

BEFORE OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF WATER RIGHT)
LICENSE NO. 34-7153 IN THE NAME OF)
RONALD C. RISH)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

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

FINDINGS OF FACT

1. On September 24, 1976, the Department issued Permit 34-7153 ("permit") in the name of Leonard C. Price. This permit authorized the diversion of 0.54 cubic feet per second ("cfs") of ground water for irrigation use in the NWNE and SWNE of Section 27, Township 4 North, Range 26 East, Butte County. A condition of permit approval required the permit holder to submit proof of beneficial use of water ("proof") to the Department on or before September 1, 1981.

2. On August 25, 1981, the Department granted an extension of time to provide proof to September 1, 1986.

3. On July 15, 1983, the Department acknowledged the assignment of permit 34-7153 to Phillip A. and Linda L. Rankin.

4. On August 22, 1986, the Department granted an extension of time to provide proof to March 1, 1990.

5. On January 31, 1989, the Department contacted the permit owner to determine the extent of development as required by the Swan Falls Litigation.

6. On May 16, 1989 the Department received an assignment of permit from Phillip A. and/or Linda L. Rankin to Ronald C. Rish ("permit holder").

7. On May 19, 1989, the Department re-authorized the development of the permit.

8. On December 31, 1989, the Department notified the permit holder that proof was due and instructed the permit holder of the steps to be taken to either submit proof or request an extension of time if an extension had not already been granted. The notice was mailed to the address on record, Rt 1 Box 41, Arco, Idaho, 83213.

9. On February 14, 1990, the Department returned a proof of beneficial use form that was received on January 12, 1990, because the \$100.00 examination fee had not been received.

10. On March 1, 1990, the Department issued the permit holder a lapse notice because it had not received an acceptable proof statement or extension request.

11. On October 10, 2014, the Department received a request from the permit holder's consultant, Brockway Engineering ("Brockway"), requesting the Department reinstate the permit. The reinstatement request included a proof of beneficial use statement, the \$250.00 filing fee, and a field report indicating that the permit holder had diverted 0.22 cfs for the irrigation of 14.9 acres within the authorized development period.

12. On January 5, 2014, Department staff sent Brockway a letter requesting additional information to clarify the field report. The letter requested clarification of the flow measurements and the number of acres recommended in the field report. The letter stated that aerial photography Brockway used to identify the place of use in the field report was taken two years after proof of beneficial use was due. Moreover, it did not appear to show a full 14.9 acres of irrigation. Therefore, the Department attempted to find aerial imagery for the development period for the permit, but the available Landsat imagery dating back to the development period, ending on March 1, 1990, did not provide the resolution needed to verify the actual acres irrigated during the development period. The letter gave Brockway the opportunity to provide "crop records, Farm Service Agency photos, or other information that would verify the correct acres irrigated in 1990."

13. On January 21, 2015, Brockway provided a letter and field notes verifying the flow measurements taken and a map showing the permit holder's current irrigation system. In the letter, Brockway asserted that using the 1992 aerial photo and the permit holder's current irrigation system it is reasonable to conclude that the 14.9 acres described in the field exam had been irrigated by 1990. Brockway also stated that the 1989 Landsat imagery suggests that the entire property had been irrigated, and the site inspection revealed that the entire property was irrigable with no draws, rises, or rock piles. Brockway ended the letter with the statement, "*Forensic hydrology is always difficult, and the analyst must ultimately weigh the evidence and make his best judgment. Based on this reasoning and testimony from the land owner of irrigation of the entire area in 1990, I am still recommending that the permit be licensed for 14.9 acres.*"

14. On February 2, 2015, Department staff documented in a licensing review memo, an analysis of the acres irrigated in connection with the permit. The reviewer discusses that there was no discernible irrigation in the Department's 2004, 2010, and 2013 aerial photos, and that approximately 6 acres were irrigated in 2009 and 2011. The irrigation in 2009 and 2011 did not include portions of the acreage recommended by Brockway based on the 1992 aerial photo, i.e. it was less than 14.9 acres. The Department memo also states that SPOT satellite imagery for 1989 and 1990 shows similar irrigation patterns as the 1992 aerial photos. The reviewer concluded that although the entire 14.9 acres may have had water applied to the ground based on the layout of the irrigation system, only 12.5 acres appeared to have grown an actual crop. The reviewer concluded 12.5 acres of irrigation was developed in connection with the permit.

15. On April 1, 2015, the Department reinstated the permit and issued Water Right License 34-7153 for the diversion of up to 0.22 cfs and 43.8 af of ground water for irrigation on 12.5 acres.

16. On April 20, 2015, the Department received through the Brockway a petition for reconsideration of License 34-7153. The petition stated that License 34-7153 should have been issued for 14.9 acres of irrigation. The petition also stated that the license should be based on the 1990 Landsat photography, the water right owner's testimony, and the certified water rights examiners report. The petition also indicated that the licensing examiner used the Landsat satellite imagery to determine the acres irrigated, while claiming that the satellite imagery was not good enough to delineate any real structures or fields.

ANALYSIS

In the high-resolution black-and-white 1992 aerial photography the field examiner used to depict the irrigated place of use, land with actively growing vegetation appears very dark. As the vegetative cover diminishes, the land appears lighter and lighter. Land with no vegetative cover appears almost white. Within the 14.9-acre place of use described by the field examiner, 12.5 acres of land exhibit the dark color consistent with actively growing vegetation. A 2.4-acre strip of land through the middle of the 14.9-acre area appears much lighter, which would indicate that plant growth was not active within the 2.4-acre area. Department staff consulted other resources to determine if the entire 14.9-acre area was actually beneficially irrigated. Landsat imagery shows vigorous plant growth as bright red, with less plant growth appearing as light red and pink. Areas of little or no plant growth appear white or blue. Landsat imagery has much lower resolution than the 1992 aerial photography used by the field examiner. Landsat imagery from 1989 shows some plant growth within the 14.9 acre area, but it does not appear as deeply red as nearby areas of obviously irrigated land. Landsat imagery from 1990 shows much of the 14.9 acre area as deeply red, signifying irrigation, but some land within the northeast portion of the area appears blue, signifying no irrigation. The resolution of SPOT black-and-white imagery from 1989 and 1990 is also not quite as good as the 1992 aerial photography, but it appears to confirm the observation that 2.4 acres within the 14.9- acre area does not support vigorous plant growth. Department staff also consulted high-resolution true-color aerial photography from 2004, 2006, 2009, 2010, 2011, and 2013. In no case was the entire 14.9-acre area irrigated. In the 2006 aerial photography, it is very clear that much of the 2.4-acre area does not support a crop. The Department's conclusion is that even if the irrigation system applies water to the entire 14.9-acre area reported by the field examiner, beneficial use did not occur throughout the entire 14.9-acre area during the development period for the permit. The 1989 and 1990 SPOT images show a pattern of beneficial use more-or-less consistent with the 1992 aerial photography, which depicts 12.5 acres of beneficially irrigated land.

CONCLUSIONS OF LAW

1. The authorized development period for Permit 34-7153 ended on March 1, 1990, when the permit lapsed.
2. The consultant was given the opportunity during the licensing review process to supply crop records, Farm Service Agency photos, or other information that verify the number of acres beneficially irrigated in 1990. In response to the request for clarification of the acres irrigated, Brockway did not provide any additional information that was not contained in the original field report.

3. Beneficial Use Examination Rule 37.03.02.010.23 defines the place of use as follows:

Place of Use (P.U. or POU). The location where the beneficial use is made of the diverted water.

4. Idaho Code 42-219(1) states in part the following (emphasis added):

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.**

5. The petition for reconsideration provided no new evidence beyond what had already been supplied by the original field report and subsequent letters to the reviewer.

6. A field exam either by Department personnel or by a certified field examiner is a guide for the director to determine the amount of beneficial use established by the development of a water right. It is the Director's duty to determine the amount of beneficial use. Using 1989 and 1990 SPOT imagery, the license reviewer could only find 12.5 acres growing a crop within the place of use the field examiner found irrigated. The field examiner was given ample opportunity to provide evidence that a crop had been grown on more than the 12.5 acres, and no additional documentation was supplied. Applying water to ground that does not have a growing crop does not constitute a beneficial use.

7. The Department should deny the petition pursuant to Rule 730.02.a of the Department's Rules of Procedure (IDAPA 37.01.01.730.02a).

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing Water Right License No. 34-7153 is **DENIED**.

Dated this 1st day of May, 2015.

Shelley G. Keen

Shelley Keen, Manager
Water Right Section