

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT NO. 22-07114)	AMENDED ORDER
IN THE NAME OF NORTHWEST FARM)	WITHDRAWING PRELIMINARY
CREDIT SERVICES ACA AND STEVECO)	ORDER VOIDING PERMIT
CANYON FARMS INC.)	
_____)	

This matter having come before the Idaho Department of Water Resources ("Department"), the Department finds, concludes and orders:

PETITION FOR RECONSIDERATION

In the Matter of Permit No. 22-7114, the Department issued an Order Withdrawing Preliminary Order Voiding Permit on September 7, 2010. On September 21, 2010, Robert L. Harris of Holden, Kidwell, Hahn, and Crapo, P.L.L.C., on behalf of the permit holder, filed a Petition for Reconsideration (petition). The petition was filed timely pursuant to Rule 730.02.a of the Departments Rules of Procedure (IDAPA 37.01.01.730.02.a). The petition requested a change in the language of finding of fact no. 28 of the Order Withdrawing Preliminary Order Voiding Permit. The requested change would clarify that the Resolution of Protest Against Voiding Permit 22-7114, referenced in finding of fact no. 28 of the order, addressed more issues than just the extent of beneficial use developed under permit 22-7114. The Department has added language to finding of fact no. 28 to address the concerns of the petition. The Department issues this Amended Order Withdrawing Preliminary Order Voiding Permit, to reflect the change in finding of fact no. 28.

FINDINGS OF FACT

1. On November 20, 1974, J. Wayne Stevens, applied to the Department for a permit to appropriate 20.0 cubic feet per second (cfs) from Canyon Creek, tributary to the Teton River, within the SE¼SE¼, Section 13, Township 6 North, Range 43 East, B.M., for the irrigation of 1,702 acres in Madison County.
2. On February 25, 1975, the Department approved the application as Permit No. 22-7114 (permit) with a condition of approval requiring the permit holder to permanently install and maintain a measuring device as part of the diverting works and a condition requiring that proof of beneficial use be submitted to the Department on or before March 1, 1978.
3. On May 24, 1978, the Department ordered that the proof of beneficial use due date be extended to August 1, 1978, since the permit holder was not given notice sixty (60) days prior to the proof due date as required by section 42-204, Idaho Code.

4. On July 10, 1978, the Department received a Request for Extension of Time (request) to provide additional time in which to submit proof of beneficial use. The permit holder indicated that the irrigation system was installed but the pumping plant was not capable of diverting the quantity of water intended and that larger horsepower motors were necessary.

5. On July 13, 1978, the Department approved the request and extended the proof of beneficial use due date to August 1, 1980.

6. On July 9, 1980, the Department received the permit holder's Proof of Beneficial Use statement for the permit.

7. On August 22, 1988, the permit holder filed a claim for the permit in the Snake River Basin Adjudication (SRBA). Information in the claim indicates that the point of diversion from Canyon Creek had the same pumping system in place that existed when field examinations (FE) were completed for water rights 22-7069 (FE on July 20, 1978), 22-7103 (FE on July 20, 1978), and 22-7230 (FE on June 21, 1979). At the time of the examinations, the pumping system had a capacity of 12.94 cfs. Based on information in the claim, the permit holder did not increase pumping system capacity as described in the Request for Extension of Time granted for this permit on July 13, 1978.

8. On September 20, 1994, the Department received an assignment of permit conveying ownership of the permit to Northwest Farm Credit Services ACA and Stevecco Canyon Farms Inc.

9. On June 20, 2008, Department staff conducted a field examination to verify the water use developed in accordance with the permit. Although the examiner recommended the issuance of a license for 20.00 cfs of water for the irrigation of 1,702 acres within a 2,725.4 acre place of use, he did not confirm beneficial use of water during the authorized development period and compliance with the conditions of approval of the permit.

10. On August 1, 2008, Department staff noted that in July of 2007, State Water District No. 1 (WD 01) notified the permit holder by telephone that the permit condition requiring installation of a permanent measuring device had not been met.

11. Licensed water rights 22-7069, 22-7103, and 22-7230 were claimed in the SRBA and decreed with a combined diversion rate limit of 12.94 cfs for the irrigation of 2,725.4 acres. These rights authorize the diversion of water from Canyon Creek at the same point of diversion authorized by the permit and cover all lands authorized for irrigation under the permit.

12. A review of Department diversion records indicates that the greatest diversion rate from the point of diversion shared by rights 22-7069, 22-7103, and 22-7230 during

the authorized development period was 10.00 cfs in 1978. State Water District No. 1 staff indicated that the diversion record data was based on monthly volume and number of days and may not represent an instantaneous diversion rate. The data does not support an instantaneous diversion rate greater than 12.94 cfs.

13. Because water rights 22-7069, 22-7103, and 22-7230 are authorized to divert 12.94 cfs capacity from the Canyon Creek point of diversion, it was determined that no beneficial use of water was developed under the permit that was not already authorized by prior water rights.

14. 42-204, Idaho Code, provides, in pertinent parts, as follows:

The department shall require that actual construction work and application of the water to full beneficial use shall be complete within a period of five (5) years from the date of such approval, but may limit the permit to a less period than is named in the application, and the permit shall set forth the date when beneficial application of the water to be diverted by such works shall be made.

The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all rights under his permit.

15. 42-219(8), Idaho Code, provides, in pertinent part, as follows.

In the event that the department shall find that the applicant has not fully complied with the law and the conditions of permit, it may issue a license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit.

16. On September 8, 2008, the Department issued a Preliminary Order Voiding Permit No. 22-7114 (preliminary order).

17. On September 18, 2008, the Department received a Petition for Reconsideration (petition) of the preliminary order from Robert L. Harris of Holden, Kidwell, Hahn, and Crapo, P.L.L.C. (petitioner), on behalf of the permit holder. The petitioner argued that Beneficial Use Examination Rules, IDAPA 37.03.02, "provide that field examinations are to be performed and used in the issuance of license for water rights", that "there is no rule contained in IDAPA 37.03.02 which permits IDWR staff to disregard a field examination", and that the Department violated Idaho law by issuing the preliminary order in essence because it did not rely upon the recommendation made by the examiner and issue a license. The petitioner requested that the preliminary order be reconsidered and that the Department issue a license for the permit as recommended by the examiner. The petitioner also requested additional time to provide evidence of development under the permit, to review Department records, and to install a measuring device as part of the diverting works.

18. Beneficial Use Examination Rule 01-02 (IDAPA 37.03.02.001.02) provides:

These rules shall not be construed to deprive or limit the director of the Department of Water Resources of any exercise of powers, duties and jurisdiction conferred by law, or to limit or restrict the amount or character of data, or information which may be required by the director from any owner of a water right permit or authorized representative for the proper administration of law.

19. Section 42-219(1), Idaho Code provides, in pertinent part, as follows (emphasis added):

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. Such license shall be issued...and shall state...the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied.

20. On September 18, 2008, the Department issued an Order Withdrawing a Preliminary Order voiding the permit. The Department provided the petitioner sixty (60) days to review Department records and submit additional information.

21. On November 25, 2008, the Department received a letter from the petitioner providing additional information with regard to Permit No. 22-7114. In the letter, the petitioner stated, "...we simply do not have any additional evidence of what the system was capable of diverting as of the date Proof of Beneficial Use was submitted..." The petitioner further requested that "the Department rely upon the results from the beneficial use field examination recently conducted."

22. On December 4, 2008, the Department issued a new Preliminary Order Voiding Permit 22-7114 (preliminary order). The order was sent by certified mail to the permit holder at Steveco Canyon Farms, Inc., C/O Mike Stevens, 49 E Sunset Cir, Rexberg ID 83440.

23. On December 16, 2008, the certified mail sent to Steveco Canyon Farms, Inc., was returned to the Department as undeliverable.

24. On December 30, 2008, the Department received correspondence from Robert L. Harris of Holden, Kidwell, Hahn, and Crapo, P.L.L.C., stating that he was not included on the service list when the December 4, 2008, preliminary order was issued despite that there is record that he is counsel for the permit holder.

25. On January 6, 2009, by certified mail, the Department served Robert L. Harris the December 4, 2008, preliminary order.

26. On January 20, 2009, Robert L. Harris of Holden, Kidwell, Hahn & Crapo, P.L.L.C., filed a Protest and Petition for Hearing in response to the December 4, 2008, preliminary order.

27. The Department considered the "protest" to be a petition for reconsideration filed pursuant to Rule 730.02a of the Departments rules of procedure (IDAPA 37.01.01.730.02.a). Rule of Procedure 730.02a provides, in pertinent part, as follows:

This is a preliminary order of the hearing officer. It can be and will become final without further action of the agency unless any part petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a petition for reconsideration of the preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order.

28. On January 22, 2010, attorney Robert L. Harris and Ernest Carlsen, IDWR Water Resource Program Manager, signed a Resolution of Protest Against Voiding Permit 22-7114 (resolution). One of the issues addressed in the resolution was the beneficial use developed during the authorized development period for 22-7114. Both agree that 2.94 cfs of water from Canyon Creek was developed under permit 22-7114 within the authorized development period above and beyond prior water rights.

29. On June 11, 2010, State Water District No. 1 (WD 01) representative, Joe Kaufman, stated in an e-mail that on August 13, 2009, he confirmed that the permit holder was in compliance with the permit condition requiring installation of a permanent measuring device.

ANALYSIS

Water Right 22-7230 is authorized to divert and inject ground water into Canyon Creek. The ground water is then rediverted from the same pumping system at the point of diversion shared with water rights 22-7069 and 22-7103.

Canyon Creek is the source of water authorized by water rights 22-7069 and 22-7103. Water Rights 22-7069 and 22-7103 are authorized to divert a combine total of 10.0 cfs from Canyon Creek. Since the capacity of the pumping system developed during the authorized development period for permit 22-7114 was 12.94 cfs, there remains 2.94 cfs of diversion capacity that could be diverted from Canyon Creek that has not already been authorized by prior water rights with Canyon Creek as the source.

CONCLUSIONS

1. The Department erred by not originally serving Robert L. Harris with the December 4, 2008, Preliminary Order to voiding Permit 22-7114 (preliminary order).

2. The Department corrected its error on January 6, 2009, by serving Robert L. Harris with the December 4, 2008 preliminary order. The December 4, 2008, preliminary order would become a final order without further action of the Department unless a party petitioned for reconsideration within fourteen (14) days after Robert L. Harris was served.

3. Because a Protest and Petition for Hearing was received within 14 days after Robert L. Harris was served the Preliminary Order Voiding Permit 22-7114, the preliminary order did not become final.

4. The petition of reconsideration resulted in a dialog between the petitioner and the Department that prevented the preliminary order from becoming final.

5. There is no obligation that any of the 12.94 cfs capacity of the delivery system shared by water rights 22-7039, 22-7103, and 22-7230, be contributed from ground water under water right 22-7230.

6. Beneficial use of 2.94 cfs of water from Canyon Creek was developed during the authorized development period for permit 22-7114, in excess of prior water rights.

7. The permit holder has complied with the permit condition requiring installation of a permanent measuring device.

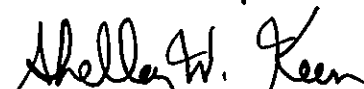
8. The Department should withdraw the preliminary order voiding Permit 22-7114.

9. There is no need to schedule a hearing because the Preliminary Order Voiding Permit 22-7114 should be withdrawn.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that preliminary order voiding Permit No. 22-7114 is **WITHDRAWN**.

DATED this 24th day of September, 2010.



SHELLEY KEEN, Manager
Water Rights Section