

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

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

This matter having come before the Department of Water Resources (Department) as a result of the filing of an application for amendment of permit, proof of beneficial use and a beneficial use field report, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. Permit no. 37-8205 (permit) was approved by the Department on February 8, 1993 for heating and recreation use. The heating and recreation uses were described in conditions of approval of the permit as heating for 45 domestic dwellings, 115 townhouses, commercial office space, greenhouses, a gym, and an indoor pool; and recreational use for a horse center, an indoor pool, gym, and tennis facilities. An additional condition of the permit approval 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."

Amendment of Permit

2. On May 4, 2009, the Department received an Application for Amendment of a Permit (amendment) in connection with permit no. 37-8205. The amendment proposed modifying conditional language on the permit approval document specifying the authorized heating and recreational uses. Potential uses proposed by the amendment are: heating of existing and future dwellings, commercial buildings, greenhouses, or other structures of various kinds; heating indoor bathing and swimming pools, recreational spas or similar facilities; heating one or more outdoor ponds or recreational spas for bathing, swimming, and general recreation; melting of ice and snow on existing and future roadways, tennis courts or any other recreational facilities; and melting of ice and snow within a reservoir in the vicinity of pond spillway and headgates.
3. On May 21, 2009, the Department caused the amendment to be advertised in the *Idaho Mountain Express*. The amendment was not protested.
4. On June 10, 2009, the Department received an engineering report for the Clarendon Hot Springs Geothermal Project (report) prepared by Brockway Engineering, PLLC (Brockway), the applicant's representative. The report discusses the proposed uses of water in connection with the amendment as well as system design requirements.

5. Section 42-111, *Idaho Code*, says, in pertinent part:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms to be furnished by the department of water resources together with the statutory fee for filing and recording same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder.

6. On July 17, 2009, the Department corresponded with Brockway, with a copy to the applicant, to inform them that the amendment must be augmented with data showing that the total diversion volume under the amended uses will not exceed the total diversion volume anticipated for the original permitted uses and that the proposed uses will not consume water unless an acceptable mitigation plan is provided. The Department provided 30 days to allow the applicant to provide the necessary information and informed the applicant that if the information is not received within 30 days, the Department would take action to void the application.

7. The Department has not received the necessary information regarding the amendment.

8. Section 42-204, *Idaho Code*, says, in pertinent part:

If the application is returned to the applicant or the department shall request additional information and the applicant fails to return the corrected application or to supply the needed information within thirty (30) days, the department may void the record of said application and notify the applicant of such action.

Proof of Beneficial Use

9. Permit no. 37-8205 was approved with a condition that proof of beneficial use was due on October 1, 1996. The proof due date was extended multiple times to 2006 due to litigation. The proof due date was further extended for good cause to October 17, 2009. Further extensions are not available to the permit holder pursuant to Section 42-204, *Idaho Code*.

10. On June 10, 2009, the Department received a letter from Charles G. Brockway seeking guidance from the Department regarding diversion and use of the system anticipated under the amendment of permit no. 37-8205. One of the questions posed to the Department was:

Prior to the Proof date, it is anticipated that the entire system will be in place with a diversion capacity of 765 gpm. However, the snowmelting system obviously cannot be used unless snow is actually falling. Furthermore, the calculated peak demands for all three uses will not actually be required until the design climatic conditions occur. How will the Department handle this?

11. On June 24, 2009, the Department responded as follows:

Section 42-219, Idaho Code requires that the license 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.’

The Department recognizes that peak heating requirements may vary from year to year based on climatic conditions and may be willing to recognize a higher rate and/or volume to address reasonable climatic fluctuations. However, the Department is not authorized to provide additional time to beneficially use the water because the permit has already received the maximum extensions provided by law.

12. On October 19, 2009, the Department received a timely Proof of Beneficial Use statement (proof) and a Beneficial Use Field Report (field report) for permit no. 37-8205 completed by Charles G. Brockway on behalf of Sun Valley Land & Minerals Inc. (permit holder). Charles G. Brockway is a certified water right examiner.

13. The field report describes the delivery system as being capable of delivering water for maintaining an outdoor heated pond/spa recreational facility, melting snow on roadways, and heating two small residences with a system capacity of 1.76 cfs and an annual diversion volume of 942 af. The field report does not state how much water has actually been put to beneficial use during the authorized development period.

14. Rule 35.02 Part a of the Department’s Beneficial Use Examination Rules (IDAPA 37.03.02) states, in pertinent part:

Field reports received from certified water right examiners will be accepted if the report includes all the information required to complete the report and provides the information required by Rule Subsection 035.01.

15. Rule 35.01 Part a of the Department’s Beneficial Use Examination Rules (IDAPA 37.03.02) states:

All items of the field report must be completed and must provide sufficient information for the director to determine the extent of the water right developed in order for the report to be acceptable to the director.

16. Rule 35.01 Part b of the Department’s Beneficial Use Examination Rules (IDAPA 37.03.02) states:

Permitted uses partially developed by the permit holder shall be described. Permitted uses which were not developed by the permit holder shall be noted. Uses determined to exist which are not authorized by the permit being examined shall also be noted.

17. Rule 35.01 Part l of the Department’s Beneficial Use Examination Rules (IDAPA 37.03.02) states:

Information shall be submitted concerning the beneficial use that has been made of the water unless the purpose of use is for irrigation. For example, for stockwater use, the number and type of stock watered shall be provided. Similar indications of the extent of beneficial use shall be provided for all other non-irrigation uses.

18. Rule 35.01 Part o of the Department's Beneficial Use Examination Rules (IDAPA 37.03.02) states:

The amount (rate and/or volume) of water shall be limited by the smaller of the permitted amount, the amount upon which the license examination fee is paid, the capacity of the diversion works or the amount beneficially used, including any statutory limitation of the duty of water.

19. Section 42-219, *Idaho Code*, says, in pertinent part:

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 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. The field report describes conditions of the permit requiring nonconsumptive use and identifying specific uses associated with heating and recreation, but did not describe compliance with those conditions by determining whether the developed system would consume water or whether the intended uses would require more water than originally permitted.

21. Rule 35.01 Part f of the Department's Beneficial Use Examination Rules (IDAPA 37.03.02) states:

The method of compliance with each condition of approval of a permit shall be shown on the field report by the examiner.

22. Rule 35.02 Part b of the Department's Beneficial Use Examination Rules (IDAPA 37.03.02) states:

Field reports not completed as required by these rules will be returned to the certified water right examiner for completion. If the date for submitting proof of beneficial use has passed, the penalty provisions of Rule 055 shall apply.

23. Rule 55.02 Part a of the Department's Beneficial Use Examination Rules (IDAPA 37.03.02) states:

Failure to submit either the license examination fee or an acceptable field examination report prepared by or under the supervision of a certified water right examiner by the proof due date is cause to lapse the permit pursuant to Section 42-218a, Idaho Code, unless an extension of time pursuant to Section 42-204, Idaho Code, extending the proof of beneficial use due date has been approved.

ANALYSIS

Amendment of Permit

Permit no. 37-8205 was issued by the Department to authorize use of geothermal water for a number of specific uses under the general purposes of heating and recreation. The specified uses were generally considered to be nonconsumptive, which allowed processing of the permit in an area of the Big Wood River and Snake River basins that prohibited new consumptive uses. The permit included a condition of approval requiring that the use of water shall be nonconsumptive and if the use is found to be consumptive in the future, the consumption must be replaced or the user must cease diversion. It was conceivable that the list of specified uses or the discharge of geothermal water could result in consumption of water.

The amendment proposes uses that would potentially increase the amount of water diverted and used and potentially consume water. The applicant has not provided required information to demonstrate that increases in use of water and water consumption will not occur. The applicant, through their representative, argues that the determination of consumptive use does not need to be addressed until some future date. However, the law requires that the Department can only approve an amendment if the use of water will not increase and will not adversely affect the rights of others. Current management activities in the Big Wood River and Snake River basins prohibit consumptive use to protect the rights of others.

Proof of Beneficial Use

The prior appropriation doctrine through the application, permit and licensing process provides a water user with a priority date as of the date an application is submitted to the Department. The priority date is valid against all junior appropriators, only to the extent that the water user diverts and beneficially uses the water during the authorized development period of the permit. Beneficial use of the water must be the basis for a water right license to be issued by the Department; otherwise, the process would only serve to tie up the resource to the detriment of future appropriators.

The field report submitted to the Department recommends licensing based on a system that was just completed prior to the date proof was due. Beneficial use of the water will not occur until water is needed and used during the coming years. Issuing a license for anticipated beneficial uses would equate to providing additional time to complete beneficial use. The Department cannot provide additional time to complete beneficial use because the maximum extensions allowed under the law have already been provided to the permit holder.

Beneficial Use Examination rules of the department require that a field report address compliance with each condition of approval of a permit. The examiner notes that the uses developed differ significantly from the permitted uses. The examiner recommends that the actual developed uses should be licensed because the original permit did not restrict the annual volume. The recommendation ignores the potential increase in use of water and should have

discussed potential differences in water use between the original permit and uses identified during the exam. In addition, the field report should have discussed the potential for increased consumption. The examiner suggested on the field report that the condition requiring that the use shall be nonconsumptive does not need to be addressed until some future date. The field report is the appropriate time to address the requirement, especially since the amendment to change the uses has not been approved by the Department.

CONCLUSIONS OF LAW

1. Without information to analyze potential increased water use and consumptive use, the Department cannot ascertain whether the amendment will result in the diversion and use of more water than originally permitted and whether the use will be nonconsumptive as required by law and conditions of the permit.
2. The Department should void the amendment for failure to submit the necessary information.
3. The permit holder submitted proof of beneficial use timely. However, the field report is not acceptable because it does not detail the extent of actual beneficial use during the authorized development period and because it does not adequately address compliance with conditions of the permit as required by law and rules of the Department.
4. The Department should reject the field report for failure to complete the report as required by rules of the Department.
5. The field report is not acceptable, therefore, the field report and the proof statement should be returned to the certified water right examiner.

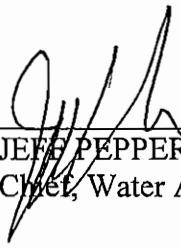
ORDER

IT IS HEREBY ORDERED that the Application for Amendment of a Permit for permit no. 37-8205 submitted to the Department on May 4, 2009 is **VOIDED**.

IT IS FURTHER ORDERED that the Beneficial Use Field Report for permit no. 37-8205 submitted to the Department on October 19, 2009 is **REJECTED**. The Beneficial Use Field Report and the Proof of Beneficial Use statement shall be returned to the certified water right examiner.

IT IS FURTHER ORDERED that the Department will provide the permit holder 30 days to submit an acceptable Beneficial Use Field Report and Proof of Beneficial Use statement to the Department. Failure to submit an acceptable Beneficial Use Field Report and Proof of Beneficial Use statement within the 30-day period is cause to lapse the permit pursuant to Section 42-218a, Idaho Code.

Dated this 24th day of November, 2009.


JEFF PEPPERSACK
Chief, Water Allocation Bureau

SCANNED
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