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DEPARTMENT OF
WATER RESOURCES

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Attorney for Petitioner Greg Obendorf

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

In the Matter of Permit Nos. 63-32465	)	Case No. _____
(split to 63-32911 and 63-32912),	)	
63-32466 and 63-32467	)	PETITION TO REVOKE, ANNUL
In the Name of Tree Top Ranches LP	)	AND/OR WITHDRAW PERMITS
_____	)	

Petitioner Greg Obendorf, by and through his counsel of record, Dana L. Hofstetter of Hofstetter Law Office, LLC, on behalf of himself and others similarly interested, respectfully submits this Petition to revoke, annul and/or withdraw the above-referenced water right Permits, pursuant to Idaho Code §§ 42-203A(3), 42-1701A, and 67-5254, the Idaho Department of Water Resources' Rules and other applicable legal authorities. As described more fully below, notice of these Applications for Permit was legally defective. Accordingly, it is necessary for the above-referenced Permits to be

revoked, annulled and/or withdrawn to fully satisfy applicable notice requirements and afford interested and affected parties, including the Petitioner, the opportunity to file Protests. This Petition is supported by Idaho Department of Water Resources (“IDWR”) files for the above-referenced Permits, other matters of record with IDWR, and the *Affidavit of Dana L. Hofstetter* filed contemporaneously with this Petition.

Background

Tree Top Ranches, L.P. submitted Application for Permit Nos. 63-32462, 63-32465, 63-32466 and 63-32467 to IDWR on December 28, 2005. All four Applications concerned the same non-irrigation season wildlife project with various points of diversion from the Boise River and from Sand Hollow Creek in Canyon County. One of the Applications, 63-32462, received 3 protests, including one from the Petitioner and one from another of Hofstetter Law Office’s clients; but the other three Applications apparently were not officially protested by the June 25, 2007 published deadline.¹ (Coincidentally, of the four, only that same Application, 63-32462, had been included in the IDWR Weekly Water Right Listing mailing, the others having been omitted.) While Application for Permit No. 63-24262 has not proceeded much further administratively, the other three Tree Top Applications were processed and were conditionally approved on December 5, 2007.

¹ The record may reflect the interest of the Hofstetter Law Office clients in all four (4) Applications, even the unprotested ones, as Ms. Hofstetter had telephone conversations with the then IDWR Agents assigned to these Applications about her clients’ concerns.

Legal Discussion

Idaho Code § 42-203A(3) requires that the Idaho Department of Water Resources (“IDWR”), upon written request, provide notices of application to any person who pays an annual mailing fee:

The director of the department shall cause a copy of the notice of application to be sent by ordinary mail to any person who requests in writing to receive any class of notices of application and who pays an annual mailing fee as established by department regulation.

IDWR’s Weekly Water Right Listing is provided in satisfaction of these statutory notice requirements. *IDAPA 37.03.08.040.02(d)*. IDWR’s Weekly Water Right Listing provides mailed notices of applications to those who submit the annual subscription fee. *See, id.; Affidavit of Dana L. Hofstetter; and Idaho Code § 42-221(N)*.

Counsel for Petitioner received Notice of Application for Permit No. 63-34262, as part of her subscription to IDWR’s Weekly Water Right Listing; however, Notice of Application for Permit Nos. 63-32465 (split to 63-32911 and 63-32912), 63-32466 and 63-32467 were omitted from the publication. *Affidavit of Dana L. Hofstetter, Exhibits A and B*. Accordingly, counsel for Petitioner, on behalf of her clients, only filed Protests to Application No. 63-32462. *Id., Exhibits C and D*. Had she known that Application for Permit Nos. 63-32465, 63-32466 and 63-32467 also were being published and were subject to the same Protest deadline of June 25, 2007, she also would have filed Protests to some, if not all, of these Applications on behalf of the same and/or different clients.

Affidavit of Dana L. Hofstetter. Also, it is possible that others failed to file Protests because of the defective IDWR Weekly Water Right Listing.

IDWR's provision of mailed notice pursuant to Idaho Code § 42-203A(3) is mandatory ("The director ... **shall**"). While *IDAPA 37.03.08.040.02(d)(vii)* states that "errors or omissions in the notices of applications received by mail .. does not invalidate the published notice," this regulatory language cannot be interpreted to override the statutory requirement that mailed notice be provided upon request. In other words, this regulation should not be interpreted to mean that the complete failure to provide mailed notice of certain Applications can go uncorrected. Since the language of *Idaho Code § 42-203A(3)* is mandatory, IDWR must correct the failure to provide mailed notice of Applications for Permit Nos. 63-32465, 63-32466 and 63-32467. Any interpretation of a rule that is inconsistent with this statutory mandate is not legally supportable.

There are important issues that would have been raised in timely Protests to Applications for Permit Nos. 63-32465, 63-32466 and 63-32467, if Petitioner's counsel had been aware that the Protest deadline was approaching.² It is noted that many of the points of diversion and conveyance systems on the subject applications are located on properties belonging to others. *See Applications for Permit Nos. 63-32466 and 63-32467.* For example, the property on which the point of diversion for Application for Permit No. 63-32466 is located, appears to belong to the Petitioner. *Affidavit of Dana L.*

² The following discussion of issues that could have been raised in Protests is illustrative and should not be deemed a comprehensive list of possible Protest issues.

Hofstetter. One of Petitioner's concerns is the potential expansion both in size and in period of use of what is, at most, an irrigation season easement. Thus, the Petitioner asserts that Tree Top would not have an existing easement for the proposed diversion of water under Permit No. 63-32466. Perhaps, due process requires that those whose property is directly affected by an application, such as by Application No. 63-32466, personally receive actual mailed notice of the proposed application. In any event, it is not clear how the Applicant, in this circumstance, was able to make the necessary showing of legal access pursuant to *IDAPA 37.03.08.040.05(e) and 37.03.08.045.01(c)(i)* and that any such showing was accepted by IDWR without contacting the landowner(s) involved.

Similarly, Permit No. 63-32467 appears to have unaddressed easement issues. This Permit authorizes the diversion of additional flows in the Andrews Ditch during the non-irrigation season, although Tina Iest and the Tina Iest Family Limited Partnership's water right nos. 63-32066 for 20.5 cfs and 63-11617 for 3 cfs already authorize diversion of the entire capacity of the Andrews Ditch during the non-irrigation season.³ Therefore, one must wonder whether it is the Applicant's intention to expand the Andrews Ditch as it traverses the property of others, without the apparent legal easements to do so.

Although Permit No. 63-32467 states in condition no. 15 that "this right does not grant any right-of-way or easement across the land of another," under IDWR's own regulations it is speculative, and therefore legally invalid, to issue a permit without an adequate

³ The Tina Iest Family Limited Partnership was represented by Hofstetter Law Office, LLC in the Permit No. 63-32066 proceedings and, therefore, also was one of that firm's clients that was potentially affected by the defective mailed notice.

demonstration of the existence of an easement. *IDAPA 37.03.08.040.05(e) and 37.03.08.045.01(c)(i)*. Again, also, it should be addressed whether due process principles would require actual notice or confirmation by those who have property across which an easement is asserted.

It further should be noted that Application for Permit No. 63-32461 which was submitted a week before Tree Top's Applications on December 19, 2005 by JF Watson Farms Company for the same non-irrigation season wildlife purpose and from the same source downstream, remains unapproved.⁴ It appears unjustified for similar more junior Applications, such as Tree Top's, to be approved while the senior Application remains pending, especially in view of the statutory permit approval requirements that necessitate for IDWR to determine that the proposed use will not reduce the quantity of water under existing water rights and that the water supply is sufficient for the proposed use. *Idaho Code § 42-203A(5)*. Tree Top's newly issued Permits do provide, "Subsequently approved permits based on earlier-in-time applications may reduce the amount of water available for appropriation under this right and may result in a reduction of the quantity found to be beneficially used at the time of licensing of this right." However, this condition appears to contradict the statutory mandate that the sufficiency of the water supply and the effect on existing water rights be determined prior, not after, Permit issuance. *See id.*

⁴ JF Watson Farms Company is the other one of the Hofstetter Law Office, LLC's clients that filed a Protest to Application for Permit No. 63-32462. *See Affidavit of Dana L. Hofstetter, Exhibit D.*

In summary, the omission of Application Nos. 63-32465, 63-32466 and 63-32467 in the statutorily required IDWR Weekly Water Right Listing, resulted in no Protests being filed to these Applications. However, other nearby water users and landowners, have important and relevant questions about these Applications that would have been raised in Protests and that still need to be addressed.

According to the record, Preliminary Permits Nos. 63-32911, 63-32912, 63-32466 and 63-32467 were issued by IDWR on December 5, 2007, were served by mail on the Applicant on December 7, 2007 and, under Idaho law, became Final Orders fourteen days later, on December 21, 2007. Thus, the 28 day period for judicial review under *Idaho Code § 42-5273* would not have expired before January 18, 2008. In view of the virtually contemporaneous timing of the instant Petition, the Applicant should not be substantially prejudiced if the requested relief is granted.

Conclusion

WHEREFORE, Petitioner respectfully requests that Permit Nos. 63-32465 (split to 63-32911 and 63-32912), 63-32466 and 63-32467 be revoked, annulled and/or withdrawn to fully satisfy the statutory notice requirement of Idaho Code § 42-203A(3), to provide actual notice to directly affected landowners and to afford interested parties, including the Petitioner, the opportunity to file protests.

RESPECTFULLY SUBMITTED this 30th day of January, 2008.

HOFSTETTER LAW OFFICE, LLC

By 
Dana L. Hofstetter
Attorney for Petitioner Greg Obendorf

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of January, 2008, I caused the foregoing **PETITION TO REVOKE, ANNUL AND/OR WITHDRAW PERMITS** to be served by the pre-paid method(s) indicated on the following:

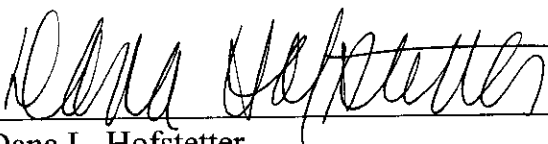
Original to:

David R. Tuthill, Jr., Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
Boise, Idaho 83702
☐ U.S. Mail ☐ Fed Ex ☒ Hand ☐ Fax

Copies to:

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Dana L. Hofstetter

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