

Dana L. Hofstetter, ISB #3867
Hofstetter Law Office, LLC
608 West Franklin Street
Boise, Idaho 83702
Telephone: (208) 424-7800
Facsimile: (208) 424-8774
E-Mail: Dana@IdahoWaterLaw.com

Attorney for Hultz Farms, Petitioner

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

In the Matter of Permit No. 63-8682

)
)
)
)
)
MOTION FOR SUMMARY DECISION
AND MEMORANDUM IN SUPPORT

Motion

Petitioner, Hultz Farms, pursuant to IDAPA 37.01.01.260, respectfully moves the Department for a Summary Decision reinstating Permit No. 63-8682 and issuing the license. The facts are uncontroverted and the Permit's cancellation was in error as a matter of law. This Motion is supported by the following Memorandum, the Affidavit of Dana L. Hofstetter and the Affidavit of H. Robert Hultz, filed contemporaneously herewith. A check payable to the Idaho Department of Water Resources in the amount of \$225.00 for the license examination fee was submitted on or about February 4, 2010. The Petitioner respectfully requests that a decision on this Motion be made as soon as possible because of the imminent irrigation season and the pendency of the Snake River Basin Adjudication ("SRBA").

Memorandum

I. Statement of uncontroverted facts.

On or about April 11, 1977, Harold M. Hultz, President, for Hultz Farms, Inc. (the "Permitholder") submitted an Application for Permit to Appropriate the Public Waters of the State of Idaho (the "Application") with the Idaho Department of Water Resources (the "Department" or "IDWR"). The Application identified the source as ground water, with the location of the point of diversion in the SW1/4NE1/4 of Section 25, Township 5 North, Range 4 West, B.M., Canyon County, Idaho and requested approval for 5.1 cubic feet per second ("cfs") to irrigate 255 acres in Section 25, Township 5 North, Range 4 West. On June 17, 1977, then IDWR Deputy Director, Kenneth Dunn, approved the Application and issued Water Right Permit No. 63-8682 (the "Permit"). The approval indicated that proof of beneficial use of the water was to be submitted on or before June 1, 1982. Petitioner Hultz Farms owns the real property (the "Property") which Permit No. 63-8682 covers. *Affidavit of H. Robert Hultz.* Hultz Farms is the successor in interest to Hultz Farms, Inc. the original holder of Permit No. 63-8682. *Id.*

A Well Driller's Report confirms that the well associated with the permit was drilled in 1977. *Affidavit of Dana L. Hofstetter, Exhibit D.* The well was first used in that same year due to the drought conditions existing at the time. *Affidavit of H. Robert Hultz.* In accordance with the statutes in effect at the time, the IDWR proof of beneficial use postcard was submitted on or about April 16, 1982. *Affidavit of Dana L. Hofstetter, Exhibit C.* By letter dated December 7, 1982, IDWR acknowledged receipt of the proof of beneficial use statement and informed the Permitholder that, "Before a license can be issued, a field examination must be made by a representative of this Department. A field examiner will

contact you to arrange to examine your system.” *Id.* Nowhere in the Department’s December 7, 1982 letter is the need to submit a fee mentioned. Apparently, no fee was requested because at the time proof was due, no such fee was required. Idaho statutes at the time did not provide for the submission of such a fee. *Affidavit of Dana L. Hofstetter, Exhibit A.*

In 1981/1982, Harold Hultz suffered a stroke and subsequently passed away on April 1, 1984. *Affidavit of H. Robert Hultz.* Upon Harold Hultz’s incapacitating stroke, his wife took over administrative responsibilities for Hultz Farms, Inc. *Id.* After 1982, there was no further activity in the Permit file until April 30, 1986 when the Department sent Hultz Farms, Inc. a letter requesting submission of an examination fee based on newly enacted legislation. *Affidavit of Dana L. Hofstetter, Exhibit C.* Another letter from the Department dated September 4, 1986 apparently followed. *Id.* Then on April 30, 1987 the Department apparently followed up with a Lapse Notice. *Id.*

II. The Department has no authority to require an examination fee for the subject Permit for which proof of beneficial use was due and properly submitted in 1982, prior to enactment of the 1986 examination fee legislation.

House Bill 671 which was enacted by the 1986 Idaho Legislature and effective as of April 4, 1986 apparently provided the basis for requesting payment of the examination fee and for lapsing of the subject Permit. However, under Idaho law, the new legislation should not apply retroactively to permits for which proof of beneficial use already had been due and had been timely submitted.

Retroactive legislation is that which affects vested or already existing rights. *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 624, 636 P.2d 745, 746 (1981).

Generally, a statute is not applied retroactively in the absence of clear legislative intent. *Johnson v. Stoddard*, 96 Idaho 230, 234, 526 P.2d 835, 839 (1974). Water right permits for which proof of beneficial use has been properly submitted, such as Permit No. 63-8682, are vested property rights. *Hidden Springs Trout Ranch*, 102 Idaho at 625, 636 P.2d at 747 (stating that applicant for water right permit may obtain a vested right following compliance with statutory steps). Thus, House Bill 671 enacted in 1986 could only be validly applied to the subject Permit if there was clear legislative intent that it was intended to be applied retroactively. In any event, even if House Bill 671 evidenced a clear retroactive legislative intent, which it does not, retroactive imposition of the Bill's new fee would violate the Idaho Constitution's Article XI, § 12 prohibition against "new liabilities in respect to transactions or considerations already past."

The legislation itself in the final Section 3 provides only for prospective application:

An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval [April 4, 1986].

Affidavit of Dana L. Hofstetter, Exhibit B. Thus, based on this provision, the legislation's new requirement that an examination fee be submitted with proof of beneficial use would not be retroactively applicable to approved Permits for which proof of beneficial use already had been due and timely submitted before April 4, 1986.¹

It appears that the Department has interpreted the following provision of the new legislation to reflect its retroactive intent, although the following provision does not provide

¹ This brief does not address the legislation's applicability to already issued Permits for which proof of beneficial use had not been due or submitted by the effective date of the new legislation, April 4, 1986, as those facts are not presented here. In the instant case, proof of beneficial use had been due and had been timely submitted about four years before the enactment of the new legislation in 1986.

the requisite “clear legislative intent” of retroactive applicability since a prospective only interpretation of this provision also is possible:

Holders of permits who have submitted proof of beneficial use but have not had their project examined for beneficial use shall submit the fee ... within sixty (60) days of notification by the director of the department of water resources that a license examination fee is required. Failure to submit the fee in the time allowed shall be cause for the director to advance the date of priority of the permit one (1) day for each day that the fee is late; provided that if the fee is not fully paid within one (1) year of the time it is due, the director of the department of water resources may consider the proof of beneficial use for the permit to be incomplete and lapse the permit as provided in section 42-218a, Idaho Code.

*Affidavit of Dana L. Hofstetter, Exhibit B.*²

While, by its express language, this provision applies to permit holders who submitted proof of beneficial use without the fee, there is “no clear legislative intent” that this provision is to apply retroactively to impose the fee on those Permits for which proof of beneficial use was submitted without the fee before the effective date of the legislation. In other words, this provision could be interpreted to apply only prospectively to those proofs of beneficial use submitted without the fee (and without the alternative examination report) after the April 4, 1986, effective date of the new legislation. If the legislature had intended to provide for retroactivity, the legislation should include language clearly indicate such retroactive applicability such as: “Holders of permits who have submitted proof of beneficial use before the effective date of this Act but have not had their project examined for beneficial use shall submit the fee ... within sixty (60) days of notification by the director....” However, as actually enacted, the provision is capable of prospective application only to proofs of

² Attached as Exhibit B to the Affidavit of Dana L. Hofstetter is a copy of House Bill 671, enacted by the 1986 Idaho Legislature.

beneficial use submitted without the fee or examination report after the legislation's April 4, 1986 effective date. There is nothing in this provision as enacted, or in the remainder of the legislation, that would indicate a "clear legislative intent" to apply the law retroactively to proofs of beneficial use that had been due and properly submitted before the effective date of the new legislation. Actually, the legislation, in section 3, expressly provided for the contrary, that the legislation (including the new fee requirement) would "be in full force and effect on and *after* its passage and approval."

Further, the retroactive application of House Bill 671 to the subject Permit, was "a new liability in respect to transactions or considerations already past" in violation of the Idaho Constitution, Article XI, § 12. At the time of enactment of House Bill 671, the Permitholder already had complied with all requirements for proof of beneficial use. Applying House Bill 671 retroactively, as IDWR did, resulted in the Permitholder being responsible for a new liability (the license fee) in violation of Article XI, § 12 of the Idaho Constitution. See *Butler v. City of Blackfoot*, 98 Idaho 854, 858-59, 574 P.2d 542 (1978) (holding that the City of Blackfoot could not assess local improvement district members for costs incurred prior to establishment of the L.I.D. due to Article XI, § 12's prohibition on the "imposition of laws imposing new pecuniary liabilities 'in respect to transactions or considerations already past.' ") Since the new license fee requirement postdated the Permit's beneficial use proof deadline and also the date of actual submission of that proof, the new fee was "a new liability in respect to transactions or considerations already past," as applied to the Permit. Therefore, IDWR's imposition of the licensing fee with respect to the Permit violated Article XI, § 12 of the Idaho Constitution.

Therefore, due to the lack of express retroactive legislative language and to the Idaho Constitution's Article XI, § 12 prohibition on the retroactive imposition of new pecuniary liabilities, the Department improperly retroactively applied House Bill 671's examination fee provisions to the subject Permit. Thus, when the Department lapsed the Permit for failure to submit the fee, it was acting both in excess of its statutory authority and in violation of the Idaho Constitution and the Permit should be reinstated pursuant to Idaho Code § 42-218a(3).

III. Since the Permitholder's principal passed away in 1984, reasonable cause exists to reinstate the Permit pursuant to Idaho Code § 42-218a(2).

By 1986 Mrs. Hultz had taken over administrative responsibilities for the Permitholder due to her husband's sudden illness and subsequent death. *Affidavit of H. Robert Hultz*. It appears that Mrs. Hultz did not fully understand the correspondence from the Department during this period of time. *Id.* However, there is evidence that the beneficial use of the Permit had been made by the 1982 deadline. *Id.*; *Affidavit of Dana L. Hofstetter, Exhibit D*. Thus, there is reasonable cause to reinstate the Permit pursuant to Idaho Code § 42-218a(2).

IV. Since the Petitioner was incorrectly told that Permit reinstatement would not be possible, there also is another basis to reinstate the Permit pursuant to Idaho Code § 42-218a(3).

When Petitioner learned of the situation in about the Summer of 1987 and went to the Department, he apparently was incorrectly told that nothing could be done to reinstate the Permit. *Affidavit of H. Robert Hultz*. Thus, there is also legal basis to reinstate the Permit without advancement of the priority date based on error of the Department pursuant to Idaho Code § 42-218a(3).

V. Conclusion.

For the foregoing reasons, the cancellation of Permit No. 63-8682 was void *ab initio*, cancelled in error, or reasonable cause exists for reinstatement and the Permit should be reinstated and the license issued with the original priority date of April 11, 1977 or, in the alternative with an advanced priority date.

DATED this 26th day of March, 2010.

HOFSTETTER LAW OFFICE, LLC

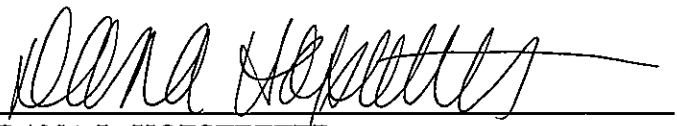
By 
Dana L. Hofstetter, for the firm
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of March, 2010, I caused a true copy of the foregoing MOTION FOR SUMMARY DECISION AND MEMORANDUM IN SUPPORT to be served by the method(s) indicated on the following:

Original to:

Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
☐ U.S. Mail ☐ Fed Ex ☒ Hand ☐ Fax


DANA L. HOFSTETTER

4099.1\9081