

CERTIFICATE OF SERVICE

I hereby certify that January 6, 2009 I mailed a true and correct copy, certified postage prepaid, of the foregoing PRELIMINARY ORDER to the persons listed below:

RE: Preliminary Order in the Matter of Permit No. 22-7114

ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO PLLC
PO BOX 50130
IDAHO FALLS ID 83405-0130

Emalee Rushing
Emalee Rushing
Office Services Supervisor

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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO**

IN THE MATTER OF PERMIT NO. 22-7114)
IN THE NAME OF NORTHWEST FARM)
CREDIT SERVICES ACA AND STEVECO)
CANYON FARMS INC.)

**PRELIMINARY ORDER
VOIDING PERMIT**

This matter having come before the Department of Water Resources (Department) as a result of an investigation by the Department to determine the extent of beneficial use of water, the Department finds, concludes, and orders:

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 SE $\frac{1}{4}$ SE $\frac{1}{4}$, 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 Idaho Code § 42-204.
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 horse power 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 March 2, 1987, the Department received the required examination fee for the permit.

8. 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 were completed for rights 22-7069 (July 20, 1978), 22-7103 (July 20, 1978), and 22-7230 (June 21, 1979), which use the same point of diversion and pumping system. 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.
9. On September 20, 1994, the Department received an assignment of permit conveying ownership of the permit to Northwest Farm Credit Services ACA and Steveco Canyon Farms Inc.
10. 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 with evidence the beneficial use of water during the authorized development period and compliance with the conditions of approval in accordance with the permit.
11. State Water District No. 1 staff have confirmed that the permit holder has not complied with the condition of approval requiring the permit holder to permanently install and maintain a measuring device as part of the diverting works.
12. Licensed water rights 22-7069, 22-7103, and 22-7230 are claimed in the (SRBA) and recommended with a combined diversion rate limit of 12.94 cfs for the irrigation of 2,725.4 acres. These rights divert water from Canyon Creek at the same point of diversion authorized by the permit and cover all lands authorized for irrigation under the permit.
13. A review of Department diversion records indicates that the greatest diversion rate during the authorized development period was 10.0 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 rate greater than 12.94 cfs.
14. No beneficial use of water was developed under the permit that is not already authorized by prior water rights.
15. Idaho Code § 42-204 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.

16. Idaho Code § 42-219(8) 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 the permit, it may issue a license for that portion of use which is in accordance with the permit, or may refuse issuance of a license and void the permit.

17. On September 8, 2008, the Department issued a Preliminary Order Voiding Permit No. 22-7114 (preliminary order).
18. 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 licenses 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.
19. Beneficial Use Examination Rules do not require the Department to rely solely upon the information and recommendation provided by a field examiner for evaluation of the beneficial use of water developed under a permit.
20. Rule subsection 01.02 of the Beneficial Use Examination Rules, IDAPA 37.03.02, regarding the rules, 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, nor 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.

21. Idaho Code § 42-219(1) 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.

22. 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.
23. 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."

CONCLUSIONS OF LAW

1. The provisions of Idaho Code § 42-219(8) authorize the Director of the Department to void permits for which the permit holder has not fully complied with the law and the conditions of the permit.
2. Investigation by the Department revealed that the permit holder has not complied with the law and conditions of the permit because they have not established the proposed beneficial of water within the times specified as required by the permit and Idaho Code § 42-219(8).
3. The Department should void the permit pursuant to Idaho Code § 42-219(8).

ORDER

IT IS HEREBY ORDERED that issuance of a license is **REFUSED** and Permit No. 22-7114 is **VOIDED**.

Dated this 4th day of December, 2008.



JEFF PEPPERSACK
Chief, Water Allocation Bureau



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

December 8, 2008

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

STEVECO CANYON FARMS INC
C/O MIKE STEVENS
49 E SUNSET CIR
RESBURG ID 83440

NORTHWEST FARM CREDIT SERVICES ACA
PO BOX 157
REXBURG ID 83440-0157

RE: Preliminary Order in the Matter of Permit No. 22-7114

Dear Permit Holders:

The accompanying order 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 unless a party petitions for reconsideration within fourteen (14) days after issuance as described in the enclosed information sheet.

If you have any questions regarding this matter, please call me at 208-287-4947

Sincerely,

Shelley W. Keen, Manager
Water Right Permits Section

Enclosures

SCANNED
DEC 29 2008

CERTIFICATE OF SERVICE

I hereby certify that December 8, 2008 I mailed a true and correct copy, certified postage prepaid, of the foregoing PRELIMINARY ORDER to the persons listed below:

RE: Preliminary Order in the Matter of Permit No. 22-7114

STEVECO CANYON FARMS INC
C/O MIKE STEVENS
49 E SUNSET CIR
REXBURG ID 83440

NORTHWEST FARM CREDIT SERVICES ACA
PO BOX 157
REXBURG ID 83440-0157

Emalee Rushing

Emalee Rushing
Office Services Supervisor

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Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (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 issuance 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.