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DEPARTMENT OF
WATER RESOURCES

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Resource Company, LLC, Petitioner

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

In the Matter of License No. 63-7533

PETITION FOR RECONSIDERATION

Petitioner, Basin and Range Resource Company, LLC, by and through its counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, and pursuant to Title 67, Chapter 52, Idaho Code and IDAPA 37.01.01 respectfully files this *Petition for Reconsideration* regarding the *Preliminary Order Denying Petition to Correct License No. 63-7533*. This *Petition* is supported by the following Memorandum, the contemporaneously filed *Affidavit of Dana L. Hofstetter* (“*Affidavit Hofstetter I*”), *Affidavit of Steve Hannula* (“*Affidavit Hannula I*”) and

other matters of record with the Idaho Department of Water Resources (“IDWR” or the “Department”), including without limitation, the previously filed *Affidavit of Dana Hofstetter* (“*Affidavit Hofstetter I*”) and *Affidavit of Steve Hannula* (“*Affidavit Hannula I*”) in this matter.

Memorandum

I. Statement of facts.

On or about December 17, 1971, Ray Obendorf (the “Permitholder”) submitted an Application for Permit to Appropriate the Public Waters of the State of Idaho (the “Application”) with the, then titled, Idaho Department of Water Administration. *Affidavit Hofstetter I, Exhibit A*. The Application requested 1.0 cubic feet per second (“cfs”) of ground water for stockwater uses to be diverted in the NE1/4SE1/4 of Section 23, Township 6 North, Range 5 West, B.M., in Payette County, Idaho. *Id.* On December 18, 1975, Director Keith Higginson of the Idaho Department of Water Administration approved the Application for 1.0 cfs and issued Water Right Permit No. 63-7533 (the “Permit”). *Id.*

The Permitholder timely submitted the Proof of Beneficial Use for the Permit on or about November 3, 1976 and indicated that the extent of use was 1.0 cfs. *Id.* An IDWR representative conducted a licensing field examination on March 24, 1977. *Affidavit Hannula I, Exhibit B*. The IDWR field examiner identified in the Field Report a total quantity of 1.0 cfs determined from “test pump information” and also a quantity of 80 acre feet per annum (“AFA”). *Id.* The Field Report section entitled “Measurement Calculation” further noted, *inter alia*, “Water is used for stock water and also to sprinkle feedlot and cattle during dry hot weather. Well tested at 50”

diversion rate into ditch.” *Id.* The “Remarks” section of the Field Report noted, “System in operation at time of exam.” *Id.*

By subsequent notations dated January 31, 1978 on the Field Report, another IDWR reviewer (initials WHM), crossed out the 1.0 cfs quantity identified by the original field examiner and replaced it with 0.45 cfs. *Id.* The 0.45 cfs apparently was based on calculations for 2,000 head of cattle drinking 12 gallons per day each during a 2 hour period each day. *Id.* The original 80 AFA quantity in the Field Report also was struck and replaced with a volume of 27 AFA, based on calculations of what 2,000 cattle would drink over the course of a year. *Id.* Thus, the new quantities of 0.45 cfs and 27 AFA were based solely on the calculated quantities of water that the 2,000 cattle would drink but did not include any quantities associated with the related uses of feedlot and cattle sprinkling apparently for dust suppression and cattle cooling. *Affidavit Hannula I.*

On or about February 21, 1978, IDWR issued Water Right License No. 63-7533 to Ray Obendorf. *Affidavit Hannula I, Exhibit C.* License No. 63-7533 in certain places designated a diversion rate of 1.0 cfs and, in other places, 0.45 cfs. *Id.* The License identified a total annual volume of 27 acre feet. *Id.* Petitioner, Basin and Range Resource Company, LLC (“Basin and Range” or “Petitioner”), is a successor in interest to Water Right No. 63-7533. *Affidavit Hofstetter I, Exhibit B.*

On February 25, 2011, Basin and Range filed with the Idaho Department of Water Resources a *Petition to Correct License No. 63-7533* along with a *Motion for Summary Decision and Memorandum in Support*, and *Affidavit Hofstetter I* and *Affidavit Hannula I*, requesting

correction of the licensed quantities to 1 cfs and 80 AFA based on the documented results of the field examination.

On March 20, 2011, IDWR issued its *Preliminary Order Denying Petition to Correct License* denying correction of License No. 63-7533 (“License”) on the following grounds:

1. IDWR found that limiting use under the License to 0.45 cfs and 27 acre feet per year was not an error as, “The decision was a determination of beneficial use based on the permitted use of stockwater for 2,000 cattle.” and 2. The original Permitholder could have objected or filed an appeal after receiving the February 2, 1978 letter from IDWR describing the intended quantities to be licensed and within 60 days after the License issued on February 21, 1978. In this *Petition for Reconsideration*, Basin and Range respectfully asks that IDWR reconsider the *Preliminary Order Denying Petition to Correct License* since: 1. The February 2, 1978, letter incorrectly represented to the Permitholder that the IDWR field examiner found that only 0.45 cfs and 27 AFA could be recognized as beneficially used under Idaho law; 2. The usual IDWR procedure where field examination results are not consistent with permit elements is to amend the permit to conform to the field examination and such procedure was not followed in this case; and 3. IDWR has the authority to correct, and generally does correct, its licensing errors pursuant to Idaho Code § 67-5254(1), even when these are identified outside of the usual licensing appeal periods.

II. The February 2, 1978, letter incorrectly represented to the Permitholder that the IDWR field examiner found that only 0.45 cfs and 27 AFA could be recognized as beneficially used under Idaho law.

In its *Preliminary Order*, IDWR relies on the Permitholder receiving the February 2, 1978, IDWR letter which provided ten days to notify IDWR of any errors prior to License issuance. However, the February 2, 1978, letter IDWR sent to the Permitholder

incorrectly described the results of the field examination as finding only 0.45 cfs that could be recognized as beneficially used and the maximum quantity diverted to be 27 AFA:

A representative of this Department made an examination of the works covered by your Permit No. 63-7533 on March 24, 1977, and has found the following:

Amount of water that can be recognized as beneficially used under Idaho Law: 0.45 cfs

The maximum quantity diverted shall not exceed 27 acre feet per year.

Affidavit Hofstetter I, Exhibit A. Thus, the February 2, 1978 letter would have led the Permitholder to believe that the field examination only found 0.45 cfs and 27 acre feet actually used.

Unbeknown to the Permitholder at the time, the field examiner's March 24, 1977, Field Report, prepared the same date as the actual field examination, actually recommended 1 cfs and 80 acre feet based on his observations with the "system in operation at time of exam." *Id.* The Permitholder ordinarily does not receive a copy of the Field Examiner's Report and therefore would have no reason to believe that the information in the February 2, 1978, letter was not an accurate statement of the field examiner's findings.

The February 2, 1978 letter should not be used as a basis for requiring the Permitholder to have raised the discrepancy and identified the issue at the time of License issuance. That letter actually could have misled the Permitholder into believing that the 0.45 cfs and 27 acre feet were the quantities determined by the field examiner. However, the License record now reflects that the field examiner actually recommended for licensing quantities of 1.0 cfs and 80 AFA, based on his field observations.

III. **The usual IDWR procedure where field examination results are not consistent with a permit of amending the permit to conform to the field examination was not followed in this case.**

The need for permit amendment is a frequent occurrence as water right development may not always occur as originally planned. *Idaho Code § 42-211* specifically provides for changes to the permitted place, period or nature of the intended use, or other substantial permit changes in such circumstances:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms to be furnished by the department of water resources together with the statutory fee for filing and recording same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder.

IDWR field examiners frequently identify discrepancies between their field results and the operative permit. Consistent with *Idaho Code § 42-211*, IDWR utilizes a Permit Amendment process for addressing such discrepancies prior to licensing: “Suggested amendments shall be noted on the field report when the place of use, point of diversion, period or nature of use is different from the approved permit...” *IDWR, Beneficial Use Examination Rules, IDAPA 37.03.02.035.01(p)*.

To the extent the feedlot and cattle sprinkling were not encompassed within the Permit’s “stock water” use, another nature of use should have been added to the Permit through the permit amendment process. Pursuant to *Idaho Code § 42-211* and *IDAPA 37.03.02.035.01(p)*, the

ordinary IDWR procedure would have been for these discrepancies to be noted and an Application for Amendment provided to the Permitholder prior to license issuance. However, to simply drop these beneficial uses (and the associated quantities) from the License was inconsistent with Idaho law and ordinary IDWR practice.

There are innumerable examples in IDWR files of Permit Amendments undertaken for licensing purposes. A few such examples are discussed here; but IDWR files are replete with many others. A well known Permit Amendment involved Permit No. 63-3618, associated with Lucky Peak Reservoir. On March 15, 1984, the Bureau of Reclamation requested that additional uses, besides irrigation and irrigation storage, be added to the Permit No. 63-3618 which had been originally approved 20 years earlier, in 1964. *Affidavit Hofstetter II, Exhibit A*. The requested amendment was approved and instream flow maintenance and flood control were added as uses to Permit No. 63-3618. *Id.*

Permit No. 95-9045 was the subject of two separate permit amendments, one approved in 2007 and the other approved in 2010. *Affidavit Hofstetter II, Exhibit B*. Permit No. 95-9045 originally provided for irrigation and domestic uses from Coeur d'Alene Lake. The first amendment changed the nature of use from irrigation and domestic to municipal and irrigation and also changed the place of use. *Id.* The second amendment changed the nature of use to just municipal and also changed the point of diversion. The original priority date of April 12, 2000 was maintained throughout these amendments.

Permit No. 63-31862 presented a similar procedural circumstance as Permit No. 63-7533. After the permitholder's submission of Proof of Beneficial Use and performance of the field examination, it was determined that the place of use for Permit No. 63-31862 needed to be amended to conform to the field examiner's findings. *Affidavit Hofstetter II, Exhibit C*.

Accordingly, IDWR sent the Permit holder a letter informing the permitholder of the need to amend Permit No. 63-31862 and enclosed an Application for Amendment for the permitholder to sign and return so that the license could be issued based on the water use as it was actually developed. *Id.* The permitholder signed and returned the Application for Amendment and shortly thereafter License No. 63-31862 was issued based on the permit, as amended. *Id.* Likewise, Permit No. 63-9744's points of diversion and place of use were amended to conform to field examination results. *Affidavit Hofstetter II, Exhibit D.*

These examples, although but a few, confirm IDWR's usual procedure of allowing Permit Amendments to allow for license issuance based on the field examiner's findings, at least where the Permit Amendments would not exceed the originally authorized quantity. Here, the Permit authorized a quantity of 1 cfs with no diverted volume limit identified. The quantities of 1 cfs and 80 AFA determined by the field examiner would be covered by the original Permit and there would be no reason not to have offered a Permit Amendment in this instance, to the extent the feedlot and cattle sprinkling uses were not deemed part of the described "stock water" use. *See Affidavit Hannula II.*

IV. IDWR has the authority to correct, and generally does correct, its licensing errors pursuant to Idaho Code § 67-5254(1), even when these are identified outside of the usual licensing appeal periods.

There is authority for a permitholder not to be penalized where the proof of beneficial use deadline is missed because of an error or mistake of IDWR. *See* Idaho Code § 42-219. In the matter of the correction of Magic West, Inc.'s License No. 61-7189, IDWR also found that it has authority to correct a License under Idaho Code § 67-5254(1) where an IDWR error may have caused a reduced quantity of water to have been licensed. *IDWR, Final Order, In the Matter of*

License No. 61-07198 in the Name of Magic West, Inc. (January 22, 1999), attached as *Exhibit E* to *Affidavit Hofstetter II*.

The *Magic West* case bears many similarities to this subject Permit. On October 27, 1990, IDWR issued License No. 61-7189 in the amount of 0.67 cfs and 12.9 AFA to Magic West based on a field examination it had performed. On May 5, 1997, Magic West submitted a Petition to adjust the license to IDWR asserting that Magic West had used a larger volume of water under the permit than the 12.9 AFA subsequently provided on the license. Magic Valley contended that because a larger volume of water was beneficially used during the time period authorized by the permit prior to the beneficial use examination conducted by IDWR, the volume limitation in the license should be amended to reflect the higher volume of water actually beneficially used during the time period. Although IDWR had relied on information provided by Magic West during the field examination in issuing the license, IDWR found that it had erred procedurally by failing to involve Magic West's designated representative in the field examination and subsequent requests for information. Accordingly, after reviewing available data concerning beneficial use during the time prior to the field examination, IDWR corrected the authorized diversion volume under License No. 61-07189 from 12.9 AFA to 58 AFA.

Likewise in this proceeding, it was error for IDWR not to license the full beneficial use as documented in the field examination, with a Permit Amendment, if one was deemed necessary. As in *Magic West*, the License should be corrected to reflect the full beneficial use established during the authorized period.

V. **Conclusion.**

For the foregoing reasons, the License should be corrected to reflect the beneficial use quantities of 80 AFA and 1.0 cfs identified in the Field Examiner's Report.

DATED this 5th day of May, 2011.

HOFSTETTER LAW OFFICE, LLC

By 
Dana L. Hofstetter, for the firm
Attorney for Basin and Range Resource
Company, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of May, 2011, I caused a true copy of the foregoing **PETITION FOR RECONSIDERATION** to be served by the method(s) indicated on the following:

Original to:

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Idaho Department of Water Resources
The Idaho Water Center
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