

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

IN THE MATTER OF LICENSE NO. 51-7309) **ORDER GRANTING IN PART AND**
IN THE NAME OF GREG OBENDORF) **DENYING IN PART OBENDORF'S**
_____) **PETITION FOR RECONSIDERATION**

This matter having come before the Department of Water Resources ("Department") as a petition to reconsider the issuance of a water right license, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On April 17, 1992, the Department issued Permit No. 51-07309 ("Permit") to John A. Mather ("Mather") authorizing him to appropriate 1.60 cubic feet per second ("cfs") from wastewater to be used for irrigation of 80 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 7, Township 7 South, Range 5 East, B.M., Ada County.
2. Condition no. 4 of the Permit identifies it as an appropriation of trust water pursuant to the Swan Falls Settlement agreement.
3. On April 20, 1994, the Department received Mather's Proof of Beneficial Use statement for the Permit.
4. On April 28, 2005, Mather assigned ownership of the Permit to Greg Obendorf ("Obendorf").
5. On April 11, 2018, the Department completed a Beneficial Use Field Report confirming the extent of the beneficial use of water established in connection with the Permit.
6. On April 25, 2018, the Department issued Water Right License No. 51-7309 ("License") to Obendorf acknowledging that a right to use 0.17 cfs, up to an annual total of 34.8 acre-feet ("af"), of wastewater had been established for the irrigation of 8.7 acres of land within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 7, Township 7 South, Range 5 East, B.M., Ada County.
7. Condition no. 4 of the License states:

When the minimum stream flow water rights in the Snake River at Murphy Gage are not being satisfied, the right holder shall cease diverting water for the consumptive uses authorized by this right.
8. On April 27, 2018, the Department mailed the License to Obendorf. The Department's cover letter states the License is a preliminary order of the Department.

9. On May 11, 2018, the Department received a timely filed Petition for Reconsideration ("Petition"). The Petition states, "the petitioner questions the basis for the significant (about 90%) reduction in acreage and corresponding reduction in the amount of water and the addition of condition #4 which did not appear in the permit for this right."

APPLICABLE RULES AND STATUTES

1. Idaho Code § 42-219 directs the Department to examine the evidence in relation to a permit as follows:

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall state the name and post-office address of such user, the purpose for which such water is used and **the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied.** (Emphasis added)

2. Rule 035.01.j of the Department's Beneficial Use Examination Rules (IDAPA 37.03.02) states, in pertinent part:

For each use of water the examiner shall report an annual diversion volume based on actual beneficial use during the development period for the permit.

3. Rule 035.03.a of the Department's Beneficial Use Examination Rules (IDAPA 37.03.02) states, in pertinent part:

For irrigation purposes, the duty of water shall not exceed five (5) acre feet of stored water for each acre of land to be irrigated or more than one (1) cubic foot per second for each fifty (50) acres of land to be irrigated unless it can be shown to the satisfaction of the Director that a greater amount is necessary.

4. Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01) states, in pertinent part:

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.

ANALYSIS

1. When the Department issues a water right license, it must limit the water right to the extent of beneficial use established during the development period for the permit. See Idaho Code § 42-219.
2. Additional analysis by the Department of the irrigated place of use, as it is seen in aerial imagery, found a maximum annual irrigation of 9.6 acres during the development period for the Permit.
3. Condition no. 4 of the License is a standard administration condition applied to licenses authorizing the use of water held in trust under the Swan Falls Settlement agreement.

CONCLUSIONS OF LAW

1. The Department should grant the Petition in part to modify the number of acres authorized to be irrigated pursuant to the License and to adjust the associated diversion rate and the annual diversion volume of the License accordingly.
2. The Department should not remove condition no. 4 of the License.

ORDER

IT IS HEREBY ORDERED that the Petition is **GRANTED in part** with respect to the number of acres, the diversion rate, and the annual diversion volume of the License.

IT IS FURTHER ORDERED that the Petition is **DENIED in part** with respect to the removal of License condition no. 4.

IT IS FURTHER ORDERED that the elements of the License are **MODIFIED** as follows:

For the beneficial use of irrigation: 9.6 acres, diversion rate of 0.19 cfs, and annual diversion volume of 38.4 af.

The Maximum Diversion Rate of the License is 0.19 cfs.

The Maximum Diversion Volume of the License is 38.4 af.

Dated this 1st day of June, 2018.



Shelley W. Keen, Manager
Water Rights Section



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

June 01, 2018

GREG OBENDORF
26496 DEB LN
PARMA ID 83660

RE: Preliminary Order in the matter of Water Right No. 51-7309

Dear Permit Holders:

The accompanying order is an **"amended preliminary order"** issued by the department pursuant to Rule 730 of the department's Rules of Procedure (IDAPA 37.01.01). It can and will become a final order without further action of the department unless any party petitions for reconsideration within fourteen (14) days after issuance as described in the enclosed information sheet.

If you have any questions regarding this matter, please call me at 208-287-4947.

Sincerely,

A handwritten signature in blue ink that reads "Shelley W. Keen".

Shelley W. Keen
Water Rights Section Manager

Enclosure(s)

c: DANA L. HOFFSTETTER

CERTIFICATE OF SERVICE

I hereby certify that on June 04, 2018, I mailed a true and correct copy, certified, postage prepaid, of the foregoing PRELIMINARY ORDER (**ORDER GRANTING IN PART AND DENYING IN PART OBENDORF'S PETITION FOR RECONSIDERATION**) to the person(s) listed below:

RE: Preliminary Order in the Matter of Water Right No. 57-7604

GREG OBENDORF
26496 DEB LN
PARMA ID 83660

DANA HOFFSTETTER
HAWLEY TROXEL ENNIS & HAWLEY
877 MAIN ST STE 1000
PO BOX 1617
BOISE ID 83701-1617


Darla Block
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.

MEMORANDUM

Date: May 31, 2018
To: Shelley Keen
From: Michele Edl
Re: reconsideration of acres for License 51-7309

A timely petition for reconsideration of License No. 51-7309 has prompted a second look at the conditions of approval and the recommended number of acres.

The "(p)etitioner requested the basis for the significant (about 90%) reduction in acreage and corresponding reduction in the amount of water and the addition of condition #4 which did not appear in the Permit for this right."

On Monday 5/14/2018, I met with the petitioner's representative Dana Hofstetter, to discuss the petition of reconsideration. Ms. Hofstetter expressed the permit holder's desire that additional acres be attributed to the right. She pointed out acres as possibly irrigated based on one of the field examiners' maps but provided no additional evidence with respect to beneficial use.

I provided Ms. Hofstetter large-screen views of the aerial photography that I had used to make my recommendation and demonstrated the difficulty that the Department had with finding irrigation in this area in the absence of ground truthing.

The field examiner's notes indicate that she was considering a follow-up site visit to site confirm the sources of the water and the quantity of irrigation that was occurring. That follow-up visit never occurred. The property ownership and use have changed since the field examiner's visit in 1998. Both Ms. Hofstetter and I agreed that a contemporary follow-up visit would not provide information relevant to the use established before 1998.

The naturally occurring soils in this area are classified as poorly or somewhat poorly drained Letha loam or Baldock loam respectively. The typical depth of the water table for this soil type is 2 to 4 feet below the surface. https://soilseries.sc.egov.usda.gov/OSD_Docs/L/LETHA.html
Lower-lying areas would be capable of supporting dense vegetation without the application of any additional water to the land surface. To create irrigated pasture on these soils, the permit holder would have needed to dig (and re-dig) a system of drainage ditches to convey water away from the property, as well as to any fields which were to be intentionally irrigated. Water would be present in the shallow drainage ditch system with or without any beneficial use occurring.

An approach which considers the only presence of water in a conveyance system and green vegetation in the vicinity without an understanding how much of either are naturally occurring, gives irrigation credit where no credit is due. Better indications of an intentionally irrigated pasture in this area would be evidence of land leveling or the absence of dense shrubbery which are also adjacent to the constructed ditches.

Elevation in the two quarter-quarters of the permitted POU varies approximately 40 feet per mile and is difficult to see in 2D photography. However relative vegetation density can be seen and exploited to make an informed recommendation for irrigation. To estimate the number of acres that were intentionally irrigated by the drain-ditch system serving Right 51-7309, I compared aerial photography from 1987 (before the permit) with aerial photography from July 1999, (the year after the field examiner's visit). I found that the majority of the permit-authorized POU did not show signs of purposeful irrigation.

My revised recommendation is small increase in acres for the license. It is based on a more liberal interpretation of the lands that edge the drainage ditches. As a result, I am recommending an additional 0.9 acre and an increase in volume and rate that is associated with it.

The revised elements for the irrigation use authorized by License 51-7309 are:

9.6 acres

$0.19 \text{ cfs} = 9.6 \text{ acres} \times 0.02 \text{ cfs/ac}$

$38.4 \text{ af} = 9.6 \text{ acres} \times 4 \text{ af/acre}$



