

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF LICENSE OF WATER)
RIGHT NO. 36-8800 ISSUED IN THE NAME)
OF DEAN AND DOROTHY HOWARD)
_____)

**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 water right license, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On December 6, 1999, Dean and Dorothy Howard (permit holders) filed application No. 36-8800 to develop a right to divert 0.26 cfs from waste water tributary to Wilson Lake to be diverted in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 32, Township 09 South, Range 20 East, B.M., Jerome County, to irrigate 12.7 acres within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 29, Township 09 South, Range 20 East, B.M., Jerome County.
2. The application noted the land to be irrigated was owned by the Bureau of Land Management (BLM) and was being irrigated pursuant to the Sikes Act. It was further noted that portions of the land had been irrigated since 1978. During processing the application the BLM was notified of the application.
3. On August 17, 2000, the Department received a proof of beneficial use statement for the permit from Dean Howard indicating 12.7 acres was irrigated.
4. On July 21, 2014, a Department field examiner (examiner) conducted an inspection to verify the beneficial use of water developed in accordance with the permit. The examiner reported that the permit holder had diverted waste water and irrigated 12.7 acres in accordance with the permit.
5. Review of aerial photography dated 1998 to 2000 confirms 12.7 was irrigated during the development period of the permit within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 29, Township 09 South, Range 20 East, B.M., Jerome County.
6. Aerial photography dated: 2004, 2006, 2009, 2011 and 2013 confirms irrigation within the within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 29, Township 09 South, Range 20 East, B.M., Jerome County.
7. On July 31, 2014, the Department issued Water Right License 36-8800 (license) as a preliminary order confirming the right to divert 0.26 cfs and up to 50.8 acre feet per year from waste water in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 32, Township 09 South, Range 20 East, B.M., Jerome

County, to irrigate 12.7 acres within the NW¼SE¼ Section 29, Township 09 South, Range 20 East, B.M., Jerome County.

8. On August 14, 2014, the Department received a petition for reconsideration (petition) to issuance of the license filed by BLM (petitioner). The petitioner asks the Department to withdraw granting of the license since the Sikes Act lease for irrigation of the BLM land expired on December 30, 2004, and has not been renewed. They further argue that a water right cannot be established in trespass.

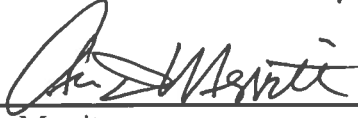
CONCLUSIONS OF LAW

1. IDAHO CODE § 67-5243(3) provides in pertinent part that “Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the issuance of that order. The presiding officer shall render a written order disposing of the petition.”
2. IDAPA 37.01.01 (Rules of Procedure of the Department) Rule 730.02.a. provides in pertinent part that the Department 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.”
3. IDAHO CODE § 42-219 provides in pertinent part that “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.”
4. IDAPA 37.03.02 (Beneficial Use Examination Rules of the Department) Rule 035.01.j. provides in pertinent part that “the examiner shall report an annual diversion volume based on the actual beneficial use during the development period for the permit.”
5. The petitioner has not provided adequate information to show that the license is in error and does not correctly confirm the beneficial use of water established during the development period of the permit. While the BLM is correct that a water right cannot be developed in trespass, this water right was not developed in trespass. The permit holders were authorized to irrigate the land during the timeframe beneficial use occurred. As BLM admits, the Sikes Act lease did not expire until 2004, well after beneficial use occurred. Moreover, it appears from the 2014 field exam that beneficial use is still occurring today. Whether the water right holder can continue to irrigate the land is a property access issue between the BLM and the water right holders.
6. The Department should deny the petition for reconsideration of the order pursuant to Idaho Code § 67-5243(3).

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the order licensing water right 36-8800 is **DENIED** pursuant to Idaho Code § 67-5243(3).

Dated this 20th day of August, 2014.

A handwritten signature in black ink, appearing to read "Allen Merritt", written over a horizontal line.

Allen Merritt
Southern Region Manager

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of August, 2014, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER DENYING PETITION FOR RECONSIDERATION** to the person(s) listed below:

**Documents enclosed: Order Denying Petition for Reconsideration for
Water Right License 36-8800 (Dean & Dorothy Howard)**

DEAN HOWARD
DOROTHY HOWARD
920 PLAINVIEW DR
TWIN FALLS, ID 83301

WAYDE JOHNSON
2352 E 990 S
HAZELTON, ID 83335

BECKY J RUDOLPH
803 S 1975 E
HAZELTON, ID 83335

BUREAU OF LAND MANAGEMENT
FRED PRICE, WATER RIGHTS SPECIALIST
1387 S VINNELL WAY
BOISE, ID 83709-1657

BUREAU OF LAND MANAGEMENT
GARY J WRIGHT, WILDLIFE BIOLOGIST
KASEY C PRESTWICH, REALTY SPECIALIST
SHOSHONE FIELD OFFICE
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SHOSHONE, ID 83352

BUREAU OF LAND MANAGEMENT
STEVEN R DAVIS, HYDROLOGIST
BURLEY FIELD OFFICE
15 E 200 S
BURLEY, ID 83318

A handwritten signature in cursive script, reading "Denise Maline", written over a horizontal line.

Denise Maline
Administrative Assistant