

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE)
NO. 63-7533 IN THE NAME OF)
RAY OBENDORF)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

This matter having come before the Department of Water Resources (Department) as a petition to reconsider a *Preliminary Order Denying Petition to Correct License*, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On February 25, 2011, the Department received a *Petition to Correct License* from Basin and Range Resource Company, LLC (petitioner) in reference to license 63-7533. The petition identifies Basin and Range Resource Company, LLC as the owner of the place of use described in license 63-7533. Basin and Range Resource Company, LLC, is the claimant listed in the Snake River Basin Adjudication recommendation for subcase 63-7533. The petitioner requests that license 63-7533 be corrected to include all the uses documented in the beneficial use field report and to authorize a total diversion rate of 1.0 cfs and a total diversion volume of 80 acre-feet per year.

2. On April 20, 2011, the Department issued a *Preliminary Order Denying Petition to Correct License* 63-7533 on the grounds that the Department's decision to limit the use under the license to 0.45 cfs and 27 acre-feet per year for stockwater purposes was not an error and that the permit holder at the time had two opportunities to object if he disagreed with the quantity of water licensed.

3. On May 5, 2011, the Department received a *Petition for Reconsideration* regarding the *Preliminary Order Denying Petition to Correct License*. The petition for reconsideration argues:

“1. The February 2, 1978, letter incorrectly represented to the Permitholder (sic) 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; 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.” Petition page 4.

4. On March 24, 1977, a Department field examiner (examiner) conducted an inspection to verify the beneficial use of water developed in accordance with the permit. The field exam report provides that “[w]ater is used for stockwater and also to sprinkle feedlot and cattle during dry hot weather.” The examiner estimated the diversion works could divert 1.0 cfs based on test pump information. The examiner listed 80 acre-feet as the recommended total annual diversion volume. The examiner did not provide an explanation for recommending 80 acre-feet.

5. On January 31, 1978, a Department employee (reviewer) tasked with reviewing the field exam report and making a recommendation on how the water right should be licensed reviewed the March 24, 1977 field exam report. The reviewer recommended that the license be issued for 0.45 cfs, the amount necessary to supply 12 gallons of water for each head of cattle during a two-hour pumping period. The reviewer recommended an annual diversion volume of 27 acre-feet based on 12 gallons per day per head for 2000 head of cattle over 365 days a year.

6. On February 2, 1978, the Department sent Ray Obendorf (permit holder) a letter that informed him that an examiner conducted an examination of permit 63-7533 on March 24, 1977 and found that the amount of water that can be recognized as beneficially used under Idaho law is 0.45 cfs and that the maximum quantity delivered shall not exceed 27 acre-feet per year. Although the examiner found additional uses for more water, the letter was an accurate statement based upon the permitted use of stockwater. Moreover, the letter did inform the permit holder that a license would be issued for the amounts listed unless the permit holder disagreed and contacted the Department within 10 days. The permit holder had the opportunity to contact the Department to review the field examiner's report and to inform the Department if he disagreed with the quantities listed or if he determined that the quantities listed were insufficient. The permit holder did not respond, and only after 33 years is the issue now being raised by a new owner.

7. In cases where an amendment of permit is warranted, Department practice is to seek an amendment of the permit from the permit holder. For example, if an examination revealed an authorized water use was developed in a location not described on the permit, an amendment of the permit would be sought to ensure that the use can be authorized in the alternate location. An amendment of permit 63-7533 was not warranted because the beneficial use of stockwater for 2000 head of cattle, as described on the application and permit, was fully confirmed and additional water to sprinkle the feedlot and cattle during dry hot weather was considered an additional use. An additional water use cannot be authorized by amending the permit.

8. The Department's determination that 0.45 cfs and 27 acre-feet per year was the extent of beneficial use authorized by the permit was not an error. The Department reviewer had the field examiner's report and recommendations available for his review. After reviewing the available information, the reviewer made a determination of the extent of beneficial use authorized by the permit and the Department issued license 63-7533 to reflect that determination.

CONCLUSIONS

1. Section 67-5243(3), *Idaho Code*, provides in pertinent part as follows:

Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the issuance of that order. The presiding officer shall render a written order disposing of the petition.

2. Rule 730.02.a. of the Rules of Procedure of the Department provides in pertinent part that the Department will "dispose of the petition for reconsideration within twenty-one (21) days of its receipt or the petition will be considered denied by operation of law."

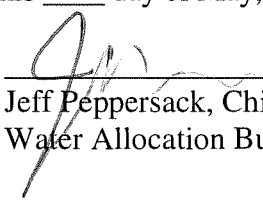
3. The Department does not agree that the license confirming stockwater use in the amount of 0.45 cfs and 27 acre-feet per year is an error. It was a determination by the Department of beneficial use developed under the permit and subject to appeal at the time of licensing. The petitioner cannot now come forward claiming an error simply because they disagree with the amount licensed.

4. The Department should deny the petition for reconsideration of the *Preliminary Order Denying Petition to Correct License* pursuant to Section 67-5243(3), *Idaho Code*.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the *Preliminary Order Denying Petition to Correct License* 63-7533 is **DENIED** pursuant to Section 67-5243(s), *Idaho Code*.

Dated this 24 day of May, 2011.



Jeff Peppersack, Chief
Water Allocation Bureau