

BEFORE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PETITION TO)
CORRECT WATER RIGHT LICENSE)
NOS. 37-7268, 37-7454, 37-7602 and 37-8679)
_____)

**PRELIMINARY ORDER
CORRECTING LICENSES**

This matter having come before the Department of Water Resources (Department or IDWR) as a result of the filing of a petition to correct water right licenses, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

Water Right 37-7454

1. On December 30, 1975, the Department issued Permit 37-7454 to Steven R. Shaw authorizing the establishment of a right to divert ground water for irrigation purposes. The permit authorized irrigation of 200 acres in the amount of 4.0 cfs. The permit required proof of beneficial use to be submitted by December 1, 1980.
2. On August 4, 1980, the Department received a proof of beneficial use statement from Steve Shaw.
3. On July 30, 1980, Department staff conducted a field examination to verify the beneficial use of water established in connection with Permits 37-7149 and 37-7602. The field examiner indicated that rights 37-7149 and 37-7602 used the same pumping system as Permit 37-7454. The field examiner found that the point of diversion and place of use were different than the locations authorized under Permit 37-7454. The field examiner measured the capacity of the pumping system at 5.09 cfs.
4. On November 20, 1980, Mr. Shaw submitted an application to amend the permit to correct the locations of point of diversion and place of use to correspond with the finding of the Department's field exam. The Department approved the amendment on December 24, 1980.
5. On December 24, 1980, the Department issued License 37-7454 to Steven R. Shaw for the diversion of 4.0 cfs from ground water to irrigate 200 acres of land within Section 30, Township 6S, Range 19E, B.M. The license included a condition limiting the use of water to 5.09 cfs when combined with right 37-7602.

Water Right 37-7602

6. On June 29, 1977, the Department issued Permit 37-7602 to Steve Shaw authorizing the establishment of a right to divert ground water for irrigation purposes. The permit authorized irrigation of 160 acres in the amount of 3.2 cfs. The permit required proof of beneficial use to be submitted by June 1, 1982.
7. On August 2, 1978, the Department received a proof of beneficial use statement from Steve Shaw.
8. On July 30, 1980, Department staff conducted a field examination to verify the beneficial use of water established in connection with the permit. The field examiner indicated that the pumping system also provided water for rights 37-7149 and 37-7454. The field examiner noted that not all the lands authorized under the permit were irrigated, but the permit could be amended to cover other irrigated lands within the system. The field examiner measured the capacity of the pumping system at 5.09 cfs.
9. On June 1, 1982, the Department mailed a letter to Mr. Shaw summarizing the results of the field exam and provided a form to amend the place of use under the permit. The Department did not receive an application to amend the permit
10. On August 31, 1982, the Department issued License 37-7602 to Steve Shaw for the diversion of 0.7 cfs from ground water to irrigate 35 acres of land within Section 30, Township 6S, Range 19E, B.M. The license included a condition limiting the use of water to 5.09 cfs when combined with right 37-7454.

Water Right 37-7268

11. On September 19, 1973, the Department issued Permit 37-7268 to Ralph Bowen authorizing the establishment of a right to divert ground water for irrigation purposes. The permit authorized irrigation of 160 acres in the amount of 3.2 cfs. The permit required proof of beneficial use to be submitted by September 1, 1978.
12. The Department received an assignment of permit on September 8, 1975 to change the owner of the permit to Steven R. Shaw.
13. On September 7, 1978, the permit lapsed for failure to submit proof of beneficial use by the due date.
14. On July 11, 1988, the Department received a proof of beneficial use statement and documentation supporting extent of development during the authorized development period from Louis Hubsmith. On December 8, 1988, the Department issued an order reinstating the permit and advancing the priority date to July 11, 1988.
15. On July 24, 1990, Department staff conducted a field examination to verify the beneficial use of water established in connection with the permit. The field examiner found that the point of diversion and place of use were different than the locations authorized under the permit. The field

examiner indicated that rights 37-7454 and 37-7602 used the same pumping system and overlapped a portion of the place of use authorized under the permit. The field examiner estimated the capacity of the pumping system based on a pressure of 65 psi, an estimated lift of 250 feet, and an estimated pump efficiency of 70% resulting in a total capacity of 6.2 cfs.

16. On April 9, 1992, Mr. Hubsmith submitted an application to amend the permit to correct the locations of point of diversion and place of use to correspond with the finding of the Department's field exam. The Department approved the amendment on June 10, 1992.
17. On June 10, 1992, the Department issued License 37-7268 to Louis L. and Darlene I. Hubsmith for the diversion of 3.2 cfs from ground water to irrigate 160 acres of land within Sections 19 and 30, Township 6S, Range 19E, B.M. The license included a condition limiting the use of water to 6.2 cfs when combined with rights 37-7454 and 37-7602.

Water Right 37-8679

18. On March 7, 1991, the Department issued Permit 37-8679 to Louis L. Hubsmith authorizing the establishment of a right to divert ground water for irrigation purposes. The permit authorized irrigation of 108 acres in the amount of 2.16 cfs. The permit required proof of beneficial use to be submitted by March 2, 1992.
19. On March 25, 1991, the Department received a proof of beneficial use statement from Louis Hubsmith.
20. On August 8, 1991, Department staff conducted a field examination to verify the beneficial use of water established in connection with the permit. The field examiner indicated that the pumping system also provided water for rights 37-7454, 37-7602 and 37-7268. The field examiner estimated the capacity of the pumping system based on an estimated pressure of 70 psi, an estimated lift of 242 feet, and an estimated pump efficiency of 70% resulting in a total capacity of 6.10 cfs. Department staff reviewed the exam and modified the flow capacity estimate with a reduced pressure of 65 psi to a resultant flow of 6.28 cfs.
21. On July 25, 1994, the Department issued License 37-8679 to Louis L. Hubsmith for the diversion of 1.92 cfs from ground water to irrigate 96 acres of land within Sections 19 and 30, Township 6S, Range 19E, B.M. The license included a condition limiting the use of water to 6.28 cfs when combined with rights 37-7454, 37-7602 and 37-7268.

Petition to Correct and Amend Licenses

22. On February 23, 2005, the Department received a Petition to Correct and Amend Licenses (petition) from Dana L. Hofstetter, attorney, on behalf of Louis L. and Iris B. Hubsmith (petitioners). The petition claims that the Department erred in processing a proof of beneficial use statement and in estimation of flow capacity for the pumping system associated with the rights. The petition asks the Department to correct a priority date, the places of use, flow rates, and combined flow rate conditions on one or more of rights 37-7268, 37-7454 and 37-7602.

23. The petition was accompanied by the following items submitted as evidence of an error in processing the proof of beneficial use statement and an error in estimating the flow capacity for the pumping system associated with the water rights.
- A. An Affidavit of Allen Merritt, Manager of the Department's Southern Region Office, indicating the likelihood that the Department assisted Steve Shaw in completion of a proof of beneficial use statement for Permit 37-7602.
 - B. A report entitled, "Report on Well and Irrigation System Capacity for Leon Hubsmith, Dietrich, Idaho" prepared by Brockway Engineering, PLLC (Brockway). The report concluded that, "...the best estimate of the capacity of the Hubsmith irrigation system at the time of the original IDWR field examinations (1990-91) is 3,346 gpm (7.46 cfs)." The report also concluded that, "The error in the theoretical calculations made by the two IDWR field examiners was in the assumed efficiency value. The actual pump efficiency at the time of the examinations was 82%, based on the manufacturer's performance curves. If this value had been used instead of the 'default' value of 70%, the examiners would have calculated discharges very close to the value of 7.46 cfs determined in the present analysis."
 - C. A report entitled, "Supplement Report on Well and Irrigation System Capacity - Leon Hubsmith, Dietrich, Idaho," prepared by Brockway. The report estimated the system capacity prior to 1989 based on Brockway's understanding of the system conditions at that time. The report concluded that the pre-1989 system capacity was at least 3505 gpm (7.81 cfs).
24. Department staff reviewed the water right files and aerial photography to analyze the way each license might have been issued had proof of beneficial use been submitted and processed for Permit 37-7268 in 1978 and assuming proof would have been submitted for Permit 37-7602 at the end of its authorized development period in 1982. Staff prepared a review memo dated August 3, 2006 with the recommended places of use and found that the locations and acreages would have been significantly different than the licensed place of use for each permit. In addition, the recommended places of use included some locations that were different than the locations authorized under each permit.
25. Department staff reviewed the system capacity estimates used for licensing rights 37-7268 and 37-8679 and the reports prepared by Brockway regarding system capacity. Staff prepared a review memo dated July 17, 2006 and indicated that, "Pumping plants for installed irrigation systems under actual operating conditions often have lower pumping efficiencies than the published or design values. A pumping efficiency value of 70% as a basis for flow estimation is based on Department experience over many years with pumping plants and efficiency calculations." The memo also noted that, "Although Brockway's measurements and estimations are reasonable, it is not possible to verify whether system or operating changes existed between the 1990-91 field exams and Brockway's analysis." The review concluded that the Department's estimates were based on the examiner's judgment and reasonable standards.

26. On March 23, 2005, a Notice of Change in Water Right Ownership was filed for rights 37-7268, 37-7454, 37-7602 and 37-8679 indicating Alton and Paula Huyser Trust as the owner of the water rights. The Department updated the water right records to show the new owner.
27. The Department prepared Applications for Amendment indicating the recommended changes to the place of use and adjusting the diversion quantities and conditions of approval for each permit. The Department mailed the applications to Dana Hofstetter, attorney for Alton and Paula Huyser Trust, for signature and fees.
28. On September 8, 2006, the Department received the Applications for Amendment of the permits from Alton and Paula Huyser Trust.
29. Section 42-219, *Idaho Code*, includes the following directive to the Department:

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.

ANALYSIS

The preparation, submittal and processing of proof of beneficial use for a permit where proof was not due for another four years and omission of a permit where proof was due in less than one month was likely due to an error in the initial preparation of the proof statement. Although the permit holder is ultimately responsible for submittal of proof of beneficial use; the Department should accept responsibility for the initial error that occurred while assisting Mr. Shaw in the preparation of the proof statement. The error significantly reduced the development period and the associated beneficial use found at the time of licensing of the early-proof permit. In addition, the error resulted in lapsing of a permit that was developed. Reinstatement of that permit did not recognize the error and advanced the priority date of the reinstated permit.

The field exam conducted by the Department in July, 1980, should have been applicable to Permit 37-7268 instead of Permit 37-7602, in addition to Permit 37-7454. The system capacity was measured at 5.09 cfs.

The field exam conducted in July, 1990 should have been applicable to Permit 37-7602. The July, 1990 and August, 1991 field exams estimated the system capacity at 6.2 cfs and 6.28 cfs respectively. The Department could have calculated different flow estimates at the time of the field exams and licensing of the permits, but the estimates that were made were based on the examiners' judgment and reasonable standards. The licenses have been issued for more than 10 years and corrections should not be made on the basis that the findings could have been different. The Department should correct licensing errors in cases where clerical or procedural errors are identified. The use of 70% pumping efficiency to estimate flow cannot be characterized as a clerical or procedural error in the licensing process.

CONCLUSIONS OF LAW

1. Section 42-218a(3), *Idaho Code*, includes the following:

The original priority date of a lapsed permit shall not be reinstated except upon a showing of error or mistake of the department.

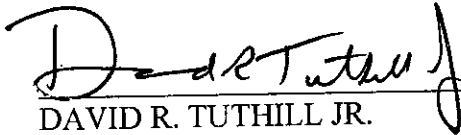
2. The Department erred in 1978 while assisting Steve Shaw in completion of a proof of beneficial use statement for Permit 37-7602 instead of Permit 37-7268. The error resulted in early submittal of proof for Permit 37-7602 and subsequent reduction in acres under the license; and lapse of Permit 37-7268 and subsequent reinstatement with an advancement of the priority date of the water right.
3. Under Section 42-219, *Idaho Code*, the Department has a statutory obligation to issue a water right license that accurately portrays the extent of beneficial use of water developed in accordance with the permit.
4. The Department should approve the Applications for Amendment of the permits to authorize the changes to the original permits as determined by the Department with appropriate conditions.
5. The Department should correct License 37-7268 to list the original priority date, and correct Licenses 37-7268, 37-7454, 37-7602 and 37-8679 to list the appropriate places of use and adjusted diversion quantities and conditions of approval.
6. The Department should limit the combined use of Licenses 37-7268 and 37-7454 to the measured capacity of 5.09 cfs.
7. The Department's estimates of the flow capacities determined in 1990 and 1991 are applicable to Permits 37-7602 and 37-8679, respectively. The flow capacities were reasonable estimates and cannot be characterized as errors in licensing of those rights.
8. The Department should limit the combined use of Licenses 37-7268, 37-7454 and 37-7602 to the estimated capacity of 6.2 cfs.
9. The Department should limit the combined use of Licenses 37-7268, 37-7454, 37-7602 and 37-8679 to the estimated capacity of 6.28 cfs.

ORDER

IT IS HEREBY ORDERED that the Applications for Amendment of Permits 37-7268, 37-7454, 37-7602 and 37-8679 submitted to the Department on September 8, 2006 are **APPROVED** with conditions as shown attached to this order.

IT IS FURTHER HEREBY ORDERED that Water Right License Nos. 37-7268, 37-7454, 37-7602 and 37-8679 are **CORRECTED** as set forth in the Amended Water Right Licenses issued on this date in conjunction with this order.

Dated this 1st day of December, 2006.



DAVID R. TUTHILL JR.
Administrator, Water Management Division