

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE)
NO. 37-22815 IN THE NAME OF)
BLAINE COUNTY)
SCHOOL DISTRICT #61)
_____)

**ORDER GRANTING A PETITION
FOR RECONSIDERATION AND
MODIFYING A PRELIMINARY ORDER**

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 May 3, 2013, the Department issued Permit No. 37-22815 (“permit”) to Blaine County School District #61 (“right holder”) authorizing it to appropriate 1.20 cubic feet per second from groundwater to be used for heating and cooling purposes within the SE¼NE¼, Section 13, Township 04 North, Range 17 East, B.M., Blaine County.
2. On September 16, 2013, the Department received the right holder’s Proof of Beneficial Use statement for the permit.
3. On July 12, 2017, the Department conducted a field examination to confirm the beneficial use of water established in connection with the permit. The Department found that the right holder had developed the permitted water use.
4. On July 25, 2017, the Department issued Water Right License No. 37-22815 (“license”) to the right holder.
5. On August 3, 2017, the Department mailed the license to the right holder. The Department’s cover letter states that the license is a preliminary order of the Department.
6. On August 10, 2017, Christian R. Petrich, the right holder’s representative, filed a petition for reconsideration (“petition”) with the Department in connection with the license. The petition asks that the Department increase the annual diversion volume limit authorized by the license because:

The volume of water needed for heating or cooling purposes in some future year may be substantially greater than that which would have been required within the development period, the last 10 years, or the period of record.

7. The petition proposes that the Department modify the 210.0 acre-foot annual diversion volume limit in one or more of the following three ways:

1. Establish one volume limit for heating *and* cooling uses, and adding to the volume a 50% margin-of-safety premium. This would result in an annual volume limit of 329 AF (210 AF + 9.2 AF = 219.2 AF + 50% = 329 AF).
2. Add a condition stating that the annual volume limit may be exceeded in a particularly cold or hot year.
3. Remove the volume limit entirely, recognizing that (the) use is entirely non-consumptive.

APPLICABLE RULES AND STATUTES

1. Idaho Code § 42-219 directs the Department to examine the evidence in relation to the 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.

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

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.

...

Annual diversion volumes for heating and cooling uses may be adjusted to account for documented weather conditions during any single heating or cooling season from among the fifty (50) years immediately prior to submitting proof of beneficial use for the permit.

...

The following water uses are exempt from the volume reporting requirement:

- i. Diversion to storage. (Volume should be reported for the storage use, such as irrigation storage.)
- ii. Domestic uses as defined in Section 42-111, Idaho Code.
- iii. In-stream watering of livestock.
- iv. Fire protection. (Volume is required for fire protection storage.)
- v. On-stream, run-of-the-river, non-consumptive power generation uses.
- vi. Minimum stream flows established pursuant to Chapter 15, Title 42, Idaho Code.
- vii. Municipal use by an incorporated city or other entity serving users throughout an incorporated city,...

3. 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

The Department cannot issued the license with no annual diversion volume limit. Heating and cooling purposes are not among the exemptions for volume reporting requirements listed in IDAPA 37.03.02035.01.j. The Department cannot issue the license with an approval condition exempting the water right from the annual diversion volume limit in exceptionally hot or cold years. Doing so would be tantamount to removing the required annual volume limit. The Department also cannot modify the annual diversion volume limit on the license to include a 50% margin of safety. IDAPA 37.03.02.035.01.j requires the annual diversion volume to be "based on actual beneficial use during the development period for the permit."

IDAPA 37.03.02.035.01.j does, however, allow the Department to report annual diversion volumes for heating and cooling purposes using documented weather conditions during any single heating or cooling season from among the 50 years immediately prior to submitting proof of beneficial use for the permit. The place-of-use for the license is in an area of the state requiring significantly more heating than cooling from any climate control system. The Department re-examined available climate data from the 50 years prior to proof submittal and found that 1964 would probably have been the single most extreme year for heating demand at the licensed place of use. Using 1964 climate data, the annual combined heating and cooling diversion volume needs for the licensed water use would be 226.0 acre-feet. Listing the same total annual diversion volume limit for both heating and cooling gives the right holder flexibility to meeting climate control requirements without exceeding the total authorized annual diversion volume. The Department should modify the license so that the annual diversion volume limit for each of the two beneficial uses, heating and cooling, are 226.0 acre-feet and the total annual diversion volume limit is also 226.0 acre-feet.

CONCLUSIONS OF LAW

1. The petition was filed timely. IDAPA 37.01.01.730.02.a authorizes the Department to reconsider the issuance of a preliminary order in response to a timely petition for reconsideration.
2. The Department cannot grant the specific modifications requested in the petition. However, the Department can increase the annual diversion volume limit on the license consistent with the provisions of IDAPA 37.03.02.035.01.j specific to heating and cooling water uses.
3. The Department should grant the petition for reconsideration of the preliminary order and modify the annual diversion volume limit on the license.

ORDER

IT IS HEREBY ORDERED that the petition is **GRANTED** pursuant to IDAPA 37.01.01.730.02.a.

IT IS FURTHER ORDERED that the annual diversion volume limits on the license are **MODIFIED** as follows:

- For the heating use, the annual diversion volume limit is 226.0 AF.
- For the cooling use, the annual diversion volume limit is 226.0 AF.
- The total maximum diversion volume for the license is 226.0 AF.

Dated this 28th day of August, 2017.

Shelley W. Keen

Shelley W. Keen, Manager
Water Rights Section

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER GRANTING A PETITION FOR RECONSIDERATION AND MODIFYING A PRELIMINARY ORDER** to the person (s) listed below:

RE: Water Right License No. 37-22815

**BLAINE COUNTY SCHOOL DISTRICT #61
118 W BULLION ST
HAILEY ID 83333**

**CHRISTIAN R PETRICH
C/O SPF WATER ENGINEERING LLC
300 E MALLARD DR STE 350
BOISE ID 83706**



Jean Hersley
Technical Records Specialist II

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.