

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF
LICENSE NO. 57-7267

) **ORDER DENYING PETITION**
) **FOR RECONSIDERATION**
)
)

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. 57-7267. The Final Order added a condition to water right no. 57-7267. 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. 57-7267 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.

On December 24, 2012, the Department received a letter from Robert A. Thomas ("Thomas"). The letter asks the Department to reconsider the Final Order on the grounds that the water right supplements surface water rights which were developed prior to October 25, 1984. Thomas states in part:

Although the project was not completed until 1991, I believe that a substantial investment was put in to corresponding surface water rights 57-00049, 57-00055, 57-00056B, 57-00072, 57-00074, 57-00079, and 57-00081, with the construction and maintenance of ditches since the late 1800's. The majority of this ground to which water has been beneficially used for irrigation since that time and was continued until 1991 when a well was drilled for water right 57-7267. Since surface water and ground water sources are considered to be conjunctively related, as shown by Swan Falls agreement, this right should be considered to be developed as early as the late 1800's.

In response to Thomas' petition for reconsideration, the Department has undertaken an extensive review of the water right file for this water right, looking for evidence that actual

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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.

beneficial use of water occurred prior to October 25, 1984 or that, pursuant to a valid permit, substantial investment was made. The records suggest that neither the beneficial use standard nor the substantial investment standard were met.

- On January 20, 1981, Oliver Cox applied to the Department to irrigate 840 acres from ground water. The application states Browns Creek water is used at the proposed place of use. The Department approved the application as permit no. 57-7267 (“permit”).
- On April 9, 1986, Oliver Cox assigned all his right, title and interest in the permit to Shirley Cox (“Cox”).
- On April 9, 1986, Cox applied for an extension of time to submit proof of beneficial use in connection with the permit. In her request, Cox states that the land has been cleared and some sprinkler equipment has been purchased with a cost of \$30,000. The Department approved the extension until March 1, 1989.
- On January 10, 1989, Cox applied for a second extension of time to submit proof of beneficial use in connection with the permit. In her request, Cox states that the land has been cleared and some equipment has been purchased with a cost of \$30,000. The Department approved the extension until October 1, 1991.
- On May 24, 1989 Department staff sent a Trust Water Information Questionnaire (“Questionnaire”) to Cox. On June 20, 1989, the Questionnaire was completed. The Questionnaire states that water was used prior to July 1, 1985. However, the irrigation appears to have taken place using decreed surface water rights rather than ground water as authorized by the permit.
- On July 18, 1989, Department staff wrote a memorandum that states that 242 irrigated acres will be supplemented with ground water while the remaining 589 acres on the permit will not be irrigated. The memo further states that the 242 acres should be counted as supplemental acres and not trust water acres, and the resulting order should have the effect of reducing the permit from 840 acres to 242 acres.
- On November 20, 1989, the Department issued a Continuation Order. The Department found that 232 acres were irrigated prior to July 1, 1985 using “other water rights” and ordered that the permit be limited to 232 acres. The Department added trust water conditions to the permit.
- On September 27, 1990, Cox submitted an Application for Amendment of a Permit to change the location of the point of diversion. The application describes the place of use as 232 acres within the original 840 acre place of use.
- On January 26, 1991, a well was completed for Cox.

- On October 1, 1991, the Department did not receive a proof of beneficial use statement in connection with the permit, and the permit lapsed.
- On October 10, 1991, Cox submitted a proof of beneficial use statement in connection with the permit. The Department reinstated the permit with the priority date advanced to April 6, 1981.
- On April 12, 1996, the Department issued water right license no. 57-7267 to Cox for the irrigation of 210 acres.
- On January 29, 1997, the Department acknowledged a change in ownership of water right license no. 57-7267 from Cox to Robert A. Thomas.

CONCLUSION

While the first request for extension of time to submit proof of beneficial use in connection with the permit indicates some sprinkler irrigation equipment had been purchased, it did not say if the purchase occurred prior to October 25, 1984. In addition, the substantial investment made by Cox had been in connection with multiple senior surface water rights, not water right license no. 57-7267. While Thomas is correct that surface and ground water rights are generally conjunctively administered in Idaho, this does not mean that they are considered the same source. *City of Pocatello v. Idaho*, 152 Idaho 830, 838, 275 P.3d 845, 853 (2012). Here, Cox developed a new water right from ground water when she developed water right no. 57-7267. The general rule is that a water right from ground water is separate and distinct from a water right with a source of surface water and the two are not interchangeable. This proceeding focuses only on whether water right no. 57-7267 was put to beneficial use prior to October 25, 1984 or whether the water right holder incurred a substantial investment for establishment of water right no. 57-7267 prior to October 25, 1984. The record does not support a conclusion that either occurred prior to October 25, 1984.

The record indicates that water right no 57-7267 was not put to beneficial use prior to October 25, 1984. Without additional information, it cannot be determined if a substantial investment as defined in the 1180 Contract was made prior to October 25, 1984. Based on the information presented, IDWR concludes this right is not entitled to unqualified subordination protection.

ORDER

Thomas' petition for reconsideration is **DENIED**.

DATED this 14th day of January, 2013.

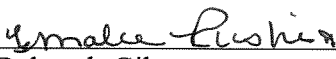

GARY SPACKMAN
Director

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2013, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER DENYING PETITION FOR RECONSIDERATION** with **Explanatory Information To Accompany An Order Denying a Petition for Reconsideration** to the person listed below:

ROBERT A THOMAS
17947 SHORT CUT RD
MURPHY ID 83650

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

for 
Deborah Gibson
Administrative Assistant to the Director

EXPLANATORY INFORMATION TO ACCOMPANY AN ORDER DENYING PETITION FOR RECONSIDERATION

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

(Required by Rule of Procedure 740.02)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, 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.