

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

IN THE MATTER OF APPLICATION FOR)	ORDER GRANTING
PERMIT NO. 63-34500 IN THE NAME OF)	IN PART PETITION
VICTOR AND DANA HOFSTETTER)	FOR RECONSIDERATION
_____)	

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

FINDINGS OF FACT

1. On June 7, 2018, the Department issued Permit to Appropriate Water No. 63-34500 ("Permit") authorizing the permit holder to divert ground water for irrigation, irrigation storage, wildlife storage, aesthetic storage, and recreation storage.
2. The Permit was issued as a preliminary order of the Department pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).
3. Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.
4. The Permit included a condition ("Condition 5") that read:

"This right when combined with all other rights shall provide no more than 0.03 cfs per acre nor exceed a combined annual maximum diversion volume of 17.1 af at the field headgate for the place of use."
5. The Permit also included a condition ("Condition 8") that read:

"This right when combined with all other rights shall provide no more than 5.0 afa per acre for irrigation storage and irrigation from storage for the place of use."
6. On June 21, 2018, the Department received a petition for reconsideration ("Petition") from the permit holder. The Petition sought revision of Condition 5 to clarify the limits in the condition apply only to the irrigation component of the Permit. The Petition also asks to remove Condition 8, as it is "unnecessary, ambiguous and could cause confusion with respect to the existing use of Farmer's Union Canal Company water rights from the same pond".

7. The place of use for the Permit is within the service area of Farmer's Union Ditch Company, Limited¹ ("Farmer's Union"). Farmer's Union holds nine water rights to divert water from the Boise River and one right to divert wastewater. The ten rights authorize Farmer's Union to irrigate a total of up to 8,394 acres. None of the water rights held by Farmer's Union authorizes irrigation storage or irrigation from storage.
8. Water rights authorizing storage in Anderson Ranch, Lucky Peak, and Arrowrock Reservoirs ("Federal Reservoirs") for irrigation purposes within the boundaries of the Boise Federal Reclamation Project ("Boise Project") were decreed in the name of the United States Bureau of Reclamation, with the following condition:

"The name of the United States of America acting through the Bureau of Reclamation appears in the Name and Address sections of this partial decree. However, as a matter of Idaho Constitutional and Statutory Law, title to the use of the water is held by the consumers or users of the water. The irrigation organizations act on behalf of the consumers or users to administer the use of the water for the landowners in the quantities and/or percentages specified in the contracts between the Bureau of Reclamation and the irrigation organizations for the benefit of the landowners entitled to receive distribution of this water from the respective irrigation organizations. The interest of the consumers or users of the water is appurtenant to the lands within the boundaries of or served by such irrigation organizations, and that interest is derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations."
9. The land irrigated by the Permit is also authorized to be irrigated with Boise Project water stored in the Federal Reservoirs and delivered by Farmer's Union.

ANALYSIS

The Petition asks the Department to revise Condition 5 to clarify that the condition applies only to the irrigation use. Condition 5 is intended to limit the rate and volume of water supplied to a field headgate for irrigation use to a defined duty of water. The intent would be clearer if the condition specifically described irrigation. The Department should revise Condition 5 to clarify that the condition is intended to limit the rate and volume supplied to a field headgate for irrigation purposes.

The Petition also asks to remove Condition 8 as it is unclear, unnecessary, and ambiguous. The purpose of Condition 8 is similar to that of Condition 5 in that it seeks to limit the amount of water stored and delivered from storage for irrigation purposes to a defined duty of water (five acre-feet per acre of irrigated land). The intent is to limit storage for irrigation under this water right when other rights also store water to irrigate the same land. The Petition argues that the use of Farmer's Union water rights from the same pond as the Permit could cause confusion. The Farmer's Union water rights themselves do not authorize irrigation storage or irrigation from storage. The user may pass Farmer's Union irrigation water through the pond as part of the delivery system, but that use of the pond does

¹ The place of use for the Permit is within the service area of Farmer's Union Ditch Company, Limited. A search of the Idaho Secretary of State business entity records and the Department's water right records did not find any record of a Farmer's Union Canal Company.

not constitute irrigation storage and is not reason to remove a duty of water limitation on the Permit. Additionally, the fact that Boise Project storage water is first stored in the Federal Reservoirs, and then passes through the pond, or is even temporarily stored in the pond is also not a reason for confusion or a reason to remove the duty of water limitation. The Boise Project storage water was diverted, stored, and delivered from storage under the Boise Project rights at, into, and from the Federal Reservoirs. That the Boise Project storage water is temporarily held in the pond on the Permit holder's property en route to the lands to be irrigated does not change the amount of water stored or delivered from storage under the Boise Project storage rights. Similarly, use of the pond to convey or hold the Boise Project storage water does not change the amount of ground water stored or delivered from storage under the Permit. The fact that other water rights authorize irrigation storage for the land under the Permit is a reason to maintain the condition limiting the combined storage to a five acre-feet per acre duty of water, rather than a reason to remove it as the Petition requests.

The Petition did not elaborate on why Condition 8 is unclear, unnecessary, or ambiguous. The language in the condition should not be revised and the condition should not be removed from the Permit.

CONCLUSIONS OF LAW

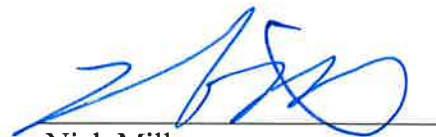
1. The Petition was filed timely.
2. Condition 5 should be amended to clarify it applies only to deliveries of water to the field headgate for irrigation purposes.
3. Condition 8 is a standard condition of the Department when issuing permits and licenses for irrigation storage. It is necessary to define a duty of water for storage purposes. Condition 8 should not be removed from the Permit.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing water appropriation Permit No. 63-34500 is GRANTED IN PART pursuant to Idaho Code § 67-5243. The November 2, 2017 Preliminary Order Approving Application for Permit 63-34500 is amended to include a revised Condition 5 that reads as follows:

"This right when combined with all other rights shall provide no more than 0.03 cfs per acre nor exceed a combined annual maximum diversion volume of 17.1 af at the field headgate for irrigation of the place of use."

Dated this 12th day of July 2018



Nick Miller
Manager, IDWR Western Region



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region • 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Website: www.idwr.idaho.gov

C.L. "BLTCH" OTTER
Governor

GARY SPACKMAN
Director

July 12, 2018

VICTOR U HOFSTETTER
DANA L HOFSETTER
4494 N CROFT PL
EAGLE ID 83616

Re: Order in the mater of Application for Permit No. 63-34500

Dear Interested Parties:

The accompanying order issued by the Department is an Order Granting In Part Petition for Reconsideration.

If you have any questions regarding this matter, please call me at 208-334-2190.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nick Miller'.

Nick Miller
Western Regional Manager

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2018, true and correct copies of the foregoing **ORDER GRANTING IN PART PETITION FOR RECONSIDERATION** were served by placing a copy of the same with postage prepaid, and properly addressed to the following:

RE: 63-34500

VICTOR U HOFSTETTER
DANA L HOFSETTER
4494 N CROFT PL
EAGLE ID 83616



Rachel Neely
Administrative Assistant

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "preliminary order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the preliminary order, any party may in writing file exceptions to any part of the preliminary order and file a brief in support of the party's position on any issue in the proceeding with the Director. Otherwise, the preliminary order will become a final order of the agency.

If any party files an exception and/or brief, opposing parties shall have fourteen (14) days to respond to the exception and/or brief. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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 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.