

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

IN THE MATTER OF WATER RIGHT NOS.)	FINAL ORDER
72-7A, 72-10032, 72-16559, AND 72-16560)	DENYING PETITION
IN THE NAME OF ROBIN WEGNER)	FOR DECLARATORY
_____)	RULING

On March 31, 2008, J. R. and Patricia Challis ("Challis") petitioned the Idaho Department of Water Resources for a declaratory ruling regarding the following issues: (1) Have water rights nos. 72-7A, 72-10032, and 72-16560 "been statutorily forfeited for five (5) years or more of non-use without a valid defense thereto?"; and (2) Is the current use of water authorized by water right no. 72-16559 an illegal use of water that must be discontinued? Challis also moved that the petition for declaratory ruling be consolidated with a contested case pending for Robin Wegner's applications to appropriate water nos. 72-16693 and 72-16694.

AUTHORITIES

Idaho Code § 42-350, with its associated title, reads, in pertinent part, as follows:

42-350. Revocation of license – Grounds – Hearing – Licensee defined. – (1) If the director of the department of water resource finds, on the basis of available information at any time after a license is issued, that the licensee has ceased to put the water to beneficial use for a period of five (5) continuous years, or that the licensee has willfully or intentionally failed to comply with any of the conditions of the license, or has willfully or intentionally failed to comply with provisions of the law governing the license, then the director of the department of water resources may issue (a) an order to show cause before the director of the department or the director's designee on or before a date therein set, which shall be not less than thirty (30) days from the date of service, why the director of the department should not revoke said license; or (b) an order directing the licensee to cease and desist the activity or activities alleged to be in violation of the conditions of the license or in violation of provisions of law governing the license. A cease and desist order may direct compliance with the license forthwith or may provide for a time schedule to bring the licensee into compliance with the conditions of the license.

Idaho Code § 42-351 states:

(1) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right.

(2) It is unlawful for any person to divert or use water in substantial violation of any provision of this title, or any rule, permit, condition of approval or order issued or promulgated pursuant to this title that is related to the diversion or use of water.

(3) Upon investigation of available information, the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.

(4) Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.

FINDINGS OF FACT

The Snake River Basin Adjudication (“SRBA”) Court decreed Wegner’s water rights discussed above on the following dates: 72-7A (11/17/2000), 72-10032 (12/5/2001), 72-16559 (12/5/2001), and 72-16560 (12/5/2001).

In the spring of 2007, the Department received a complaint about illegal storage of water in a pond constructed and owned by Wegner and illegal irrigation with the water stored in the pond. After investigation and review of water rights, on April 27, 2007, the Department simultaneously sent a letter to Wegner and a letter to J.R. and Patricia Challis, informing both Wegner and Challis that each was storing water without a water right and that the storage was illegal under Idaho Code § 42-351. The letters acknowledged the filing of an application to appropriate water filed by Challis and applications to appropriate water filed by Wegner. The letter stated that the watermaster for Water District 72D should administer the existing water rights, and that both Wegner and Challis would be able to deliver water from the ponds that was diverted and placed into the ponds under existing water rights. Water right no. 72-16559 is a water right from a spring source held by Wegner that was diverted into the pond. The letter also stated that the Department would expect the ponds to be breached after the irrigation season.

In June 2007, notices of the applications to appropriate water were published. Challis’s application was not protested. Challis protested Wegner’s application. The Department attempted to expedite a hearing for the Wegner application. When the Department attempted to schedule a prehearing conference, the earliest conference date available for the protestant and counsel was the third week of October 2007, after the irrigation season had ended.

Because of the delay in the contested case proceeding not caused by Wegner, on October 22, 2007, Gary Spackman, Administrator for the Department, sent a letter to Wegner and Challis stating the Department “does not intend to mandate breaching of the Wegner berm at the present time.” The letter also stated that “[f]ollowing issuance of a final order in the contested case, IDWR will take whatever action is necessary.”

CONCLUSIONS OF LAW

Forfeiture

The only express statutory authority granted to the Department to determine forfeiture of a perfected water right is contained in Idaho Code § 42-350. The Department’s statutory authority to determine forfeiture is limited to licenses issued by the Department. There is no parallel statutory authority granted to determine forfeiture of a decreed water right.

In *Jenkins v. State, Dept. of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982), the Idaho Supreme Court recognized that, upon filing an application to transfer an existing water right, the right holder presents the decreed water right to the Department to determine its validity and the extent of its use. Wegners did not file an application for transfer for the water rights alleged to be forfeited in Challis’s petition.

The Department does not have the authority to initiate an administrative proceeding to determine whether a decreed water right is forfeited unless the validity of the decreed water right must be determined as part of an authorized process assigned to the Department by the legislature.

Illegal Use of Water

Idaho Code § 42-351 states that it is unlawful to divert or use water without a water right. The Department has “discretion” to issue a notice of violation for the illegal use or “may” issue cease and desist orders or initiate an action seeking injunctive relief. The statute does not mandate that these enforcement remedies issue in every instance.

The Department has traditionally weighed several criteria in determining what enforcement activity, if any, it should initiate for an unlawful use of water. As an overall goal, the Department has focused on compliance, not penalty. Other criteria considered by the Department include the magnitude of the use, efforts exerted by the water user to comply with the law, the effect of the water use on other existing water rights, and the limited resources of the Department in pursuing and enforcing the illegal use of water.

When the Department applies the above criteria to the facts related to the storage of water by Wegner, and the Department also considers the timetable for the pending contested case for Wegner’s application for a water right to store water, the Department

determines, under its statutory discretion, that it should not require removal or breach of a portion of the reservoir embankments before the outcome of the pending contested case.

Challis asserts that the Wegner's use of water under water right no. 72-16559 is an illegal use of water that must be discontinued. The storage of water in the Wegner reservoir is not authorized by a water right. The Department has consistently allowed natural flow water rights to be passed through a storage facility. Even though the storage in the Wegner pond is not authorized by a valid water right, the inflow and outflow water to the pond that could be diverted under right no. 72-16559 is not an illegal use of water.

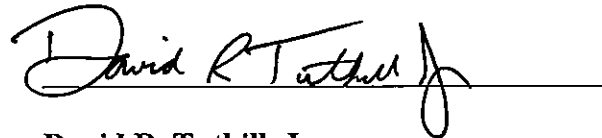
ORDER

IT IS HEREBY ORDERED that the petition for declaratory ruling requesting that the Department determine water right nos. 72-7A, 72-10032, and 72-16560 to be forfeited, is **Denied**.

IT IS FURTHER ORDERED that the petition for declaratory ruling requesting that the Department determine the current use of water authorized by water right no. 72-16559 an illegal use of water that must be discontinued is **Denied**.

IT IS FURTHER ORDERED that, because of the denial of the petition for declaratory ruling, the request for consolidation of the petition with the pending contested case for water right applications nos. 72-16693 and 72-16694 is **Denied**.

Dated this 18th day of April, 2008.

A handwritten signature in black ink, reading "David R. Tuthill, Jr.", followed by a horizontal line.

David R. Tuthill, Jr.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2008, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid, certified mail – return receipt requested, and properly addressed to the following:

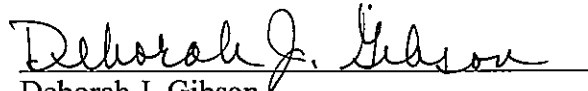
Document(s) Served: Final Order Denying Petition for Declaratory Ruling and Explanatory Information to Accompany a Final Order.

PATRICK BROWN
HUTCHINSON & BROWN
PO BOX 207
TWIN FALLS ID 83303-0207

NORMAN SEMANKO
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139

ROBIN J WEGNER
HC 63 BOX 1576
CHALLIS ID 83226

JOHN R CHALLIS
PO BOX 1220
CHALLIS ID 83226-1220


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

**EXPLANATORY INFORMATION
TO ACCOMPANY A
FINAL ORDER**

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4), Idaho Code.

REQUEST FOR HEARING

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. See section 42-1701A(3), Idaho Code. **Note: The request must be received by the Department within this fifteen (15) day period.**

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) the service date of the final order, b) an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.