

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF	)	PRELIMINARY ORDER CONCLUDING
LICENSE NO. 36-7291A	)	THAT CLARIFYING LANGUAGE
	)	SHOULD NOT BE ADDED
	)	TO WATER RIGHT NO. 36-7291A
_____	)	

This matter having come before the Idaho Department of Water Resources (“Department”) as a request for a hearing pursuant to Idaho Code § 42-1701A(3), the Department finds, concludes, and orders as follows:

PROCEDURAL HISTORY

On December 14, 2012, the Director (“Director”) of the Idaho Department of Water Resources (“Department”) issued a *Final Order Adding Clarifying Language to Assist the Department in Administration of Water Rights Entitled to Qualified Subordination (Appendix B List)* (“Final Order”) in the matter of water right no. 36-7291A. The Final Order added a condition to water right no. 36-7291A. The condition was added to assist the Department in water right administration by making it easier to determine, based upon the face of the water right, which water rights do not receive the benefit of unqualified subordination under the Swan Falls Agreement (“Agreement”) and the Contract to Implement Senate Bill 1180 (“1180 Contract”).¹ The condition was added to water right no. 36-7291A and to other water rights within the trust water area which have priority dates senior to October 25, 1984, but which did not have beneficial use or substantial investment² prior to October 25, 1984.³

On December 26, 2012, the Department received a *Request for Hearing* (“Request”) from Phil Blick (“Blick”) of Northside Farms Co. (“Northside”), the owner of water right no. 36-7291A. In the Request, Blick asserted that the clarifying language should not be added to water right no. 36-7291A because beneficial use of water in accordance with water right no. 36-7291A was established before October 25, 1985.

On March 25, 2013, the Department conducted the requested hearing. Blick was the sole

1. The history and effect of the Swan Falls Agreement and the 1180 Contract are described in greater detail in the Final Order and will not be repeated in this order but are adopted herein by reference.

2. As defined in the 1180 Contract.

3. While the 1180 Contract uses a cutoff date of November 19, 1982, the parties subsequently agreed in the proceedings in SRBA Subcase No. 00-91013 to use October 25, 1984 as the cutoff date for both the Swan Falls Agreement and the 1180 Contract.

witness. At the hearing, Blick submitted a written statement identified as *Exhibit A*.

FINDINGS OF FACT

1. On February 23, 1973, the Department issued permit no. 36-7291 to Marin Dobrev and/or Shirley Dobrev (“Dobrevs”) authorizing the diversion of 3.2 cubic feet per second (“cfs”) of ground water within the NE¼NE¼ of Section 35, T8S, R14E, B.M., for the irrigation of 160 acres of land. Of the proposed place of use, 80 acres were to be in the N½NE¼ of Section 35, T8S, R14E, B.M., and 80 acres were to be in the N½NW¼ of Section 36, T8S, R14E, B.M.
2. Sometime in the years before 1979, Dobrevs sold the permitted place of use. Northside acquired the portion of the place of use lying in Section 35, and Edward Hubbard and/or Geneva Hubbard (“Hubbards”) acquired the portion of the place of use in Section 36. Northside rented the Hubbards’ portion of the place of use and began farming the entire permitted place of use. For the first year or two that it farmed the permitted place of use, Northside irrigated with water from Northside Canal Co. After a year or two, Northside rented mainlines and sprinkler lines to irrigate the permitted place of use for a year. Northside then purchased its own sprinkler equipment for irrigation of the place of use.
3. In *Exhibit A* from the hearing on this matter, Blick wrote that Northside purchased \$42,920 of pumping and irrigation equipment in “1974 or 1976.” Among the listed equipment are “6 wheel lines” for \$18,000.00 and “2 hand lines” for \$2,500.00.
4. On January 30, 1978, Dobrevs assigned permit no. 36-7291 to Northside. Also on January 30, 1978, Northside assigned half of permit no. 36-7291 to the Hubbards. Northside retained half of permit no. 36-7291 to irrigate the N½NW¼ of Section 36, T8S, R14E, B.M. Northside’s half of permit no. 36-7291 was re-designated as permit no. 36-7291A (“permit”). The Hubbards’ half of permit no. 36-7291 was re-designated as permit no. 36-7291B (“Hubbard permit”).
5. On January 31, 1978, Northside applied for an extension of time to submit proof of beneficial use in connection with its permit. In its application, Northside stated:

Ground has been developed, Irr. by partial of the Ground belonging to part owner of the Permit [sic].

New Well on our own property. Has used Neighbors well for last years Crop.
Will drill new well this Spring.
6. On February 23, 1978, the Department approved Northside’s extension request and set the proof of beneficial use deadline as February 1, 1979.

7. Also on January 31, 1978, Northside applied to the Department to amend the point of diversion for its permit to the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, T8S, R14E, B.M., and the place of use for the permit to the W $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 36, T8S, R14E, B.M. The Department approved the amendment on March 10, 1978.

8. On January 8, 1979, Northside applied for another extension of time to submit proof of beneficial use in connection with the permit. In its application, Northside stated:

Well has been drilled, and sprinkler system has been installed.

Idaho Power Co. will not supply power for the well until pending lawsuit is settled.

9. On January 12, 1979, the Department approved Northside's extension request and set the proof of beneficial use deadline as February 1, 1984.

10. On March 21, 1984, Northside applied for a third extension of time to submit proof of beneficial use in connection with the permit. In its application, Northside stated:

Completed drilling of a well.

Idaho Power Co. has refused to connect power for pumping due to Swan Falls lawsuit.

11. On April 23, 1984, the Department approved Northside's extension request and set the proof of beneficial use deadline as February 1, 1989.

12. On September 6, 1988, Northside submitted a proof of beneficial use statement for the permit.

13. On March 6, 1989, Northside submitted a *Trust Water Information Questionnaire* ("questionnaire") stating that water had not been used in connection with the permit before July 1, 1985. Blick signed the questionnaire for Northside. At the hearing, Blick stated that he had signed the questionnaire, but he really did not know what he was signing. His testimony at hearing was that irrigation in connection with the permit had occurred before 1985.

14. On May 10, 1989, the Department issued a *Continuation Order* concluding that the permitted use would appropriate trust water and re-authorizing development in compliance with the provision of Idaho Code § 42-203D.

15. On May 15, 1989, the Department completed a *Beneficial Use Field Report* confirming the beneficial use of water in accordance with the permit. The field examiner reported that Northside diverted water from a well in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36, T8S, R14E,

B.M., and irrigated 69 acres with “8 ¼-mile sprinkler lines.”

16. On January 17, 1991, Northside Farms Co. assigned the permit to Farm Credit Bank of Spokane and Philip J. Blick.
17. On November 27, 1992, the Department issued water right license no. 36-7291A (“license”) to Northside Farms Co. and Farm Credit Bank of Spokane for the diversion of 1.17 cfs of ground water within the SW¼NW¼ of Section 36, T8S, R14E, B.M., for the irrigation of 69 acres in the W½NW¼ of Section 36, T8S, R14E, B.M. Approval condition no. 8 on the license states:

This right is for use of Trust Water and is subject to review to determine availability of water for the use and to re-evaluate the public interest on May 10, 2009.

ANALYSIS

Despite the questions about the timing of first use of water, the most relevant and compelling evidence for this matter is that Northside invested more than \$42,000.00 for irrigation equipment in the years between permit issuance and the original proof due date in February of 1978. Of the total investment, Northside spent \$20,500.00 for a total of eight sprinkler lines. The 1989 *Beneficial Use Field Report* confirms that the place of use for the permit was irrigated with eight sprinkler lines. The amount spent exceeds the \$15,000.00 needed to qualify as a substantial investment.

CONCLUSIONS OF LAW

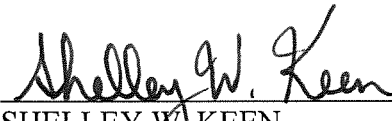
1. Northside made a substantial investment in irrigation equipment to develop the water use authorized by permit no. 36-7291A before October 25, 1984.
2. The water diverted in connection with license no. 36-7198A is not trust water.
3. Approval condition no. 8 should be removed from license no. 36-7198A.
4. The clarifying language added to license no. 36-7198A by the Final Order should not be added to the license.

ORDER

IT IS HEREBY ORDERED that because the Department finds that the water diverted pursuant to water right no. 36-7291A not trust water and that clarifying language **SHOULD NOT BE INCLUDED** on water right no. 36-7291A.

IT IS FURTHER HEREBY ORDERED that approval condition no. 8 should be removed from license no. 36-7198A.

DATED this 8th day of April, 2013.



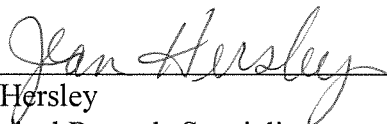
SHELLEY W. KEEN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April, 2013, I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER CONCLUDING THAT CLARIFYING LANGUAGE SHOULD NOT BE ADDED TO WATER RIGHT NO. 36-7291A** to the persons listed below:

NORTHSIDE FARMS CO
C/O PHIL BLICK
PO BOX 635
BOISE ID 83321

JAMES C TUCKER
IDAHO POWER COMPANY
PO BOX 70
BOISE ID 83707



Jean Hersley
Technical Records Specialist

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.