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March 7, 2017

VIA HAND DELIVERY

Idaho Department of Water Resources
Attn: James Cefalo
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-1718
james.cefalo@idwr.idaho.gov

RE: Response to Letter Dated December 20, 2016; Final Request for Department to Issue Permit for Application for Permit No. 22-7648.

Dear James:

This letter is a response to your letter dated December 20, 2016, which concerns Application for Permit No. 22-7648 (hereinafter, "22-7648"). Thank you for taking the time to review the Department's water right backfile for 22-7648 and confirming that there is no written evidence that provides any clues as to why the application was held, that other ground water applications in Basin 22 for agricultural irrigation were approved during the same time period, and that there is no evidence that the Department ever completed its review of 22-7648. Furthermore, as you stated in your letter, the Amended Moratorium Order did not encompass the property described in 22-7648, which is further evidence that 22-7648 can be issued.

As you know, Idaho Code § 42-203A describes the obligations of the Department when processing an application for water right permit. It states that "[i]n the event that no protest is filed, then the director of the department of water resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the department of water resources." Idaho Code § 42-203A(4).

It is a well-grounded principle of law that an action is governed by the rules and statutes in place at the time an action is undertaken. See *South Fork Coalition v. Board of Commrs. of Bonneville County*, 117 Idaho 857, 861 (1990) ("In *Cooper v. Board of County Commrs. of Ada County*, 101 Idaho 407, 614 P.2d 947 (1980), we further reinforced Idaho's position with the minority jurisdictions that the ordinance in effect at the time of the application is controlling." . . . the law is well established in Idaho that an ordinance in effect at the time of the original filing is controlling[.]; see also *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. . . a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to

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encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); see also Geoffrey C. Weien, *Retroactive Rulemaking*, 30 Harv. J.L. & Pub. Pol’y 749, 2007 (“the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994))).

22-7648 was advertised in the Fremont County Herald-Chronicle, the Idaho Statesman, the Twin Falls Times-News, and the Lewiston Morning Tribune on March 15, 1990 and March 22, 1990. No protests were filed. Because there was then no prohibition on new applications at that time, and the application was processed before the Department’s development of ESPAM and its generally-held position that any impact equates to an injury, the permit should be issued based on those standards, and not be treated any differently than it would have been treated at the time it should have been issued. Evidence of the Department’s processing standards at that time were contained in 22-7648’s companion application for permit (22-7649) as described in a letter from the Department dated February 26, 1990. The letter contained the following statements (with our emphasis):

“If the application is not protested, it will be forwarded to our state office in about five weeks. State office personnel will conduct a complete review prior to final processing of the application and will notify you of the outcome of this review. When a permit is issued, you will be sent a copy. **A typical processing time for an unprotested application is about eight weeks.**”

Because 22-7648 was advertised without protest, a permit should be issued. Re-advertisement of 22-7648 will surely result in protests given the current positions of various irrigation interests that have evolved over the past 25 years. Therefore, my client is opposed to re-advertisement of 22-7648, and has directed me to oppose attempts by the Department to re-advertise it.

As we previously described, 22-7648 sought approval for the development of 10.61 cfs of ground water for use on 821 acres. According to the map contained in the application, the proposed place of use was already mostly irrigated by Water Right Nos. 22-2294 and 22-7057. The map identified only 39 acres for proposed new irrigation located in the W1/2 of the NE1/4 of Section 25, Township 7N., Range 42E. Land in these quarter-quarters are now covered by other water rights which authorize their irrigation. The remarks section of the application document states: “This application filed to bring water up to 0.02 cfs/acre.”

Despite the statement of the applicant’s intent to develop 39 acres of newly-irrigated land,

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we reiterate our prior proposal to help resolve this matter and alleviate concerns the Department may have where my client would consent to issuance of the permit with a condition that it cannot develop newly irrigated lands, and is only being issued to bring the total water rights associated with the designated place of use up to 0.02 cfs/acre.

Because 22-7648 had made it through the advertisement process without protest (just like 22-7649), and because the applicant provided all necessary information requested of the Department, the only remaining act of the Department was the ministerial act of issuing a permit. Please let me know in writing if the Department intends to issue the permit for 22-7648 without re-advertisement. If the Department will not issue the permit, please also notify us in writing. If a permit is not issued, it is likely that the matter may need to be determined by a court, perhaps in a mandamus action. The mandamus action would be based upon Idaho Code § 42-203A(4), as well as the provisions of Idaho Code § 42-204, which provides (with our emphasis):

The department of water resources **shall** issue a permit for any approved application, make a record of the approval and provide a copy of the permit to the applicant, who shall be authorized, on receipt thereof, to proceed with the construction of the necessary works for the diversion of such water, and to take all steps required to apply the water to a beneficial use and perfect the proposed application.

My client hopes to avoid possible litigation, but it is important to its operation to bring its farm's water rights up to 0.02 cfs/acre in order to be as efficient as possible in its operations.

We appreciate your attention to this matter. If you have any questions, or if you discover any new information concerning 22-7648, please let me know.

Best Regards,



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.