE**

I hereby certify that on **April 09, 2020** I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER (PRELIMINARY ORDER DENYING PETITION FOR RECONSIDERATION)** to the person(s) listed below:

RE: Preliminary Order in the Matter of Permit No. 75-14954

**BRYAN YENTER  
CINDY YENTER  
662 HWY 93 N  
CARMEN ID 83462-4505**

  
\_\_\_\_\_  
**Jean Hersley  
Technical Records Specialist**

## **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.