

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE	)	
NO. 22-13457 IN THE NAME OF	)	PRELIMINARY ORDER
<u>JOHN SMITH OR RICHARD SMITH</u>	)	CORRECTING LICENSE

This matter having come before the Idaho Department of Water Resources ("Department") as the result of a motion to set aside a partial decree within the Snake River Basin Adjudication ("SRBA") the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On December 29, 1982, John H. Smith filed an application (No. 22-7418) with the Department, seeking a permit to divert 14.40 cfs of ground water to irrigate 720 acres. The place of use described in the application included the NENW and NWNW of Section 18, T05N, R41E. The place of use did not include acres in the SWNW or SENW of Section 18, T05N, R41E.

2. Permit 22-7418 was issued by the Department on June 11, 1985. The permit place of use was identical to the application place of use and did not include acres in the SWNW or SENW of Section 18, T05N, R41E. Proof of beneficial use was filed by John Smith on July 1, 1985. Mr. Smith stated that he developed 720 acres under the water right permit.

3. On June 16, 1988, John Smith filed claim 22-7418 in the SRBA. Claim 22-7418 described a diversion rate of 4.4 cfs and the irrigation of 617 acres. The place of use listed in claim 22-7418 did not include acres in the SWNW or SENW of Section 18, T05N, R41E. A competing SRBA claim for a portion of water right 22-7418 was filed by Franko Farms Inc. c/o Frank Webster in August 1988.

4. Recognizing that Franko Farms was entitled to a portion of water right 22-7418, John Smith and Richard Smith filed an amended claim in the SRBA in August 1988. The amended Smith claim was assigned no. 22-7418A. The Franko Farms claim was assigned no. 22-7418B. The Smith claim, 22-7418A, described a diversion rate of 3.83 cfs and the irrigation of 537 acres. Claim 22-7418A listed the SWNW and SENW of Section 18, T05N, R41E.

5. Claim 22-7418A included the following statement:

By agreement Mr. Smith leases 80 acres in W1/2 NE1/4 Sec 13 T5N R40E to Franko Farms Inc. who uses their own wells to irrigate this leased ground (claimed under A22-7418B). Franko Farms Inc. in-turn leases 80 acres S1/2 NW1/4 Sec 18 T5N R41E to Mr. Smith who uses his own irrigation system to irrigate this ground as recorded in this claim.

6. The S1/2 of the NW1/4 of Section 18, T05N, R41E was originally covered by water right 22-7071. Right 22-7071 was licensed in November 1978 in the name of Franko Farms and included the S1/2 of the NW1/4 of Section 18. The SRBA claim filed by Franko Farms for right 22-7071 listed the 80 acres of the Smith property (in Section 13, T05N, R40E) being irrigated by the Franko Farms well under the exchange agreement described above.

7. The SRBA claim for 22-7071 did not include the S1/2 of the NW1/4 of Section 18. Franko Farms was allowed to claim a place of use different from that listed on water right license 22-7071 under an accomplished transfer theory because the change occurred prior to 1987. The partial decree issued by the SRBA Court for right 22-7071 did not include the S1/2 of the NW1/4 of Section 18.

8. Because water right 22-7418 was still a permit at the time the SRBA commenced, the Department needed to conduct a review the water right and issue a water right license before the SRBA claim could be processed. On July 9, 1997, the Department conducted a field exam of water right 22-7418A.

9. The field examiner found 592.7 acres being irrigated under water right 22-7418A. The irrigated place of use included acres in the SWNW and SENW of Section 18, T05N, R41E. The field examiner also determined that 5.87 cfs could be diverted from the Smith ground water well.

10. Water right 22-7418A was renumbered to 22-13457 at the time of licensing. When the Department prepared the license for 22-13457, there was discussion about whether the SWNW and SENW of Section 18, T05N, R41E should be included on the Smith license because Mr. Smith did not own the land.

11. In January 2006, a Department employee, Kay Walker, prepared a memo summarizing the history and basis for license 13-13457. The memo included the following discussion:

Lands in S1/2NW1/4, Sec. 18 were previously licensed under Rt. 22-7071 but those lands have not been claimed in the SRBA under Claim 22-7071. [Department staff] will request an amended claim for 22-7071 so that [staff] can recommend the lands in S1/2NW1/4, Sec. 18 as part of that licensed right. I did not include these lands in licensing recommendations [for water right 22-13457] as they are licensed under Rt. 22-7071

12. The SRBA claim for right 22-7071 was never amended by Franko Farms to cover the S1/2 of the NW1/4 of Section 18. License 22-13457 did not include the S1/2 of the NW1/4 of Section 18.

13. A partial decree for right 22-13457 was issued by the SRBA Court on November 24, 2008. The partial decree for right 22-13457 did not include any irrigated acres in the S1/2 of the NW1/4 of Section 18.

14. In April 2012, the Department notified Webster Brothers Farms, the current owner of the property, that the S1/2 of the NW1/4 of Section 18 was being irrigated without a valid water right. In response to that notice, Richard Smith, who continues to lease the property, contacted the department to discuss the history of water right 22-13457. On December 28, 2012, Mr. Smith filed a motion with the SRBA Court to set aside the partial decree for right 22-13457 to address the acres left off of the water right license.

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. License 22-13457 does not accurately portray the full extent of beneficial use developed under the Smith portion of Permit 22-7418 because it does not include acres irrigated by Mr. Smith in the SWNW and SENW of Section 18, T05N, R41E. Evidence shows that Mr. Smith was leasing the SWNW and SENW of Section 18 in the mid-1980s and could therefore develop a water right on that property.

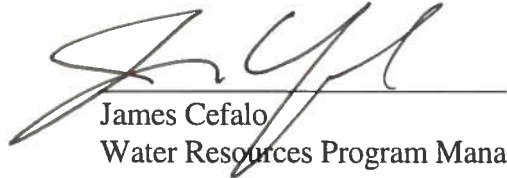
4. Evidence also shows that the SWNW and SENW of Section 18 was intentionally left off of license 22-13457 in anticipation of an amended claim being filed by Franko Farms for water right 22-7071. The amended claim was never filed by Franko Farms, leaving the SWNW and SENW of Section 18 not covered by a valid water right.

5. Because the irrigated place of use developed by Mr. Smith under water right 22-7418 (22-13457) included the SWNW and SENW of Section 18 through a valid lease agreement, those acres should be included on license 22-13457. The Department should correct License 22-13457 to include all of the acres found by the field examiner in Section 18.

ORDER

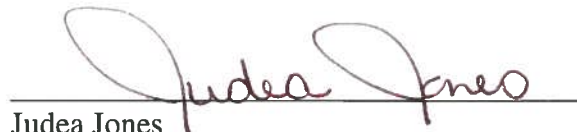
IT IS HEREBY ORDERED that Water Right License 22-13457 is CORRECTED as set forth in the Corrected Water Right License issued in conjunction with this Order.

Dated this 26th day of February, 2013.


James Cefalo
Water Resources Program Manager

CERTIFICATE OF MAILING

I hereby certify that on the 28th day of February 2013, I mailed a true and correct copy of the foregoing PRELIMINARY ORDER CORRECTING LICENSE, to the person(s) listed below:


Judea Jones
Administrative Assistant

US MAIL

RE: PRELIMINARY ORDER CORRECTING LICENSE (22-13457)

**Richard Smith
PO Box 8
Rexburg, ID 83440**

**Jerry Rigby
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.