

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT)
LICENSE NO. 21-7406 IN THE NAME OF)
H. J. ORME OR RUSSELL O. BAUM)

PRELIMINARY ORDER
CORRECTING LICENSE

This matter having come before the Idaho Department of Water Resources ("Department") as the result of an error discovered in a water right license, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On January 4, 1989, H. J. Orme and Russell O. Baum filed Application No. 21-7406 with the Department, seeking a permit to divert 2.00 cfs from Fall River for the irrigation of 204 acres. The place of use described in the application included 176 acres in the north half of Section 1, T08N, R43E and 28 acres in the south half of Section 36, T09N, R43E.

2. Much of the irrigated ground in the south half of Section 36, T09N, R43E was already covered by an existing water right. Water right 21-2151 carries a priority date of May 11, 1967 and authorizes the diversion of 1.01 cfs and the irrigation of 153 acres in the SW1/4 and the W1/2 of the SE1/4 of Section 36, T09N, R43E.

3. Application for Permit 21-7406 was intended to cover an additional 28 acres in the south half of Section 36 that had been developed after water right license 21-2151 was issued in 1972. Application for Permit 21-7406 included the following statements: "Lands have been [irrigated] since 1972. [Application was] [f]iled to record actual use of water."

4. Permit 21-7406 was issued by the Department on January 3, 1992. The permit stated that proof of beneficial use was due on or before December 1, 1992. Proof of beneficial use was filed by Russell Baum on November 23, 1992. The proof stated that the full 204 acres had been developed at the proposed place of use.

5. On August 8, 1995, the Department conducted a field exam for Permit 21-7406. The examiner measured the pump diversion from Fall River and found a diversion rate of 3.00 cfs. The examiner recommended that water right 21-7406 be licensed with a diversion rate of 1.99 cfs.

6. The field exam report only identified irrigated acres in the north half of Section 1, T08N, R43E. The examiner did not report any acres in the south half of Section 36, T09N, R43E. The examiner stated that the ground in Section 36 was covered by water right 21-2151.

7. The beneficial use field exam report includes the following statement: "License 21-02151 uses the same point of diversion as 21-07406, but there is no place of use overlap." It

appears from the field exam write-up and the map prepared with the field exam that the examiner did not actively investigate the 28 acres located in Section 36 as listed in the permit.

8. Aerial photography from 1987 and 1992 shows that approximately 181 acres were being irrigated in the SW1/4 and the W1/2 of the SE1/4 of Section 36, T09N, R43E. When the 153 acres associated with existing right 21-2151 are subtracted from that amount, it leaves 28 acres, the exact amount described in Permit 21-7406. Satellite imagery from 1991 and 1996 also confirms the irrigation of approximately 181 acres on the Baum property in Section 36.

9. It appears that the 28 acres in Section 36 were inadvertently left off of the license for water right 21-7406. Evidence strongly suggests that the 28 acres in Section 36 were irrigated prior to 1992. Water right license 21-7406 should be corrected to include the 28 acres in Section 36.

10. Because the diversion rate listed on the license was based on a measurement of the system, no changes should be made to the diversion rate. The season of use should be updated to match the irrigation season of use recognized for that area of the state, 4/1 to 10/31. The maximum annual diversion volume should be adjusted to 714 acre-feet (3.5 acre-feet per acre x 204 acres).

CONCLUSIONS OF LAW

1. Idaho Code § 42-219 describes the Department's role in licensing a water right after proof of beneficial use has been submitted:

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.

2. Under Idaho Code § 42-219, the Department has an obligation to issue a water right license that accurately portrays the extent of beneficial use developed in accordance with a permit.

3. Existing License 21-7406 does not accurately reflect the full extent of beneficial use developed under Permit 21-7406. Evidence available to the Department suggests that 28 acres should be added to the water right in Section 36, T09N, R43E.

4. The Department should correct License 21-7406 to include all of the 204 acres being irrigated under the water right.

ORDER

IT IS HEREBY ORDERED that Water Right License 21-7406 is CORRECTED as set forth in the Corrected Water Right License issued in conjunction with this Order.

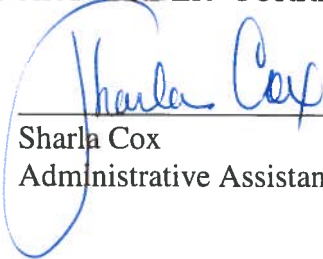
Dated this 3rd day of December, 2013.



James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of December 2013, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER CORRECTING LICENSE, to the person(s) listed below:



Sharla Cox
Administrative Assistant

US MAIL

RE: PRELIMINARY ORDER CORRECTING LICENSE (21-7406)

**Russell Baum
PO Box 569
Ashton, ID 83420**

**Kent Baum
PO Box 328
Ashton, ID 83420**

**Kristine Baum
PO Box 777
Ashton, ID 83420**

**Clen and Emma Atchley
4054 East 1300 North
Ashton, ID 83420**

**Hyrum Erickson
Rigby, Andrus & Rigby Chtd.
PO Box 250
Rexburg, ID 83440**

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was **not** held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.