

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO)
CORRECT WATER RIGHT LICENSE)
NO. 98-7193)
_____)

**PRELIMINARY ORDER
CORRECTING LICENSE**

This matter having come before the Department of Water Resources ("Department") as a result of Notice of Change in Water Right Ownership, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On April 11, 1977, Richard and/or Sharlene Grantham ("Granthams") applied to the Department to appropriate 0.20 cubic feet per second ("cfs") from an unnamed spring in Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M., for domestic, irrigation, and stockwater purposes. The proposed place of use was in Government Lot 2 (SW $\frac{1}{4}$ NE $\frac{1}{4}$), Section 3, Township 64 North, Range 2 East, B.M. Government Lot 2 actually corresponds to what would be the NW $\frac{1}{4}$ NE $\frac{1}{4}$ in a regular section of the public land survey system. Within Section 3, Township 64 North, Range 2 East, B.M., the SW $\frac{1}{4}$ NE $\frac{1}{4}$ lies immediately south of Government Lot 2. The map Granthams submitted with the application shows the proposed point of diversion and place of use clearly within Government Lot 2, but the square symbol which seems to depict the proposed domestic use is close to the line between Government Lot 2 and the SW $\frac{1}{4}$ NE $\frac{1}{4}$. The Department assigned number 98-7193 to the application ("application").

2. On June 23, 1977, the Department issued Permit 98-7193 ("permit") as proposed in the application.

3. Richard Grantham submitted a proof of beneficial use statement for the permit on April 14, 1982.

4. In 1988 a Department field examiner conducted an examination to verify the beneficial use of water established in connection with the permit. The field examiner found an unnamed spring in Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M. The spring provided a supply of domestic water to a house. The examiner's map, a photocopy of a portion of a U.S.G.S. 1:24000 topographic map, depicts the domestic use southeast of the spring, just south of the line dividing Government Lot 2 from the SW $\frac{1}{4}$ NE $\frac{1}{4}$. The water right file contains two photographs, both apparently taken by the field examiner. One photograph shows a home with a green metal roof and is labeled "Place of use". The other photograph, labeled "Point of Diversion", shows a small pool of water with one-inch PVC pipe leading away.

5. On September 19, 1989, the Department issued Water Right License 98-7193 ("license" or "water right" or "right") to the Granthams for the diversion of water from an unnamed spring for domestic use. The licensed point of diversion is Government Lot 2, Section 3, Township 64 North,

Range 2 East, B.M. The licensed place of use is the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East, B.M.

6. On July 30, 2003, the Department received a *Notice of Change in Water Right Ownership* from John T. Day and Sharon L. Day (“Days”) for the water right. To support their ownership change notice, the Days submitted a warranty deed conveying two tracts of land from the Granthams to them. Both tracts are in Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M., which does not match the licensed place of use. Nevertheless, on August 1, 2003, the Department acknowledged receipt of the Days’ ownership change notice.

7. On July 2, 2012, the Department received a *Notice of Change in Water Right Ownership* (“notice”) from Gertrude Day for Water Right License 98-7193. To support her notice, Gertrude Day submitted three quitclaim deeds, each describing the same parcel of land, which is further described as a portion of the two tracts conveyed in the warranty deed from Granthams to Days. The first quitclaim deed -- dated June 30, 2004 -- conveys the interests of John T. Day and Sharon L. Day in the parcel to Andy L. Armes and Trudy Day-Armes. The second quitclaim deed -- dated August 18, 2004 -- appears to accomplish the same objective as the first quitclaim deed, although the property legal description might be slightly altered. The third quitclaim deed released Andy Armes’s interest in the same parcel to Gertrude Day. (It appears that Gertrude Day is the name used by Trudy Day-Armes after her divorce from Andy Armes.) On July 12, 2012, the Department returned the notice to Gertrude Day because the parcel described in the quitclaim deeds is in Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M., whereas the licensed place of use for the right is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East, B.M.

8. On August 2, 2012, Eric Davis (“Davis”) of the Department met with Gertrude Day at her home to investigate the water use under the right. The photograph Davis took of Gertrude Day’s home that day shows the same home photographed by the field examiner in 1988. The home now has a roof extension, perhaps a carport, which was not in place in 1988, and the green metal roof has been replaced by a gray metal roof. In the Davis photograph, a large lawn lies to the right of the driveway leading to the house. Recent aerial photography available to the Department shows a house fitting this description -- gray roof, lawn, roof extension -- in Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M., just north of the line separating it from the SW $\frac{1}{4}$ NE $\frac{1}{4}$. A Global Positioning System point collected by Davis during his visit corresponds to the location of Gertrude Day’s home. Tax parcel ownership information available to the Department indicates the house is on a parcel of land owned by Gertrude Day. Davis found that Gertrude Day’s house receives its domestic water supply from a spring located northwest of the house.

9. The recent aerial photography also shows a house approximately 200 feet southwest of Gertrude Day’s home. This house is located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East, B.M., (the licensed place of use) on a parcel owned by Williams Trust. This house does not appear on 1992 aerial imagery available to the Department. Another house lies a little further to the southwest, approximately 770 feet from Gertrude Day’s house, on a parcel owned by Richard Vilelli (“Vilelli”). The Vilelli home may have existed in 1992.

10. The field examiner’s photograph and Eric Davis’s photograph depict the same house -- Gertrude Day’s house -- as the one receiving water pursuant to Right 98-7198. However, Gertrude Day’s house is in Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M., whereas the field examiner said the home to be licensed is in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East, B.M. The field examiner used a 1:24,000 scale topographic map. His ability to accurately draw the

quarter-quarter lines on the map was limited by the small scale of the map. Consequently, his location for the home receiving water under Right 98-7198 was imprecise. Since the house on the Williams Trust parcel did not exist when the field examiner confirmed the water use under Right 98-7198, it could not have been the domestic use confirmed by the examiner. The Villelli home is in the licensed place of use and, theoretically, could have been the licensed domestic use. However, its distance from the line separating Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M., from the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 3, Township 64 North, Range 2 East, B.M., makes it unlikely. The only house in the area that reasonably could have been the established place of use was the house now owned by Gertrude Day.

CONCLUSIONS OF LAW

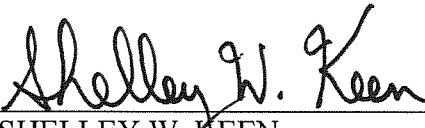
1. Idaho Code § 42-219 directs the Department to issue a water right license that accurately portrays the beneficial use of water developed in accordance with the permit.
2. The place of use for Water Right 98-7193 is within Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M.
3. Gertrude Day owns the place of use for Water Right 98-7193.
4. The current license does not accurately depict the beneficial use of water established in connection with the permit.
5. The Department should revise the place of use on the license.
6. The Department should acknowledge Gertrude Day's ownership of Water Right 98-7193.

ORDER

IT IS HEREBY ORDERED that the place of use description for Water Right License 98-7193 is **CORRECTED** to Government Lot 2, Section 3, Township 64 North, Range 2 East, B.M.

IT IS FURTHER HEREBY ORDERED that Water Right License 98-7193 shall show Gertrude Day as the owner of the water right.

Dated this 27th day of March, 2013.



SHELLEY W. KEEN
Manager, Water Rights Section

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2013, I mailed a certified true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER CORRECTING LICENSE** to the person (s) listed below:

RE: PRELIMINARY ORDER CORRECTING LICENSE NO. 98-7193

**GERTRUDE DAY
530730 HWY 95
BONNERS FERRY ID 83805**

**RICHARD VILLELLI
533739 HWY 95
BONNERS FERRY ID 83805**

**WILLIAMS TRUST
PO BOX 744
BURSON CA 95225**

**IDAHO DEPT WATER RESOURCES
NORTHERN REGION
7600 N MINERAL DR STE 100
COEUR D'ALENE ID 83815**

A handwritten signature in cursive script, reading "Jean Hersley", is written over a horizontal line.

**Jean Hersley
Technical Records Specialist I**

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.