

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, Page 1

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