

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

IN THE MATTER OF WATER RIGHT	)	AMENDED PRELIMINARY
LICENSE NO. 63-32003 IN THE NAME OF	)	ORDER IN RESPONSE TO
WEST RIVER HOMEOWNERS	)	A PETITION FOR
ASSOCIATION, INC.	)	RECONSIDERATION
_____	)	

This matter having come before the Idaho Department of Water Resources (“Department”) as a petition for reconsideration of a water right license, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. After conducting a hearing in response to a protest, the Department issued a preliminary order approving Permit to Appropriate Water No. 63-32003 (“Permit”) in the name of Marlin Land Owners LLC (“Marlin”) on May 3, 2006. The permit authorized Marlin to divert 0.12 cubic feet per second (“cfs”) of ground water for in-house domestic use for 36 homes in West River Subdivision in Canyon County. The permit further limited the domestic use to no more than 13,000 gallons per day (“gpd”) per home and to an annual total of no more than 10.1 acre-feet (“AF”). In addition to domestic use, the permit authorized the diversion of up to 0.26 cfs for fire protection purposes. The total authorized diversion rate was also 0.26 cfs.
2. The Department typically issues water appropriation permits for in-house domestic use for up to 0.6 AF per year per home. Based on this standard, the typical annual volume authorized for 36 homes is 21.6 AF. However, Idaho Code § 42-203A(5) requires the Department to ensure that a new appropriation of water will not “reduce the quantity of water under existing water rights.” The Department hearing officer issuing the preliminary order approving the Permit explained in Conclusions of Law nos. 18, 19, and 20, how limiting the annual volume for the domestic use to 10.1 AF met the Idaho Code § 42-203A(5) requirement:

18. The hearing officer could require the submittal of additional information and analysis to determine injury when applying the *Parker*¹¹ standard. In this case, however, the hearing officer is able to limit the appropriation of water to prevent injury to water rights entitled to *Parker* protection. As a result, this decision does not determine the respective burdens borne by the applicant and the protestant of coming forward with information for determination of injury under *Parker*.

19. If the flow rate and annual volume diverted from wells constructed by Marlin are limited to the small quantities assumed by the applicant’s computation in applicant’s exhibit nos. 6 and 7, the largest drawdown in a Knighten Hills well would be less than half of a foot. The most important of these quantities is the

¹¹ *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982).

annual volume pumped. If the annual volume pumped is limited to 10.1 acre-feet, the maximum drawdowns in the Knighten Hills wells will approximate the drawdowns computed in applicant's exhibit nos. 6 and 7.

20. A maximum of one-half foot of drawdown is not sufficient reduction in water level to cause loss of the ability to divert water in the existing Knighten Hills wells or to measurably increase the cost of pumping water.

3. Among its conditions of approval, the Permit contained the following measuring device, measurement, and recording requirements:

Prior to diversion of water under this right, the water right holder must install an in-line measuring device in the mainline from its wells that will accurately measure the instantaneous flow from the wells, record the maximum flow for a given month, and will measure, total, and record the total volume of water diverted from the wells. The totalizer function of the measuring devices must be capable of totalizing several years of volume diverted, and must not allow the operator to reset the volume totalizer. The measuring devices must be a propeller, ultrasonic, magnetic meter or another meter expressly approved by IDWR. The measuring devices must be calibrated after installation with an independent, reliable, portable measuring device that has been pre-calibrated to a known flow rate. The measuring devices must be re-calibrated at least every three years after the first calibration.

The water right holder must read the measuring devices and record the information read at least monthly. The water right holder must read and record the maximum flow rate diverted from each well and the totalizer readings of volume diverted. The water right holder must also maintain records of the dates of measuring device calibration, the method of calibration, and who performed the calibration. These records must be maintained by the water right holder at all times and must be submitted to the Department at any time the Department requests the records.

4. The Permit's measuring device, measurement, and recording requirements were intended to enable the Department to ensure compliance with the annual volume limit for domestic use.
5. The Permit required a proof of beneficial use statement to be submitted to the Department no later than June 1, 2007.
6. On July 13, 2007, the Department granted Marlin an extension of time to submit proof of beneficial use for the Permit.
7. On June 3, 2008, the Department granted Marlin another extension of time to submit proof of beneficial use for the Permit. The new deadline for submitting proof of beneficial use was June 1, 2013.
8. On July 14, 2008, Marlin assigned the Permit to West River, LLC.

9. On June 2, 2013, the Permit lapsed because West River, LLC, did not submit proof of beneficial use.
10. On November 23, 2015, West River, LLC, assigned the Permit to West River Homeowners Association, Inc. ("West River HOA").
11. On January 27, 2016, the Department found West River HOA had met the statutory requirements for reinstating the Permit, and the Department reinstated the Permit.
12. Among the items required for reinstatement of a permit lapsed more than 60 days is a Beneficial Use Field Report ("Field Report") completed by a Certified Water Rights Examiner ("Examiner"). In the Field Report for the Permit, the Examiner stated that prior to the June 1, 2013, proof due date, a well was constructed, water lines were stubbed to 36 lots, and a five horsepower submersible pump was used to distribute water in the West River Subdivision. The examiner determined the pumping capacity using the five horsepower pump to be 0.05 cfs. The examiner also reported that the five horsepower pump was replaced by a fifteen horsepower pump in 2015. The field examiner did not report the number of homes built on the lots in West River Subdivision.
13. Department staff used aerial photography to determine that three homes were constructed in West River Subdivision by the proof of beneficial use due date of June 1, 2013. Homes were constructed on two additional subdivision lots after June 1, 2013, making a total of five homes currently in West River Subdivision.
14. The pumping capacity of 0.05 cfs developed for West River Subdivision before June 1, 2013, is sufficient to supply the 10.1 AF per year permitted for domestic use.
15. The West River Subdivision water system does not include a storage tank.
16. During the authorized development period for the permit, neither West River HOA nor its predecessors in ownership of the Permit measured or recorded water diversion information as required by the Permit. The first measurement occurred on September 17, 2014, and it was not reported to the Department until the end of 2015.
17. On January 27, 2016, the Department issued Water Right License No. 63-32003 ("License") to West River HOA. The License confirms a water right for the diversion of up to 0.05 cfs of ground water for domestic and fire protection purposes, with a maximum annual volume for domestic purposes of 1.4 AF. The License limits the domestic use to five homes. The License also requires West River HOA to continue the measuring and reporting it commenced after the June 1, 2013, deadline for completing development of the permitted water use.
18. On February 8, 2016, the Department received West River's timely *Petition for Reconsideration* ("Petition") of the license. The Petition asks the Department to increase the annual volume limit and the number of homes that may be served. The Petition seeks the issuance of a license for domestic use in a minimum of 15 homes for the following reasons:

“The 0.05 cfs is sufficient to supply 36 homes providing [sic] a storage tank is constructed, and this storage will be added when it is necessary to do so.”

“A capacity of 0.05 cfs was developed, which at the permitted duty of 0.003 cfs per home is sufficient for fifteen homes. At an absolute minimum, the license should be limited to 15 homes and 4.2 afa.”

The License’s “proposed limits are inconsistent with the department policy that provides for inclusion of stubbed-in lots if the water supply is sufficient to meet the anticipated demand.”

“HOA operators were not aware of all of the permit’s conditions, including the condition requiring recording flowmeter readings. Upon being advised of this condition, the operator has regularly recorded meter reading [sic] and will continue to do so. Limiting the license to only five homes based on failure to read the flowmeter is an arbitrary penalty that is inconsistent with Department policy and practice.”

ANALYSIS

The permitted diversion rate of 0.12 cfs for 36 homes is 0.003 cfs, or 1.3 gallons per minute, per home. As suggested in the Petition, a diversion rate of 0.05 cfs would provide 0.003 cfs per home for fifteen homes. However, the relationship between necessary pumping capacity and the number of homes served is not linear, unless the delivery system includes adequate equalization storage. Without storage, as the available pumping capacity diminishes, the likelihood of it being fully consumed by simultaneous demand from the households on the system increases at an accelerating rate. Therefore, the permitted 0.12 cfs, or 0.003 cfs per home, is sufficient to meet peak hourly demand² for 36 homes, but 0.05 cfs is not sufficient to meet the peak hourly demand for 15 homes, even though it would also be 0.003 cfs per home.

Due to the non-linear relationship between peak hourly demand and the number of homes served, the installed capacity of 0.05 cfs is adequate for only a small number of homes, unless there is a storage tank on the delivery system. Since there is no equalization storage in the West River Subdivision system, the system is not capable of providing sufficient water to more than a few homes. This analysis is bolstered by the fact that West River HOA installed larger pumping equipment in 2015 around the time the fourth and fifth homes were added to the system. The timing of the installation of the larger pumping equipment reinforces the conclusion that West River HOA needs more than 0.05 cfs to adequately serve water to more than five homes.

CONCLUSIONS OF LAW

Extent of Beneficial Use Issue

1. Idaho Code § 42-218a.(2) provides as follows, in pertinent part:

² Simultaneous water use in multiple homes, typical of the early morning or early evening.

In connection with a proof of beneficial use statement submitted more than sixty (60) days after such notice of lapsing, the director shall require all of the following items to be submitted to the department:

(a) A report prepared by a certified water right examiner as a result of an examination to clearly confirm and establish the extent of the beneficial use of water established in connection with the permit during the time authorized by the permit and any extensions of time previously approved.

2. Rule 50.07 of the Department's Water Appropriation Rules (IDAPA 37.03.08) states:

The Director may condition permits to require commencement of construction of project works within a designated time interval not to exceed one year and completion of construction of project works and beneficial use of water within a time interval not to exceed five (5) years.

3. "If the applicant is granted a permit, the applicant then has a specified period of time to submit proof that the applicant has completed actual construction of the project and applied the water to full beneficial use. I.C. §§ 42-204 & 42-217." *Idaho Power Company v. Idaho Department of Water Resources*, 151 Idaho 266, 274, 255 P.3d 1152, 1160 (2011).
4. As stated in Water Appropriation Rule 50.07, Idaho Code § 42-218a.(2), and *Idaho Power Company v. Idaho Department of Water Resources*, the Department must limit its review of beneficial use to the development period specified by a permit. In issuing the License to West River HOA for beneficial use in five homes, the Department evaluated the capacity of the water diversion system installed during the development period specified in the Permit. The Department did not give weight to the ability of the distribution system to meet the daily and annual volume requirements for more than five homes because the equalization storage needed for peak hourly demand in more than five homes was not installed during the specified development period for the permit.
5. West River HOA asserts the Department's refusal to issue the License for domestic use in 36 homes (or 15 homes) is inconsistent with its prior use of the stub-in practice when "the water supply is sufficient to meet the anticipated demand." The Department will issue licenses for subdivision lots with water lines stubbed to them, even if homes are not built or occupied on all the lots, *if* the water system is capable of supplying sufficient water for all the lots. The Department refers to this method of evaluating beneficial use in subdivisions as the stub-in practice. However, West River did not demonstrate that the water supply is sufficient to meet the anticipated demand for all the West River Subdivision lots because it did not install a water system capable of supplying its peak hourly demand for more than five homes. The Department's decision to limit the domestic use to five homes is not an arbitrary decision, nor is it based on the failure of West River HOA and its predecessors to comply with the measurement device, measurement, and recording requirements of the Permit. The decision to limit the domestic use to five homes is based on the inability of the West River Subdivision water system installed during the specified development period for the Permit to provide adequate water for more than five homes.

6. The Department should not revise the License to authorize the domestic use of water in more than five homes.

Measuring Device, Measurement, and Recording Issue

7. The measuring device, measurement, and reporting requirements were intended to ensure West River HOA did not cause injury to other water users by exceeding the 10.1 AF annual pumping volume limit for 36 homes. It is very unlikely that five homes would collectively seek to divert more than 10.1 AF per year for their in-house use. Therefore, limiting the License to domestic use in five homes is sufficient to ensure West River will not cause injury to other water users, and measuring and recording diversion amounts is not necessary at this time. Conditions 1, 2, and 3 of the License, which carry forward the measuring and recording requirements into the future, should be replaced with a condition requiring measuring and reporting only if and when the Department determines it is necessary in the future pursuant to the Department's authority in Idaho Code § 42-701.

ORDER

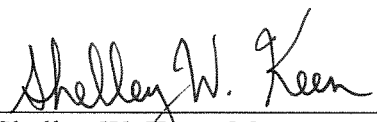
West River HOA's request to modify Water Right License No. 63-32003 to increase the number of homes authorized to be served is hereby **DENIED**.

Water Right License No. 63-32003 is hereby **MODIFIED** by deleting conditions of approval nos. 1, 2, and 3, and replacing them with the following condition:

After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to use power records to determine the amount of water diverted and shall annually report the information to the Department.

The Department will issue a new License with the ordered modifications when this order becomes final.

Dated this 29th day of February, 2016.



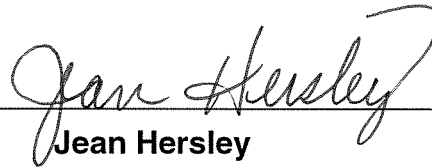
Shelley W. Keen, Manager
Water Rights Section

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2016, I mailed a true and correct copy, postage prepaid, of the foregoing AMENDED PRELIMINARY ORDER (Approved License) to the person(s) listed below:

RE: WATER RIGHT NO. 63-32003

**WEST RIVER HOMEOWNERS ASSOCIATION INC
C/O GERALD VAN REUSEN
PO BOX 1396
NAMPA ID 83653**

A handwritten signature in cursive script, reading "Jean Hersley", is written over a horizontal line.

Jean Hersley
Technical Records Specialist II