

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF LICENSE)	ORDER DENYING PETITION
NO. 23-11333 IN THE NAME OF)	FOR RECONSIDERATION
TOM SUMMERS)	
_____)	

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

FINDINGS OF FACT

1. On December 3, 2007, the Department issued Water Right License 23-11333 (license) with a priority of October 12, 2005, confirming that Tom Summers (right holder) had established a right to divert 70.7 AF of water at a rate of 0.20 cfs from Little Pine Creek, a tributary of Antelope Creek, for the irrigation of 20.2 acres in Bonneville County.

2. The Department issued the license as a preliminary order (order) pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).

3. Idaho Code § Section 67-5243(3) provides in pertinent part as follows:

Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the issuance of that order. The presiding officer shall render a written order disposing of the petition.

4. On December 14, 2007, the Department received a petition for reconsideration (petition) of the preliminary order issuing Water Right License 23-11333 pursuant to Idaho Code § Section 67-5243(3) from the right holder.

5. In his petition, the right holder stated:

It is requested that license 23-11333 as nearly as possible be brought into conformity with license 23-2071 including priority date of April 3, 1964.

6. Water right no. 23-2071 (claim) was claimed in the Snake River Basin Adjudication (SRBA) on January 13, 1989 with a source of Little Pine Creek. Transfer application no. 3520 (transfer) was received on February 6, 1989, along with a \$50.00 filing fee. The transfer was

approved on March 1, 1990, changing the source to Antelope Creek. The claim was recommended to be disallowed in the SRBA on the basis that the water right no longer exists because forfeiture of the right by nonuse was confirmed and a defense to forfeiture was not confirmed, or because abandonment of the right was confirmed.

7. On May 3, 2005, John M. Melanson, presiding Judge of the Snake River Basin Adjudication, issued a Final Order Disallowing Water Right Claim regarding water right claim no. 23-2071 and stated:

It is ordered that the above water right claim is hereby disallowed with prejudice and shall not be confirmed in any partial decree or in any final decree entered in the SRBA, Case No. 39576, in whatever form that final decree may take or be styled.

8. Idaho Code § 42-219(1) provides as follows:

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 under the seal of the office of the department of water resources, and shall state the name and post-office address of such user, the purpose for which such water is used, 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.

9. Idaho Code § 42-219(4) provides as follows:

The date of priority confirmed by the license shall be the date of the application for the permit for the construction of the works from which the water is taken, and to which the right relates, provided there has been no loss of priority under the provisions of this chapter.

10. Idaho Administrative Code, IDAPA 37.03.08, Water Appropriation Rule 35.02.b. provides as follows:

The priority of an application for unappropriated or trust water is established as of the time and date the application is received in complete form along with the statutory fee in any official office of the department. The priority of the application, remains fixed unless changed by action of the Director in accordance with applicable law.

11. Idaho Code § 42-219(8) provides as follows:

In the event that the department shall find that the applicant has not fully complied with the law and the conditions of permit, it may issue a license for that portion of the use which is in accordance with the permit, or may refuse issuance of a license and void the permit. Notice of such action shall be forwarded to the permit holder by certified mail. The applicant may contest such action by the department pursuant to section 42-1701A(3), Idaho Code.

CONCLUSIONS OF LAW

1. The license bears a priority date that was the date of receipt of the application for permit and statutory fee.
2. The license cannot be adjusted to bear a priority date earlier than the date of receipt of the application for permit.
3. The license cannot be adjusted to confirm use that is not in conformance with the permit.
4. The Department has no authority to reopen Snake River Basin Adjudication Case No. 39576 regarding water right claim no. 23-2071.
5. The Department should deny the petition for reconsideration of the order pursuant to Idaho Code § 67-5243(3).

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing Water Right License 23-11333 is **DENIED** pursuant to Idaho Code § 67-5243(3).

Dated this 24th day of December, 2007.


JEFF PEPPERSACK
Chief, Water Allocation Bureau