

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO )  
CORRECT WATER RIGHT LICENSE )  
NO. 32-7128 AND 32-7136 )  
\_\_\_\_\_ )

**PRELIMINARY ORDER  
CORRECTING LICENSE**

This matter having come before the Department of Water Resources (Department) as a result of the filing of a petition to correct a water right license, the Department finds, concludes, and orders:

**FINDINGS OF FACT**

1. On March 27, 1985, the Department issued Permits 32-7128 and 32-7136 (permits) to Birch Power Company authorizing the establishment of rights to divert water from Birch Creek within the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 3, Township 8 North, Range 30 East, B.M., for power generation in the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 17, Township 8 North, Range 31 East, B.M., Clark County.

2. On August 8, 1986, the Department approved two Applications for Amendment of Permit for Permits 32-7128 and 32-7136. The amendments changed the place of use to the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 31 East, B.M., Clark County.

3. August 22, 1986, the Department received and subsequently processed two Assignment of Permit forms assigning the permits to Ted Sorenson (right holder).

4. On February 15, 1989, a certified water right examiner submitted two Beneficial Use Field Reports verifying the beneficial use of water established in connection with the permits. On a hand-written report the field examiner reported that the point of diversion was located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34, Township 9 North, Range 30 East, B.M., and that the place of use is within the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 31 East, B.M. for both permits. On a typed version of the field report, the field examiner reported that the point of diversion was within the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34, Township 9 North, Range 31 East, B.M., and that the place of use is within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 31 East, B.M., Clark County, for both permits.

5. On September 22, 1989, the Department received the right holder's proof of beneficial use statements for the permits.

6. On October 26, 1989, the Department received a letter from the water right examiner that conducted the field examination that clarified that the point of diversion for both permits is located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34, Township 9 North, Range 30 East, B.M. and that the place of use is located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 31 East, B.M.

7. On July 18, 2001, a Department reviewer prepared an Application for Amendment of Permit for 32-7128 and 32-7136 indicating that the point of diversion used in connection with the permits is within Government Lot 5 (SE $\frac{1}{4}$ SW $\frac{1}{4}$ ) of Section 34, Township 9 North, Range 31 East, B.M., and the place of use is within the SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Range 8 North, Range 31 East, B.M., Clark County. The right holder signed the amendments and submitted them to the Department on August 14, 2001.

8. On October 24, 2001, the Department approved the application for amendment of Permit 32-7128 and issued Water Right License 32-7128 (license) for the beneficial use of water established in connection with the permit. The license described the point of diversion as Government Lot 5 (SE $\frac{1}{4}$ SW $\frac{1}{4}$ ) of Section 34, Township 9 North, Range 31 East, B.M., and the place of use in the SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Range 8 North, Range 31 East, B.M., Clark County.

9. On December 7, 2001, the Department issued an Amended Water Right License for license 32-7128 to correct an omission of conditions required on the license.

10. On December 10, 2001, the Department approved the application for amendment of Permit 32-7136 and issued Water Right License 32-7136 (license) for the beneficial use of water established in connection with the permit. The license described the point of diversion as Government Lot 5 (SE $\frac{1}{4}$ SW $\frac{1}{4}$ ) of Section 34, Township 9 North, Range 31 East, B.M., and the place of use in the SW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Range 8 North, Range 31 East, B.M., Clark County.

11. Condition number 8 on Water Right License 32-7128 and 32-7136 incorrectly referenced the point of diversion as the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 3, Township 8 North, Range 30 East, B.M. In addition, condition number 11 on Water Right License 32-7136 and 32-7128 is not consistent with the requirements under condition numbers 7 and 8 on the licenses.

12. On November 21, 2005, the Department received the right holder's request to correct the point of diversion for both licenses to the SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 34, Township 9 North, Range 30 East, B.M., and the place of use for both licenses to the NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 31 East, B.M., Clark County.

### CONCLUSIONS OF LAW

1. Idaho Code § 42-219 directs the Department to issue a water right license that accurately portrays the beneficial use of water developed in accordance with the permit.

2. Despite the fact that the preliminary order issuing the licenses became final, the Department should correct its clerical mistakes by correcting the legal description for the point of diversion and place of use in accordance with the field examiner's findings and correcting the conditions of approval.

3. The Department should revise the point of diversion, place of use description and conditions on the amendments and on the licenses.

**ORDER**

IT IS HEREBY ORDERED that the point of diversion description and place of use description for the Application for Amendment for Licensing Purposes and Water Right License 32-7128 and 32-7136 are **CORRECTED** to:

Point of Diversion: SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 34, Township 9 North, Range 30 East,  
B.M. Clark County  
Place of Use: NE $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 14, Township 8 North, Range 31 East, B.M.,  
Clark County.

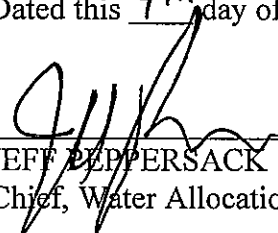
IT IS FURTHER HEREBY ORDERED that condition number 8 on Water Right Licenses 32-7128 and 32-7136 is **CORRECTED** as follows:

8. If the right holder does not comply with Condition No. 7 listed above, the right holder shall build and maintain a gate in the hydropower diversion located in the SESW, S34, T9N, R30E, B.M. and shall allow 11% of the flow of Birch Creek or 5.0 cfs, whichever is smaller, to flow past the feeder canal diversion on Birch Creek, said water to remain in the natural channel of Birch Creek.

IT IS FURTHER HEREBY ORDERED that condition number 11 on Water Right Licenses 32-7128 and 32-7136 is **RESCINDED**

IT IS FURTHER HEREBY ORDERED that amended Water Right Licenses shall be issued on this date in conjunction with this order.

Dated this 4<sup>th</sup> day of June, 2008.

  
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JEFF PEPPERSACK  
Chief, Water Allocation Bureau