**BEFORE THE DEPARTMENT OF WATER RESOURCES**

**OF THE STATE OF IDAHO**

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| IN THE MATTER OF<br>LICENSE NO. 22-7474 | ) | **ORDER GRANTING PETITION FOR RECONSIDERATION AND FINAL ORDER CONCLUDING THAT WATER RIGHT 22-7474 IS ENTITLED TO UNQUALIFIED SUBORDINATION UNDER THE SWAN FALLS AGREEMENT** |

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. 22-7474. The Final Order added a condition to water right no. 22-7474. 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. 22-7474 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 investment[2] prior to October 25, 1984.[3]

On December 27, 2012, the Department received a Petition for Reconsideration ("Petition") from the owners of water right no. 22-7474, Jay Ronald Peterson and Judy Anne Peterson ("Petersons"). The Petersons assert that water right no. 22-7474 meets the requirements for unqualified subordination. The Petition was supported by photocopies from the official water right file, maps generated by the Department's online resources, and a letter from Jay R. Peterson dated December 21, 2012. On January 16, 2013, the record was supplemented with an affidavit of Jay R. Peterson.

In the Petition, there are two arguments as to why the Director should reconsider the Final Order. First, the Petersons state that water right no. 22-7474 was put to beneficial use prior to

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.

October 25, 1984. Second, they assert that they expended in excess of $15,000 to develop water right no. 22-7474 prior to October 25, 1984.

In response to the Petersons request for reconsideration, the Department extensively reviewed the water right file for water right no. 22-7474. The Department looked for evidence of actual beneficial use of water prior to October 25, 1984, or evidence of a substantial investment pursuant to a valid permit. Based on the following findings, the record establishes the beneficial use standard and the substantial investment standard were met.

- On August 6, 1976, the 8-inch well identified as one of the points of diversion for water right no. 22-7474 was completed.

- On August 29, 1983, the Department received a *Claim to a Water Right* ("Claim") from the Petersons. The claim indicates the Petersons began diverting water from their 8-inch well in 1976 to supply water for irrigation, domestic, and stockwater purposes. The domestic use included a subdivision. The Claim was not maintained on file, presumably because the described use violated the mandatory permit requirement for ground water use.

- On January 2, 1984, Petersons applied for a permit to divert ground water to irrigate 140 acres, supply water to 30 homes, and water stock within the NE¼SE¼, NW¼SE¼, SW¼SE¼, and SE¼SE¼ of Section 22, Township 7N, Range 40E.

- On May 24, 1990, the Department received a Trust Water Information Questionnaire from the Petersons. Regarding development of the proposed water use prior to October of 1984, the response provides conflicting answers. Petersons responded that 130 acres had been irrigated from ground water prior to October 1, 1984. When asked if irrigation had **not** yet occurred, how many acres would be irrigated in the future, the Petersons answered "130 acres" again. In this document, the Petersons also stated that for "the last 8 years" they had been diverting water from their 8-inch well to supply water to 7 homes, 30 head of cattle, and 30-60 acres of irrigation. The use of ground water for irrigation was supplemental to surface water delivered from Farmers Friend Canal. Finally, the Petersons also stated that they were extending power to their 16-inch well, which they spent $1000 cleaning. The date of the expenditure was not provided.

- On May 25, 1990, the Department wrote a memo stating that the supplemental groundwater use proposed in the Petersons application would be "a trust water diversion".

- On July 13, 1990, the Department approved water right permit no. 22-7474 with the proof of beneficial due on or before August 1, 1994.

- On July 22, 1994, Petersons submitted a proof of beneficial use statement in connection with the permit.

- On August 12, 1996, the Department conducted a beneficial use field examination to confirm the use of water established in connection with the permit.

- On March 26, 2003, the Department issued water right license no. 22-7474 to Petersons for stockwater use, domestic use for 13 homes, and irrigation for 131 acres.

## DISCUSSION

From the water right file alone, it is not clear how much the Petersons invested in their ground water diversion and delivery systems before October 25, 1984. However, in the affidavit Jay R. Peterson provided to support the Petition, he states that in 1976 he spent about $28,500 to complete the 8-inch well, install a pump, build a pump-house, and supply power to the pump-house. Based upon this affidavit, the Department concludes the Petersons made a substantial investment to develop water right no. 22-7474 prior to October 25, 1984.

## CONCLUSION

The owners of permit no. 22-7474 made a substantial investment in the development of the water right prior to October 25, 1984. By doing so, the owners of water right no. 22-7474 met the criteria for unqualified subordination protection under the Agreement and the 1180 Contract.

The Director should grant the Petersons' request for reconsideration and refrain from adding to water right no. 22-7474 a new condition indicating that the water right owner is entitled only to qualified subordination protection.

## ORDER

The Petersons petition for reconsideration is **GRANTED** and the language regarding qualified subordination provisions **SHALL NOT BE INCLUDED** on water right no. 22-7474.

DATED this 17th day of January, 2013.

GARY SPACKMAN
Director

## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2013, I mailed a true and correct copy, postage prepaid, of the foregoing ORDER GRANTING PETITION FOR RECONSIDERATION AND FINAL ORDER CONCLUDING THAT WATER RIGHT 37-7808 IS ENTITLED TO UNQUALIFIED SUBORDINATION UNDER THE SWAN FALLS AGREEMENT and with Explanatory Information To Accompany A Final Order to the persons listed below:

JAY RONALD PETERSON
JUDY ANNE PETERSON
2169 E 200 N
ST ANTHONY ID 83445

HYRUM ERICKSON
RIGBY ANDRUS & RIGBY
PO BOX 250
REXBURG ID 83440

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

Deborah J. Gibson

Deborah Gibson
Administrative Assistant to the Director

# EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

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

(Required by Rule of Procedure 740.02)

The accompanying order is a "**Final Order**" issued by the department pursuant to section 67-5246, Idaho Code.

## PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4), Idaho Code.

## REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

## APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.