

BEFORE OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF WATER RIGHT)
LICENSE NO. 37-20628 IN THE NAME OF)
WILLIAM FRUEHLING)
_____)

**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 June 4, 2002, the Department issued Permit 37-20628 (“permit”) authorizing William Fruehling (“permit holder”) to develop a right to divert 4.00 cubic feet per second (“cfs”) from a ground water source for wildlife, wildlife storage, recreation, recreation storage, aesthetic, and aesthetic storage purposes. The permit included a condition requiring Proof of Beneficial Use (“proof”) to be submitted on or before June 1, 2007.

2. On May 21, 2007, the Department received a proof statement for the permit.

3. On June 28, 2012, a Department field examiner conducted an examination to verify the beneficial use of water established in connection with the permit. The examiner reported that the well used to supply water for the permitted purposes (“north well”) has a diversion capacity of 4.17 cfs.

4. The examiner also reported that the north well is used as a point of diversion for three other water rights. Two of the water rights sharing the point of diversion with the permit are owned by the permit holder. They are numbered 37-7282B and 37-7333B. The third right sharing a point of diversion with the permit is number 37-13251, which is owned by Mitchell B. Schmidt and Dorothy Schmidt (“Schmidts”). Right 37-13251 authorizes the diversion of water from a second point of diversion (“south well”) in addition to the point of diversion shared with the permit and Rights 37-7282B and 37-7333B. The field examiner reported that the diversion capacity of the pumping system at the south well is 2.35 cfs.

5. Right 37-13251 authorizes a diversion rate of 4.88 cfs.

6. The total pumping capacity of the two points of diversion for Right 37-13251 is 6.52 cfs (4.17 cfs + 2.35 cfs).

7. Schmidts have not diverted water in connection with Right 37-13251 in approximately

20 years.¹ If Schmidts had diverted water under Right 37-13251 during the authorized development period for the permit, the maximum amount of water that could have been diverted under Rights 37-13251, 37-7282B, 37-7333B, and 37-20628 is 6.52 cfs, which is the combined capacity of the pumping systems at the two wells.

8. On January 27, 2014, the Department issued Water Right License 37-20628 (“license”) for the diversion of up to 4.00 cfs of ground water for the permitted water uses. The Department issued the license as a preliminary order pursuant to Rule 730 of the Department’s Rules of Procedure (IDAPA 37.01.01.730).

9. The license included the following conditions limiting the use of the license in combination with the rights sharing its point of diversion:

- Rights 37-7282B, 37-7333B, and 37-20628 when combined shall not exceed a total diversion rate of 4.17 cfs.
- Rights 37-7282B, 37-7333B, 37-13251 and 37-20628 when combined shall not exceed a total diversion rate of 6.52 cfs.

10. On January 30, the Department mailed the license to the right holder.

11. On February 12, 2014, the Department received the permit holder’s timely petition for reconsideration of License 37-20628. The permit holder indicated that “the remainder of the irrigation (Gordon Schmidt’s 4.88 cfs under 37-13251) should be allowed to be diverted from the south well, so the total rate limit should be $4.17 + 4.88 = 9.05$ cfs. With the license as proposed, condition 9 would limit the south well to a diversion of $6.52 - 4.17 = 2.35$ cfs”

12. Idaho Code § 42-219 provides in pertinent part (emphasis added):

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.**

CONCLUSIONS OF LAW

1. Issuing License 37-20628 without conditions limiting its use in combination with the rights sharing its point of diversion could be interpreted as authorization to divert a combined total of up to 9.05 cfs, which would exceed the capacity of the diversion works actually established during the development period for the permit. While it is possible that Schmidts could have changed their pumping system to increase the pumping capacity from the south well so that they could divert the entirety of Right 37-13251 from it, they did not do so. Because Idaho Code § 42-219 directs the Department to issue water right licenses for

¹ The land that is the place of use for Right 37-13251 is enrolled in the federal Conservation Reserve Program (“CRP”). Pursuant to Idaho Code § 42-223(1), water rights appurtenant to land in a federal cropland set-aside program such as the CRP are not subject to forfeiture.

what “has been” used, not what could have been used, the Department must base the license for 37-20628 on the pumping capacity that was actually installed during the development period for the permit.

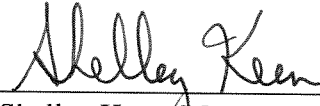
2. The condition limiting rights 37-7282B, 37-7333B, 37-13251 and 37-20628 to a combined total of 6.52 cfs is not necessarily intended to limit the ability of Schmidts to divert 4.88 cfs pursuant to their water right. The reduction could be applied to Fruehling’s water rights, so long as the total limit of 6.52 cfs is not exceeded.

3. 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. 37-20628 is **DENIED**.

Dated this 27th day of February, 2014.



Shelley Keen, Manager
Water Rights Section

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2014, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER DENYING PETITION FOR RECONSIDERATION to the person (s) listed below:

RE: WATER RIGHT LICENSE 37-20628

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