

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF PERMIT NO.)	FINAL ORDER WITHDRAWING AN
37-8205 IN THE NAME OF SUN)	ORDER REJECTING BENEFICIAL USE FIELD
VALLEY LAND & MINERALS)	REPORT AND VOIDING APPLICATION
INC. _____)	FOR AMENDMENT OF PERMIT

This matter having come before the Department of Water Resources (Department) as a result of filing of an application for amendment of a permit, proof of beneficial use and a beneficial use field report, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On November 24, 2009, the Department issued a Preliminary Order Rejecting Beneficial Use Field Report and Voiding Application for Amendment of Permit (order) for Permit No. 37-8205 (permit) in the name of Sun Valley Land & Minerals Inc. (permit holder). The order was mailed to the permit holder, and the permit holder's attorney and representative, on November 30, 2009. The Department rejected the beneficial use field report because the report did not detail the extent of actual beneficial use during the authorized development period and because the report did not adequately address compliance with conditions of the permit. The order provided the permit holder 30 days to submit an acceptable beneficial use field report and proof of beneficial use statement before the permit would be lapsed. The Department voided the application for amendment of permit because the permit holder failed to submit information necessary to analyze potential increased water use and consumptive use.
2. The Department did not receive a petition for reconsideration for the order. The order became a final order of the Department after 14 days of the service date of the order, in accordance with Rule 730.02.b. of the Department's Rules of Procedure (IDAPA 37.01.01).
3. One of the conditions of approval of the permit required that the water use shall be nonconsumptive and "...if use is found to be consumptive in the future, the consumption must be replaced or the user of the water must cease diversion until a plan of replacement is implemented."
4. On December 18, 2009, the permit holder filed a Request for Extension of Time to submit proof with the Department. The extension request included information analyzing the potential for increased water use and consumptive use associated with the application for amendment of permit. The analysis indicated that the proposed amendment of the permit would increase consumptive use of water by 15.93 acre-feet per year. The permit holder requested the

extension of time to address mitigation requirements associated with the increase in consumptive use of water.

5. On December 30, 2009, the Department denied the permit holder's request for extension of time to submit proof. The Department denied the request because it did not meet the criteria for an extension pursuant to Section 42-204, *Idaho Code*.
6. On December 30, 2009, the permit holder submitted an acceptable beneficial use field report, a proof of beneficial use statement, and information necessary for the Department to continue processing the application for amendment of permit for Permit No. 37-8205. The field report included information estimating that the development under the permit, as proposed in the amendment, would increase consumption of water by approximately 15.93 acre-feet due to increased evaporation from a heated pond.

CONCLUSIONS OF LAW

1. Rule 760 of the Department's Rules of Procedure (IDAPA 37.01.01) provides in pertinent part as follows:

The agency head may modify or amend a final order of the agency (be it a preliminary order that became final because no party challenged it or a final order issued by the agency head itself) at any time before notice of appeal to District Court has been filed or the expiration of the time for appeal to District Court, whichever is earlier, by withdrawing the earlier final order and substituting a new final order for it.

2. Pursuant to Section 67-5273, *Idaho Code*, an appeal to District Court must be filed within twenty-eight days of a preliminary order becoming final.
3. The Order Rejecting Beneficial Use Field Report and Voiding Application for Amendment of Permit is no longer necessary because the permit holder has provided an acceptable beneficial use field report and information necessary for the Department to continue processing the application for amendment of permit. The Director should withdraw the order.
4. The use developed under the permit to heat a pond will result in consumption of water due to increased evaporation from the pond. The permit holder must cease diversion of water to the pond under the permit until a plan of replacement is implemented. The Department should condition any approval of the application for amendment of permit to require mitigation or replacement water for the consumption of water due to increased evaporation from the heated pond.

ORDER

IT IS HEREBY ORDERED that the Order Rejecting Beneficial Use Field Report and Voiding Application for Amendment of Permit issued by the Department on November 24, 2009 for permit

37-8205 is **WITHDRAWN**.

IT IS FURTHER ORDERED that the permit holder shall cease diversion of water to the pond under the permit until a plan of replacement is implemented. Any approval of the application for amendment of Permit No. 37-8205 shall include a condition requiring that, prior to continued diversion of water to the heated pond, mitigation or replacement water shall be provided for consumption of water due to increased evaporation from the heated pond.

Dated this 5th day of January, 2010.


GARY SPACKMAN
Interim Director

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2010, I mailed a true and correct copy, postage prepaid, of the foregoing FINAL ORDER WITHDRAWING AN ORDER REJECTING BENEFICIAL USE FIELD REPORT AND VOIDING APPLICATION FOR AMENDMENT OF PERMIT to the person(s) listed below:

RE: WATER RIGHT PERMIT NO. 37-8205

**BROCKWAY ENGINEERING
2016 N WASHINGTON ST STE 4
TWIN FALLS ID 83301**

**SUN VALLEY LAND & MINERALS INC
PO BOX 1959
SUN VALLEY ID 83353**

**EDWARD LAWSON
LAWSON LASKI CLARK & POGUE PLLC
PO BOX 3310
KETCHUM ID 83340**

A handwritten signature in cursive script, reading "Danni M. Smith", is written over a horizontal line.

**Danni M. Smith
Office Services Supervisor**

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

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

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) the date of issuance (not service) of the final order, b) the date of issuance of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.