

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 13-7784 IN THE NAME OF) **ORDER DENYING PETITION**
MILLER FAMILY REAL ESTATE, L.L.C.) **FOR RECONSIDERATION**

On March 15, 2011, Miller Family Real Estate, L.L.C. ("Miller") filed Application for Permit No. 13-7784, seeking a permit to divert water from Current Creek, Stockton Creek, and Cottonwood Creek for recreation and aesthetic storage. The application was advertised to the public beginning on May 19, 2011. Protests were filed by Brent Abbott, Merrill Ranch Partnership, LLC ("Merrill"), Treasureton Irrigation Company ("Treasureton"), and Strongarm Reservoir Irrigation District ("Strongarm"). PacifiCorp filed a motion to intervene in the contested case, which was granted on October 20, 2011.

Treasureton withdrew its protest against the application by filing a Stipulation for Withdrawal of Protest. The stipulation set forth specific conditions that Treasureton wanted added to the permit and referred to a March 1, 2012 Settlement Agreement between Miller and Treasureton, which included additional provisions applying to those parties.

Mr. Abbott, PacifiCorp and Merrill withdrew their protests against the application by filing a *Stipulation for Withdrawal of Protests*. The stipulation set forth specific conditions that the signing parties wanted added to the permit and referred to a May 15, 2012 Settlement Agreement between Miller, Mr. Abbott, Merrill, and PacifiCorp, which included additional provisions applying to those parties.

Strongarm withdrew its protest against the application by filing a *Stipulation for Withdrawal of Strongarm Reservoir Irrigation District's Protest*. The stipulation was filed with the Department on February 7, 2013.

On March 4, 2013, the Department issued Permit 13-7784, authorizing Miller to begin development under the permit. A copy of the permit was served on all of the parties on March 4, 2013. Permit 13-7784 did not include all of the proposed conditions listed in the various stipulations and settlement agreements. Permit 13-7784 did include the following condition:

The diversion and use of water described in this right may be subject to additional limitations agreed to by the protestants and the right holder under separate agreements to which the Department is not a party and which may be enforceable by a court of law.

Attorney T.J. Budge filed a *Joint Petition for Reconsideration* ("Petition") on behalf of Merrill and Treasureton on March 18, 2013, exactly 14 days after Permit 13-7784 was issued by the Department. The issuance of a permit is considered a preliminary order of the Department.

Therefore, any party to the contested case could file a petition for reconsideration within 14 days of the service date of the permit. The Petition filed by Merrill and Treasureton was filed in a timely manner.

The Petitioners argue that three specific conditions should have been included on the permit as directed by the various stipulations and settlement agreements. The Petition states, “Unless and until [the three] conditions are added, the protests of Merrill and Treasureton remain in effect.” The three proposed conditions are as follows:

The use of water under this water right shall be subject to the terms of the Settlement Agreement effective May 15, 2012 between Miller Family Real Estate, LLC, Merrill Ranch Partnership, LLC, Brent Abbott, and PacifiCorp, on file with the IDWR.

The use of water under this water right shall be subject to the terms of the Settlement Agreement effective March 1, 2012, between Miller Family Real Estate, LLC and Treasureton Irrigation Company on file with the IDWR.

Diversions from Cottonwood Creek are limited to times when the Treasureton Irrigation Company diverts water into the Treasureton Canal for irrigation purposes, unless prior written approval is obtained from Treasureton Irrigation Company to divert water through the Treasureton Canal during times when water is not being diverted into the Canal for irrigation purposes.

Idaho Code § 42-203A(5) authorizes the Department to issue water permits with conditions of approval. Rule 50.01 of the Department’s Water Appropriation Rules (IDAPA 37.03.08) states: “The Director may issue permits with conditions to insure compliance with the provisions of Title 42, Chapter 2, Idaho Code, other statutory duties, the public interest, and specifically to meet the criteria of Section 42-203A . . . including conditions to promote efficient use and conservation of energy and water.” Before a water right license is issued, the Department must verify that the water user has complied with all of the conditions of the permit. (See Idaho Code § 42-219(8))

According to Rule 50.01, the Department may add conditions to a permit that are directly related to the Department’s statutory responsibilities. Because the Department must verify that all permit conditions have been satisfied prior to issuing a water right license and must also ensure ongoing compliance with water right conditions after a license is issued, the Department must be judicious in adding conditions to permits. The conditions proposed by the Petitioners to be added to Permit 13-7784 fall outside of the enforcement jurisdiction of the Department and should not be included on the permit.

The condition describing the delivery of water through the Treasureton Canal is essentially a private conveyance agreement. Miller and Treasureton must determine when and how the privately owned canal system can be used to convey Miller’s water rights. The Department does not have enforcement authority over private conveyance agreements and, therefore, should not include a summary of the private conveyance agreement as a permit condition.

The conditions describing the private settlement agreements between the parties should also not be included on the permit. Informal settlement of contested water right matters is encouraged by the Department. However, the Department must be careful not to imply or assume enforcement authority over contractual matters such as private settlement agreements. The condition added to the permit, described above, sufficiently recognizes the various settlement agreements without making the Department responsible to enforce the terms of the agreements.

The Petition likens the stipulations and private settlement agreements from this case to stipulated settlement agreements adopted by civil courts. This analogy is not valid, however, because, unlike a civil court, the Department does not have enforcement jurisdiction over much of the subject matter contained in private settlement agreements. For example, a private settlement agreement may include a provision relating to the division of maintenance costs associated with a shared ground water well. Although the provision may be related to water, the Department does not have authority to require compliance with the maintenance provision. Therefore, the Department should not include such a provision on the water permit.

The Petitioners argue that when the Department accepts a stipulation to resolve a protest, it "must" include on the resulting permit all conditions agreed to by the parties, regardless of whether the subject matter of the conditions falls within the Department's statutory authority. This is not correct and could lead to unreasonable outcomes. The Department could find itself having to enforce conditions not even remotely related to the diversion and use of water. The Petition does not identify any statute or rule requiring the Department to include conditions on permits that are outside of the statutory authority of the Department.

The Petition filed by Merrill and Treasureton asks the Department to re-issue Permit 13-7784 with the three conditions listed above added to the permit. For the reasons stated, the Department cannot include the conditions on the permit. Therefore, the Petition should be denied.

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by Merrill and Treasureton is DENIED.

Dated this 5th day of April, 2013.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of April 2013, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER DENYING PETITION FOR RECONSIDERATION to the person(s) listed below:



Judea Jones
Administrative Assistant

US MAIL

RE: Order Denying Petition for Reconsideration (Permit 13-7784)

**Paul Arrington
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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.