

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF LAPSED PERMIT )  
NO. 63-08682 IN THE NAME OF )  
HULTZ FARMS INC )  
\_\_\_\_\_ )

**PRELIMINARY ORDER OF  
REINSTATEMENT**

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

**FINDINGS OF FACT**

1. On June 17, 1977, the Department issued Permit No. 63-8682 in the name of Hultz Farms Inc. (permit holder). The Department issued permit 63-8682 with the condition that proof of construction of works and application of water to beneficial use (proof of beneficial use) be submitted to the Department on or before June 1, 1982.

2. On or about April 16, 1982, the Department received proof of beneficial use for permit 63-8682. The proof statement included the mailing address for Hultz Farms Inc as Rt.5 Box 57, Caldwell, ID 83605. A license examination has not been completed for the permit.

3. The Department received the required proof of beneficial use statement for permit 63-8682 within the authorized development period.

4. House Bill 671 was enacted by the Idaho Legislature on April 4, 1986. The legislation amended Section 42-217, Idaho Code to require license examination fees to be submitted with a proof statement, or in the alternative, to require submittal of a completed field examination report prepared by a certified water right examiner. In addition, the legislation provided that holders of permits who had submitted proof but had not had their project examined shall submit the fee after notice of the fee requirement. The enacted legislation states in pertinent part as follows:

Holders of permits who have submitted proof of beneficial use but have not had their project examined for beneficial use shall submit the fee required in section 42-221, Idaho Code, 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.

Section 42-217, Idaho Code (emphasis added).

5. On April 30, 1986, the Department mailed an Examination Fee Notice to the permit holder at his most recent address of record listed in the Department's files; Rt. 5 Box 57, Caldwell, ID 83605. The letter indicated that an examination fee or a field examination report completed by a certified water right examiner was due within 60 days for the permit. The Department did not receive any information indicating that the address of record was no longer valid.

6. On September 4, 1986, the Department mailed an examination fee reminder to the permit holder at his most recent address of record; Rt. 5 Box 57, Caldwell, ID 83605. The Department did not receive any information indicating that the address of record was no longer valid.

7. On April 30, 1987, the Department mailed a Lapse Notice to the permit holder for Permit No. 63-8682, for failure of the permit holder to submit either the license examination fee or an acceptable field examination report.

8. On February 4, 2010, Dana L. Hofstetter, attorney, paid the license examination fee and filed a Petition to Reinstate Permit on behalf of Hultz Farms ("petitioner"). The petition requested reinstatement of the permit with the original priority date of April 11, 1977, or, in the alternative, with the priority date advanced for each day that the license fee is late.

9. An affidavit by H. Robert Hultz submitted by Dana L. Hofstetter, explained that at the time the Department sent notice that permit 63-8682 was about to lapse, the President of Hultz Properties, Inc. had passed and bookkeeping responsibilities were in transition and therefore notice from the department went unanswered.

10. Section 42-218a, Idaho Code states in pertinent part:

A permit upon which the proof of beneficial use has not been submitted...shall lapse and be of no further force nor effect. Notice of said lapsing shall be sent by the department to the applicant at the address of record by regular mail provided:

1. That within sixty (60) days after such notice of lapsing the department may, upon a showing of reasonable cause, reinstate the permit with the priority date advanced a time equal to the number of days that said showing is subsequent to the date set for proof.
2. That upon receipt of proof of beneficial use after sixty (60) day's after such notice of lapsing, ...the director may reinstate the permit with the priority date advanced to the day that proof of beneficial use was received;
3. The original priority date of a lapsed permit shall not be reinstated except

upon a showing of error or mistake of the department.

11. On March 26, 2010, Dana L. Hofstetter, attorney, filed a Motion for Summary Decision and Memorandum in Support, requesting from the Department, a Summary Decision reinstating Permit No. 63-8682 and issuing the license.

12. Section 42-217, Idaho Code provides in regards to Proof of Application to Beneficial use:

Upon receipt of such proof and the fee as required in section 42-221, Idaho Code, by the department of water resources the department shall examine, or cause to be examined:

1. The place where such water is diverted and used, and, if the use is for irrigation, he shall ascertain the area and location of the land irrigated and the nature of all the improvements which have been made as a direct result of such use.
2. The capacities of the ditches or canals or other means by which such water is conducted to such place of use, and the quantity of water which has been beneficially applied for irrigation or other purposes.

Section 42-219(1) Idaho code provides:

1. 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.

## **ANALYSIS**

The petitioner argues that 1) the Department has no authority to require an examination fee for the permit where proof was due and submitted prior to the enactment of the 1986 examination fee legislation, 2) because the Department had no authority to require payment, the permit was improperly lapsed.

Petitioner's argument is contrary to the plain language of section 42-217, Idaho Code and the legislative history of the statute. The legislative history clearly provides that it was the specific intent of the Legislature to require an examination fee for permits which had submitted proof of beneficial use but had not yet had a field exam conducted. The Statement of Purpose for House Bill 671 describes the purpose of the legislation: "Section 1 amends existing statutes to require a fee for submittal of proof of beneficial use, to require a fee to be paid by permit holders who have submitted proof

of beneficial use for which a field examination has not been completed, and to describe the effect of failing to pay the fee. Statement of Purpose, HB 671(RS 12681)(1986)(Emphasis added).

The Department had the clear statutory authority to require an examination fee in this matter. Although the petitioner also raises the issue of the constitutionality of Section 42-217, Idaho Code, the Department is without authority to declare a statute unconstitutional and will not address the argument in this order. See IDAPA 37.01.01.415 ("A hearing officer in a contested case has no authority to declare a statute unconstitutional.").<sup>1</sup>

### CONCLUSIONS OF LAW

1. A license examination fee or a field examination report completed by a certified water right examiner was required for the permit because proof of beneficial use was submitted, but a license examination had not been completed by the date of enactment of House Bill 671.
2. The Department properly notified the permit holder of the license examination fee requirement by mailing notice to the permit holder's most recent address of record listed in the Department files.
3. The proof submitted by the permit holder was incomplete and the permit lapsed pursuant to Sections 42-217 and 42-218a, Idaho Code for failure to submit the license examination fee within one year of the due date.
4. The Department acted in accordance with the Statement of Purpose for House Bill 671 and did not err in lapsing permit 63-8682 pursuant to Sections 42-217 and 42-218a, Idaho Code.
5. The permit holder provided sufficient information to show that water was beneficially used during the authorized development period in accordance with the permit.
6. The permit holder demonstrated reasonable cause for filing late proof of

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1. Even if the Department were to address the constitutionality of the statute, the argument raised by the petitioner that a permit is a vested water right lacks basis in Idaho law. A permit is not a vested right. A permit is an inchoate right that only ripens into a vested right upon granting of a license by the Department. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380, 401-402, 263 P. 45, 52 (1927); *Hardy v. Higginson*, 123 Idaho 485, 490, 849 P.2d 946, 951 (1993); See also *A & B Irrigation Dist. v. Aberdeen-American Falls Ground Water Dist.*, 141 Idaho 746, 753, 118 P.3d 78, 85 (2005). A permit is not a water right but merely represents a user's right to perfect the permit into real property by obtaining the requisite license under Idaho Code § 42-219. Therefore the legislature may change the law governing licensing and make changes applicable to existing permit holders. See *Big Wood Canal Co.*, at 141 Idaho at 401-402, 263 P. at 52.

beneficial use.

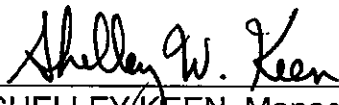
7. The Department should reinstate the permit with the priority date advanced to the date that proof of beneficial use was received.

9. Pursuant to 42-217 and 42-219(1), Idaho Code, the Department should not issue a license until a field examination is conducted and the extent of beneficial use is verified.

### ORDER

IT IS, THEREFORE, HEREBY ORDERED that Permit No. 63-8682 is **REINSTATED** with an advance in priority to **February 4, 2010**.

DATED this 5<sup>th</sup> day of August, 2010.

  
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SHELLEY KEEN, Manager  
Water Rights Section

## **EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER**

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

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

### **PETITION FOR RECONSIDERATION**

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

### **EXCEPTIONS AND BRIEFS**

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

### **REQUEST FOR HEARING**

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

### **ORAL ARGUMENT**

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

## **CERTIFICATE OF SERVICE**

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

## **FINAL ORDER**

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

## **APPEAL OF FINAL ORDER TO DISTRICT COURT**

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.