



State of Idaho

DEPARTMENT OF WATER RESOURCES

Eastern Region • 900 N Skyline Drive, Suite A • Idaho Falls ID 83402-1718

Phone: (208) 525-7161 • Fax: (208) 525-7177

Website: idwr.idaho.gov • Email: easterninfo@idwr.idaho.gov

BRAD LITTLE
Governor

GARY SPACKMAN
Director

May 15, 2019

Steven Parry
Nelson Hall Parry Tucker, PLLC
PO Box 51630
Idaho Falls, ID 83405-1630

RE: Permit 22-7792 in the name of Catherine Rowan

Dear Mr. Parry:

During a recent review of water rights, I discovered some unresolved petitions and an unresolved appeal in one of our water right files. The petitions and appeal were filed by you in 1997 as part of a larger property/water right ownership dispute between your clients, Norman and Robin Riley, and Catherine Rowan, who was represented at the time by attorney Gregory Moeller. This letter is meant to summarize the matters still pending before the Department and to propose the closure of the matters.

On September 4, 1996, Rowan filed Application 22-7792, seeking a permit to divert 3.00 cfs from ground water for the irrigation of 150.5 acres in Sections 14, 15, and 23, T05N, R40E in Madison County. The proposed point of diversion was an existing ground water well located in Section 11, T05N, R40E.

The Department published notice of Application 22-7792 and no protests were filed against the application. The Department approved the application by issuing Permit 22-7792 on January 30, 1997. The permit approval did not clearly identify whether the approval was a preliminary, recommended, or final order under the Department's Rules of Procedure (IDAPA 37.01.01). On March 12, 1997, in response to a letter from you, the Department issued an order designating the permit approval as a preliminary order.

On March 26, 1997, you filed three petitions with the Department:

- (1) *Petition for Reconsideration in RE: Permit 22-7792*
- (2) *Petition for Disclosure of Ex Parte Communications*
- (3) *Petition for Disqualification of L. Glen Saxton as Hearing Officer*

The Department has not acted on any of the three petitions. According to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01), the Department must "dispose of [a] petition for reconsideration within twenty-one (21) days of its receipt or the petition will be considered denied by operation of law." If a petition for reconsideration is denied by operation of law, any party may file an appeal with the Director of the Department within fourteen days of the denial. IDAPA 37.01.01.730.02.

On May 7, 1997, you sent a letter to the Department with the heading *Protective Appeal to Administrative Head* ("Appeal to the Director"). In the letter, you express a concern that the preliminary order approving Permit 22-7792 had become a final order by operation of law, because the Department did not act on your *Petition for Reconsideration* within twenty-one days. Your letter was intended to preserve your ability to appeal the permit approval to the Director.

Many years have passed since the petitions and appeal were filed with the Department. During this time period the Rileys and Rowan engaged in multiple years of litigation in District Court, in the Snake River Basin Adjudication, and even before the Idaho Supreme Court. On June 19, 2003, the Idaho Supreme Court issued its second decision in the case, which appears to have concluded the litigation between the parties. According to our records, shortly after the 2003 decision from the Idaho Supreme Court, the Rileys filed for bankruptcy. As part of the bankruptcy proceedings, your firm acquired ownership of water right 22-7280B, which was appurtenant to property previously owned by the Rileys. Eventually, the property previously owned by the Rileys and water right 22-7280B were conveyed to Wilcox Brothers, LLC, who still owns the property and water right 22-7280B today.

In 1997, when your *Petition for Reconsideration* was filed, it was unclear whether the Department could delay its decision on a petition for reconsideration. There is evidence in the file for Permit 22-7792 that the Department believed it could suspend the contested case indefinitely, without acting on the *Petition for Reconsideration*. Recently, the Idaho Supreme Court confirmed that the Department has no more than twenty-one days to dispose of petitions for reconsideration. *A & B Irr. Dist. v. Idaho Dept. of Water Resources*, 154 Idaho 652, 301 P.3d 1270 (2012). If the Department does not dispose of a petition for reconsideration within twenty-one days, the subject preliminary order becomes a final order by operation of law. In light of the *A & B Irr. Dist.* decision, it is the Department's position that the *Petition for Reconsideration* filed on March 26, 1997 was denied by operation of law because the Department did not dispose of the *Petition for Reconsideration* by April 16, 1997. Therefore, the preliminary order approving Permit 22-7792 is now a final order.

The 21-day deadline described in Rule 730 (IDAPA 37.01.01) only applies to petitions for reconsideration. The other two petitions you filed, relating to ex parte communications and disqualification of Glen Saxton as a hearing officer, are therefore still pending before the Department. Passage of time has rendered these petitions meaningless. Most, if not all, of the employees who were involved in the review of Application for Permit 22-7792 have retired or are no longer working for the Department. It would be very difficult at this point to prepare a summary of communications from the mid-1990s between Department staff and Rowan. Further, Glen Saxton has retired and would not be designated as a hearing officer. Rather than having the Department issue an order addressing these remaining petitions, it would be easiest for you to simply withdraw the petitions. This can be through a letter to the Department and can be scanned and sent by email.

The other matter pending before the Department is the *Appeal to the Director* filed on May 7, 1997. It seems unlikely that your clients would want to continue to pursue the appeal. Norman and Robin Riley no longer own property or water rights in the immediate area and no longer maintain an ownership interest in the proposed point of diversion (ground water well) in Section 11. According to Department records, the Rileys do own domestic, stockwater, and irrigation water rights on a property located over four miles west of the point of diversion for Permit 22-7792. If you would like to withdraw your *Appeal to the Director*, this can be done in conjunction with the withdrawal of petitions described above.

Thank you for any assistance you can provide. I apologize that it has taken so long to address these matters. I have not enclosed any of the documents from the water right file, but I am happy to send you copies of the documents if it would help refresh your memory on the case. Please feel free to call if you have any other questions. If you choose to withdraw the petitions and appeal as described above, you can email a copy of the letter to me at james.cefalo@idwr.idaho.gov.

Sincerely,

A handwritten signature in dark ink, appearing to read 'J. Cefalo', with a stylized, cursive script.

James Cefalo
(208) 525-7161

Cc: Catherine Rowan (PO Box 566, Draper, UT 84020)
Jerry Rigby (PO Box 250, Rexburg, ID 83440)