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December 16, 2016

VIA EMAIL AND REGULAR MAIL

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: *Formal Request for Department to Issue Permit for Application for Permit No. 22-7648.*

Dear James:

This letter concerns an application for water right permit filed on April 6, 1989 by Riverside Farms, c/o Richard Crapo, which was administratively numbered by the Department as 22-7648. Riverside Farms has now conveyed the property proposed to be irrigated under 22-7648 to numerous limited liability companies, each of which is associated with Crapo farming families. As described in further detail below, the application was advertised without protest, but a permit was never issued. The applicant and its successors request that the permit now be issued.

The following information is taken from documents available under the backfile for 22-7648 from the Department's website.

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."

On April 17, 1989, the applicant was informed that the application could not be processed because of the then-existing Swan Falls controversy. Eventually, however, 22-7648 and a companion application for permit (22-7649) were processed as described in a letter from the Department dated February 26, 1990. The letter contained the following statements (with our emphasis):

Established in 1896

“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.**”

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.

On April 12, 1990, Harold Jones sent a letter to Richard Crapo requesting additional information concerning the unprotested application in order for IDWR to complete its review. Richard Crapo responded in a letter dated August 7, 1990. With all necessary information in the Department's hands by August of 1990, it was anticipated that a permit would be forthcoming. This is particularly the case when considering the statement in the February 19, 1990 letter that the typical processing of unprotested applications was only “about eight weeks.”

Unfortunately, for reasons that are not clear from the water right backfile, no permit for 22-7648 was issued by the Department. However, a permit for 22-7649—the companion application to 22-7648—was issued on May 1, 1990, well within the stated eight-week timeframe for unprotested applications described by the Department.

At the time 22-7548 was advertised, there was no Department moratorium that would prevent issuance of a permit, even for new applications that proposed irrigation of new land. It was not until May 15, 1992 that a moratorium order was entered for new permit applications, an order which was subsequently amended on January 6, 1993, and against on April 30, 1993.

The *Amended Moratorium Order* dated April 30, 1993 contains the following provisions:

3. The moratorium applies to all applications proposing a consumptive use of water filed after the date of the order and to all applications filed prior to the entry of the order for which approval has not been given, except as herein provided.
4. The moratorium does not affect the authorization to continue development of any existing approved application (permit).

An initial reading of these provisions suggests that because the formality of issuing a permit document was not undertaken for 22-7648, the provisions of paragraph 3 bar any further action or development of 22-7648. However, based on the issuance of 22-7648's companion application—22-7649—on May 1, 1990, it appears that 22-7648 was not issued simply due to a Department

oversight or error. 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.

Concerning unprotested permit applications, Idaho Code § 42-203A(4) provides:

“In 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 to of water resources.”

Further, Idaho Code § 42-204 also provides:

“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 he proposed application.”

My understanding is that you have undertaken a review of the Department’s file for 22-7648, and cannot find any documentation explaining or demonstrating why the formal step to issue a permit for 22-7648 was not undertaken when the substance of the unprotested application effectively made it a permit.

Accordingly, please consider this letter to be a formal request for the Department to issue a permit for 22-7648 within thirty (30) days of the receipt of this letter. If the Department declines to issue a permit, we request a written response explaining why the final ministerial step of issuing a permit will not be undertaken. This explanation will then be reviewed by the applicant to determine if it should pursue any other legal remedies.

Finally, it should be noted that the applicant desires to develop the permit as represented in the original application to bring the diversion rate on their farm up to as close to 0.02 cfs per acre as possible. The applicant does not desire to develop new irrigated acreage—the originally designated new acreage in Section 25 is now already covered by other water rights.

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.

James Cefalo
December 16, 2016
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Best Regards,



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