

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF CORRECTING)
WATER RIGHT LICENSE NO. 22-7397)
IN THE NAME OF LAYNE HARRIS)
_____)

**PRELIMINARY ORDER
CORRECTING LICENSE**

This matter having come before the Department of Water Resources (Department) as a request for correction of a water right license, the Department finds, concludes, and orders:

CASE SUMMARY

Layne Harris, through his attorneys Kent Foster and Rob Harris, requested that the Department correct Water Right License 22-7397 to show the authorized diversion rate as 3.16 cfs, or 0.02cfs per acre, of water for the 158-acre irrigated place of use. The Department issued the license in 1990 with an authorized diversion rate of 1.97 cfs based on the conclusion that the 3.21 cfs of water diverted by Mr. Harris was spread over 258 acres. Mr. Harris admits that he irrigated approximately 258 acres at the time of the Department's field examination to verify beneficial use in connection with the permit, but he asserts that the 3.21 cfs was applied only to his 158 acres during the authorized development period for Permit 22-7397.

The Department did not conduct a hearing on the matter. For this decision the Department relied upon public records maintained by the Department, including all records pertaining to water rights, claims to water rights, and applications for water rights. The Department allowed the right holder's attorney to augment the water right file with the following items relevant to this case:

- "Affidavit of Robert Layne Harris" dated July 3, 2008.
- A copy of a 1985 land lease agreement between the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints ("Landlord") and Layne Harris ("Tenant").
- A copy of a mortgage for the NE¼ of Section 10, T6N, R41E, B.M., that R. Layne Harris, Beverly K. Harris, W. Henry Harris, Lena Harris, Danny L. Harris, and Marguerite C. Harris signed with the Federal Land Bank of Spokane.

JURISDICTION AND AUTHORITIES

Idaho Code § 42-219 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.

FINDINGS OF FACT

1. On June 24, 1982, the Department issued Layne Harris (right holder) a permit to establish a right to divert 3.2 cubic feet per second (cfs) from ground water within the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, T6N, R41E, B.M., for the irrigation of 160 acre in the NE $\frac{1}{4}$ of Section 10, T6N, R41E, B.M. The priority date for the permit was April 30, 1982. As a condition of approval, the right holder was required to submit proof of beneficial use for the permit on or before July 1, 1983.
2. By September 13, 1982, the right holder had installed a 200 horsepower G. E. electric motor with an Aurora turbine pump and a 60 horsepower U. S. electric motor and an Aurora centrifugal booster pump to divert water from his well in the NE $\frac{1}{4}$ of Section 10, T6N, R41E, B.M.
3. On July 2, 1983, the permit lapsed because the right holder had not submitted a proof of beneficial use statement within the required time.
4. On July 21, 1983, the right holder submitted a proof of beneficial use statement indicating that he had irrigated 160 acres in connection with his permit.
5. On August 16, 1983, the Department reinstated the permit. As a penalty for submitting the proof of beneficial use statement after the deadline stated in the permit, the Department advanced the priority date of the permit to May 20, 1982.
6. On August 8, 1985, the right holder leased 96 acres of farmable land in the N $\frac{1}{2}$ of Section 11, T6N, R41E, B.M., from the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints.
7. On July 17, 1987, a Department staff member conducted a beneficial use field examination in accordance with Idaho Code § 42-217 to verify the beneficial use of water established by the right holder in connection with the permit. The field examiner's report indicated that the right holder's diversion and delivery system, which included a 200 horsepower well motor and a 60 horsepower booster pump motor, applied 3.21 cfs of water using nine

quarter-mile hand lines. The field examiner recommended issuing a water right license for 3.16 cfs, or 0.02 cfs per acre, for the 158 acres he found to be irrigated within the permitted place of use.

8. A December 1, 1987, supplement to the examiner's field report prepared by a senior Department staff member stated that the right holder's irrigation system also irrigated land in the N½ of Section 11, T6N, R41E, B.M., in connection with other water rights. Including the land in Section 10 and the land in Section 11, the right holder's irrigation system covered approximately 258 acres.

9. The right holder's well in the SE¼NE¼, Section 10, T6N, R41E, B.M., was not an authorized point of diversion for water rights appurtenant to land in Section 11, T6N, R41E, B.M.

10. The field examiner's report does not state that the nine quarter-mile hand lines were used exclusively to irrigate the permitted place of use or that they were used also used to irrigate land in Section 11, T6N, R41E, B.M.

11. On January 24, 1990, a Department staff member prepared a memorandum titled "Clarification and Correction of Field Examination" for the permit. In the memorandum the staff member indicated that nine quarter-mile hand lines is generally excessive for the irrigation of 158 acres and that nine hand lines is more reasonable for 258 acres. The memorandum also explains that because the irrigation system covered 258 acres, the established diversion rate per acre was 0.0124 cfs. The author of the memorandum recommended that the Department apply the established rate per acre to the 158-acre place of use reported by the field examiner and issue a license with a total diversion rate of 1.97 cfs.

12. On February 28, 1990, the Department issued Layne Harris a water right license for the diversion of 1.97 cfs from ground water within the SE¼NE¼, Section 10, T6N, R41E, B.M., for the irrigation of 158 acres in the NE¼ of Section 10, T6N, R41E, B.M. The Department did not issue the license as an order of the Department or indicate a deadline for appealing the issuance of the license or the elements of the water right confirmed in the license.

13. On February 5, 2007, the Department received a request to correct the licensed diversion rate to 3.16 cfs from the attorney for the right holder, Kent W. Foster.

14. On June 24, 2008, the Department notified the right holder's new attorney, Robert L. Harris, that it did not have sufficient information to refute the prior diversion rate analysis or to change the license.

15. On July 8, 2008, the right holder's attorney submitted an affidavit from the right holder. In item no. 14 of the affidavit, the right holder explains that he did not lease or irrigate the 100-acre parcel (actually 96 acres according to the lease agreement) in Section 11 until 1986.

16. In item no. 5 of the right holder's affidavit, he explains that he "developed nine quarter mile handlines for convenience in order to get across the property faster." It is not clear from the right holder's statement what he means by "the property," but it can be inferred from other statement in item no. 5 that "the property" was 160 acres.

17. After the license was issued in 1990, the Department has changed the standard season of use for irrigation at the licensed place of use to 4/1 to 10/31.

18. The licensed annual volume for the right is 553.0 af or 3.5 af per acre, but a condition of approval on the license limits the use to 3.0 af per acre.

19. The standard annual diversion volume limit for irrigation in the vicinity of the licensed place of use is 3.5 af per acre.

ANALYSIS

The essential question of this case is whether the right holder diverted and used more than 1.97 cfs of water to irrigate a 158-acre portion of the permitted place of use before extending his irrigation system to cover an additional 100 (or 96) acres. If the right holder diverted and used more than 1.97 cfs for the 158 acres prior to submitting proof of beneficial use in 1983, then the Department erred in its original determination of beneficial use and the right holder is entitled to a water right license for the additional amount.

The 1982 mortgage agreement shows that the right holder had already installed the same diversion works that were found by the Department's field examiner in 1987. The timing of the installation of the diverting works is critical for two reasons. First, the fact that the booster motor and pump were in place by 1982 refutes the assumption that the booster was installed for the purpose of pressurizing lines extended to the leased land in 1985. Second, those diverting works were capable of diverting 3.21 cfs in 1987, and likely were capable of 3.21 cfs in 1982 if a sufficient number of handlines were in place at that time.

The right holder asserts in his affidavit that he employed nine handlines on the 158 acres within the permitted place of use as a matter of convenience, even though fewer handlines may have been sufficient. Because the Department's field examiner did not indicate whether the nine handlines were used on 158 acres or 258 acres, the Department cannot positively refute his assertion, even though it may seem unusual. The right holder did not state when the nine handlines were first employed. It is possible that some were added after he submitted proof of beneficial use, but it is equally possible that all nine handlines were utilized right from the start to deliver 3.21 cfs of water to the permitted place of use.

CONCLUSIONS OF LAW

1. Idaho Code § 42-219 obligates the Department to issue a water right license that accurately portrays the water right developed in accordance with the permit.
2. By the time he submitted proof of beneficial use for Permit 22-7397, the right holder had installed sufficient diverting works and applied 3.21 cfs of water from ground water to irrigate 158 acres within the permitted place of use in the NE¼ of Section 10, T6N, R41E, B.M.
3. The authorized diversion rate on Water Right License 22-7397 does not accurately portray the water use developed in accordance with the permit during the authorized development period.
4. The authorized season of use for Water Right License 22-7397 exceeds the accepted normal season for the authorized place of use by one day.
5. The conditions of approval on the license are not consistent with the licensed annual diversion volume limit on the license.
6. The authorized diversion rate for Water Right License 22-7397 should be 3.16 cfs.
7. The authorized season of use for Water Right License 22-7397 should be 4/1 to 10/31.
8. The conditions of approval on the license should limit the use of water to 3.5 af per acre of land irrigated.
9. The Department should correct Water Right License 22-7397 to authorize a diversion rate of 3.16 cfs, a season of use of 4/1 to 10/31, and a diversion volume limit of 3.5 af per acre.

ORDER

IT IS HEREBY ORDERED that the authorized diversion rate for Water Right License 22-7397 shall be 3.16 cfs.

IT IS FURTHER HEREBY ORDERED that the authorized season of use for Water Right License 22-7397 shall be 4/1 to 10/31.

IT IS FURTHER HEREBY ORDERED that approval condition no. 5 on the license shall say:

This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 3.5 afa per acre for irrigation of the lands above.

IT IS FURTHER HEREBY ORDERED that the Department shall issue a corrected water right license document for Water Right 22-7397 on this date in connection with this order.

Dated this 3rd day of September, 2008.

A handwritten signature in black ink, appearing to read "Gary Spackman", written over a horizontal line.

GARY SPACKMAN

Administrator, Water Management Division