

KAKL

DEPARTMENT OF
WATER RESOURCES

Attorney for Louis L. "Leon"
and Iris B. Hubsmith

In the Matter of License Nos. 37-7268,
37-7454, 37-7602 and 37-8679

Case No. _____

PETITION TO CORRECT AND AMEND LICENSES

PETITION TO CORRECT AND AMEND LICENSES - 1

processed Proof of Beneficial Use which caused advancement of the priority date for License No. 37-7268 and reduction of the place of use for License No. 37-7602.¹

This Petition is supported by Idaho Department of Water Resources (“IDWR”) License files for the above-referenced water rights, SRBA Court documents, other matters of record with IDWR, and the Exhibits filed contemporaneously with this Petition in the enclosed Exhibit Volume. *Exhibits 1 to 4* are the respective water right Licenses with the requested corrections identified. These corrections are requested as a package since revisions to one License, without analogous revisions to another License, may inappropriately affect the collective nature and scope of the water rights.

Background

Three water right water Permits (Nos. 37-7268, 37-7602 and 37-7454) were obtained during the 1970's for irrigation of Lincoln County lands from a new well. Each of the Permits was obtained at a different time, had a different Proof of Beneficial Use deadline and provided for the irrigation of different lands, although all three Permits related to the same well. The Hubsmiths now own these three water rights, along with a more recently issued water right (No. 37-8679) covering the same well.

In the Spring of 2003, the Hubsmiths contacted attorney Dana Hofstetter after realizing that the designated combined quantity limitation for Water Right License

¹ Additionally, as noted on *Exhibit 2*, a place of use government lot legal description which is facially incorrect is requested to be corrected for License No. 37-7454.

Nos. 37-7268 and 37-8679 was 6.2 cubic feet per second (“cfs”), instead of the approximately 7.5 cfs that actually are necessary to properly irrigate the covered lands. In the process of reviewing the IDWR license files for the water rights associated with this same well, Ms. Hofstetter additionally discovered that a Proof of Beneficial Use form, which had been submitted in 1978, apparently was improperly identified as being for Water Right No. 37-7602, rather than 37-7268. As a result, Permit No. 37-7268 improperly had lapsed and the acreage on Water Right License No. 37-7602 improperly had been reduced due to an early field examination.

Negotiations promptly were commenced with IDWR and efforts were undertaken to set aside the SRBA Partial Decrees for Water Right Nos. 37-7454 and 37-7602, so that all the associated Licenses appropriately could be corrected. *Exhibits 6, 7 and 8.* In December 2003, the SRBA Court set aside the Partial Decrees so that IDWR could consider correction of the Hubsmiths’ related Licenses. Now, the Hubsmiths, in this proceeding, seek to have the licensed combined quantity limitation corrected from 6.2 cfs to 7.81 cfs, the original priority date for License No. 37-7268 reinstated, and the unduly small acreage and quantity for License No. 37-7602 adjusted as appropriate.

The Combined Quantity Limitation Correction

Shortly after Leon Hubsmith purchased the subject property, he learned of lapsed Permit No. 37-7268, and quickly took steps to reinstate the Permit. *Exhibit 7-E.* He also made application for Permit No. 37-8679 to cover additional acreage that apparently had

been irrigated since the early 1980's, but had not been included in any other existing water rights. *Exhibit 7-N*. During the resulting 1990 field examination for Permit No. 37-7268, Charles G. Brockway, then a student intern with IDWR, was unable to make a water level measurement and, therefore, calculated a theoretical capacity of 6.2 cfs and noted that four pivots and four sets of handlines were served by the well.

Exhibit 9. In the 1991 Field Examination Report for Permit No. 37-8679, Justin Bolles similarly noted the inability to take an accurate measurement and likewise calculated a theoretical capacity of 6.28 cfs, while noting that the system contains "four standard pivots and [approximately] 20 handlines." *Exhibit 10*. The source of the incorrect combined quantity limitation was these field examinations for Permit Nos. 37-7268 and 37-8679. Because the field examiners were unable to take actual measurements, they had relied on a 70% theoretical pump efficiency in their calculations. *Exhibits 9 and 10*. The field examiners relied on the default value of 70%, although Mr. Hubsmith previously had submitted information to IDWR identifying the actual pump efficiency, based on the pump curve, to be 83%. *See Exhibit 7-E, Attachment*.

In 2003, shortly after realizing the discrepancy between their actual water needs and the combined quantity limitation, the Hubsmiths asked Charles G. Brockway to review these prior Field Examination Reports. Mr. Brockway prepared an initial report of September 29, 2003, and, pursuant to IDWR request, a follow-up report of

February 11, 2005. *Exhibits 11 and 12*. At the outset, Dr. Brockway noticed a patent error in the Field Examination Reports: A diversion rate substantially greater than 6.28 cfs, based on the presence of four pivots alone, would be necessary. Yet, the system, as reported in the Field Examination Reports, had four pivots plus numerous handlines. *Exhibit 11 at 1*.

Dr. Brockway measured the flow of the system during the Summer of 2003, and based on these measurements, determined that system capacity actually was 7.46 cfs. *Id. at 3*. It should be noted that Dr. Brockway's determination is consistent with a 1994 Idaho Power measurement of 3300 gpm, taken shortly after the IDWR field examinations in the early 1990's. *Exhibit 13*. In his September 29, 2003 Report, Dr. Brockway explained that the difference between the theoretical calculation of 6.28 cfs and the more accurate measured capacity of 7.46 cfs likely was due to the use of the default value of 70% for pump efficiency in those theoretical calculations, rather than the actual pump efficiency of 82% as determined by the pump curve. *Exhibit 11 at 4*.

In his follow-up report of February 11, 2005, Dr. Brockway calculated the pre-1989 system capacity, since the original irrigation system had been reconfigured somewhat in 1989. Based on detailed information concerning the pre-1989 system, Dr. Brockway concluded that the system capacity at that time was at least 3505 gallons per minute ("gpm") or 7.81 cfs. *Exhibit 12 at 3*. It is significant that this conclusion comports with the January 20, 1976 receipt for the pump which notes an 83% pump

efficiency and a capacity of 3500 gpm. *Exhibit 7-E, Attachment*. Since Mr. Hubsmith had submitted this 1976 receipt to IDWR in support of his request to reinstate Permit No. 37-7268, the 83% actual pump efficiency information was available in the file and the field examiners could have used it, rather than the less precise default value of 70% in their calculations.² *Id.*

This evidence overwhelmingly demonstrates that the actual pre-1989 system capacity was approximately 7.81 cfs, rather than 6.2 cfs. The 6.2 cfs figure represents a theoretical capacity calculation based on an inaccurate pump capacity, while 7.81 cfs more closely represents actual beneficial use both prior to and after 1989. Further, it is readily apparent that the 6.2 cfs quantity would not have been sufficient to serve the four pivot plus handlines in place, as Dr. Brockway noted in his September 29, 2003 Report. Ample evidence from a number of different sources establishes that the 6.2 cfs combined quantity limitation did not accurately represent system capacity, and that the correct capacity was approximately 7.81 cfs. Accordingly, pursuant to Idaho Code § 67-5254(1), the Hubsmiths respectfully request amendment of Water Right License No. 37-7268 to more accurately reflect actual water usage and actual water needs for both the pre-1989 and the post-1989 systems. *See IDWR Final Order, In the Matter of License No. 61-07189 In The Name of Magic West, Inc. (January 22, 1999) (Exhibit 14).*

² In the 1980 field examinations for Water Right Nos. 37-7454 and 37-7602, system capacity was measured to be 5.09 cfs. *See Exhibit 7-J*. However, in 1980, much less acreage was being irrigated than would be just a few years later. The relatively few acres under irrigation in 1980 resulted in this low capacity measurement.

The Mis-Numbered Proof of Beneficial Use Form Consequences:
License No. 37-7268 Priority Advancement and License No. 37-7602
Acreage and Quantity Reduction

1. The Mis-Numbered Proof of Beneficial Use

Permit Nos. 37-7268, 37-7602 and 37-7454 sequentially were obtained during the 1970's to provide for the irrigation of new lands from the same well.³ Because Permit No. 37-7268 had been obtained first, its Proof of Beneficial Use form was due the earliest, by September 1, 1978. *Exhibit 7-A*. Proof of Beneficial Use for Permit No. 37-7454 was not due until December 1, 1980. *Exhibit 7-L*. And Proof of Beneficial Use for Permit No. 37-7602 was not due until June 1, 1982. *Exhibit 7-I*. As described more fully below, IDWR's designation of Permit No. 37-7602 on the Proof of Beneficial Use form that Mr. Shaw apparently submitted for Permit No. 37-7268 in 1978, resulted in the lapsing of Permit No. 37-7268 and an early field examination for Permit No. 37-7602. Ultimately, this caused the priority date for License No. 37-7268 to be advanced to 1988, and License No. 37-7602 unduly to be limited to only 35 acres and 0.70 cfs. *See Exhibit 5*.

As is customary, IDWR on June 30, 1978 sent the permitholder, Steve Shaw, a sixty day notice regarding the September 1, 1978 Proof of Beneficial Use deadline for

³ On September 19, 1973, IDWR (then called the Department of Water Administration) issued Permit No. 37-7268 to Ralph Bowen for a ground water right. *Exhibit 7-A*. On September 8, 1975, Ralph Bowen assigned Permit No. 37-7268 to Steven Shaw. *Exhibit 7-B*. Steven Shaw then proceeded to obtain other Permits to irrigate additional lands from the same well. On December 30, 1975, IDWR issued Permit No. 37-7454 to Steven Shaw for irrigation of an additional 200 acres. *Exhibit 7-L*. Likewise on June 29, 1977, IDWR issued Permit

Permit No. 37-7268. *Exhibit 7-C.* Mr. Shaw, after receiving this 60 day notice letter, went to IDWR's Southern Regional office on August 2, 1978. *Exhibit 7-H.* It appears that on that date IDWR personnel assisted Mr. Shaw with preparation of the Proof of Beneficial Use form, since the form was typed in a manner similar to the way IDWR Southern Regional office staff typically typed forms at that time, the notary public acknowledging Steve Shaw's signature on the form was an employee of IDWR's Southern Regional office and the form was filed with IDWR Southern on the same day it was signed. *Exhibit 8.* Given these facts, it is likely that Mr. Shaw had come to IDWR's Southern Regional office on August 2, 1978 to submit the Proof of Beneficial Use that was due by September 1, 1978. However, in preparing and completing the form, an IDWR employee made an error in identifying Permit No. 37-7602, rather than Permit No. 37-7268. *Exhibit 7-H.* The IDWR employee preparing the form for Mr. Shaw on August 2, 1978 had typed an incorrect Permit number, a Permit for which Mr. Shaw's Proof of Beneficial Use was not due until 1982.

As a result of the erroneous identification of Permit No. 37-7602, Mr. Shaw's Permit No. 37-7268 lapsed for the failure to submit that Proof of Beneficial Use form by the September 1, 1978 deadline. *Exhibit 7-D.* Further, the field examination for Permit No. 37-7602 that was conducted in 1980 as a result of the submission of the Proof of Beneficial Use was premature. That 1980 field examination identified only 35 acres

No. 37-7602 to Steve Shaw for an additional 3.2 cfs to irrigate 160 acres from the well. *Exhibit 7-I.*

under Permit No. 37-7602 irrigated at the time, instead of the 160 acres that Permit No. 37-7602 authorized. *Exhibit 7-J*. As a result of this, License No. 37-7602 was issued for irrigation of only 35 acres and 0.70 cfs, instead of the full 160 acres and 3.20 cfs authorized under the Permit. *Exhibit 7-K*. This cascading series of events and the disastrous consequences of the permit number mis-identification on the Proof of Beneficial Use form are summarized on *Exhibit 5*.

2. License No. 37-7268's Priority Date Advancement

Mr. Hubsmith's efforts in the late 1980's and early 1990's to reinstate Permit No. 37-7268 were successful; however, because of the belief that Proof of Beneficial Use had not been timely submitted for this water right, IDWR advanced the priority date on the water right from August 23, 1973 to July 11, 1988 and ultimately, License No. 37-7268 issued with an advanced priority date of July 11, 1988. *Exhibits 7-A, 7-F and 7-G*. However, available information establishes that the acreage covered by lapsed Permit No. 37-7268 actually had been irrigated by 1978 when proof originally was due. In the 1980 field examination report for Permit No. 37-7602, the IDWR field examiner noted that the lands in Section 19 which were covered by Permit No. 37-7602 were not yet being irrigated, but that the lands in Section 30 covered by Permit No. 37-7268 were being irrigated:

Lands in Sec. 19 not irrigated at present by well. [H]owever, other lands not listed on Permit and not covered by other rts. [rights] are irrigated.

Exhibit 7-J. At the time of the 1980 field examination, Permit No. 37-7268 had lapsed and therefore, the field examiner found that the irrigated lands in Section 30 were not covered by another water right. *Id.* However, comparison of the lands that were found to be irrigated in the field examination report to Permit No. 37-7268 confirms that the acres found to be irrigated in Section 30, but with no associated water right, actually were covered by Permit No. 37-7268. *Exhibits 7-A and 7-J.*

In the December 8, 1988 IDWR Order reinstating Permit No. 37-7268, IDWR specifically found that adequate evidence had been submitted by the Hubsmiths establishing that the water had been put to beneficial use by the original 1978 deadline, but that the death of the previous permitholder and other factors constituted good cause for the Proof of Beneficial Use not being submitted in a timely manner. *Exhibit 7-F.* **Thus, with respect to the acreage licensed under 37-7268, IDWR already has made an official determination that beneficial use had been properly accomplished by the original deadline, although at the time of that 1988 Order, it was believed that Proof of Beneficial Use had not been submitted in a timely manner. *Id.***

It has become clear that Proof of Beneficial Use had been timely submitted, that the Proof of Beneficial Use form had been designated an incorrect permit number by an IDWR employee, and that had the correct permit number been put on the form, the priority date for License No. 37-7268 would not have been advanced to 1988. On this

basis, reinstatement of the original priority date for License No. 37-7268 is appropriate pursuant to Idaho Code § 42-218a.

3. License No. 37-7602's Reduction to 35 Acres and 0.70 cfs

On the other hand, because the Proof of Beneficial Use form was premature for Permit No. 37-7602, most of the acreage covered by Permit No. 37-7602 was not yet irrigated at the time of the 1980 field examination. Thus, License No. 37-7602, when issued, authorized only the irrigation of 35 acres. The additional acreage later became covered under junior License No. 37-8679, instead of 37-7602.

At the time of reinstatement of Permit No. 37-7268 in the early 1990's, IDWR found that acreage in excess of what was authorized under that Permit also was being irrigated from the well. Accordingly, Mr. Hubsmith applied for Permit No. 37-8679 to cover the approximately 100 irrigated acres for which no water right was on record.

Exhibit 7-N. **However, based on aerial photography, IDWR confirmed that the acreage under Application No. 37-8679 actually had been irrigated since the early 1980's: "The application will be considered a trust water filing due to the post 1984 priority date, but the acreage will not be counted as trust acreage due to the pre-1984 development."** *Exhibit 7-O.* On this basis, a total of 96 acres ultimately was included under License No. 37-8679.

This record evidence establishes that if the field examination for Water Right

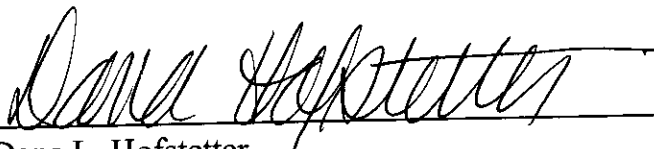
No. 37-7602 had been conducted after 1982 when the Proof of Beneficial Use actually was due, rather than in 1980, these 96 acres would have been included in License No. 37-7602. Therefore, had Proof of Beneficial Use for Permit No. 37-7602 been submitted in 1982 when it was due, the acreage and quantity elements under this License would have been greater than 35 acres and 0.70 cfs respectively. Thus, pursuant to Idaho Code § 67-5254(1), this Petition also requests correction of the place of use licensed under 37-7602 by amendment of that License to include the 96 acres and associated quantities covered under License No. 37-8679.

Conclusion

WHEREFORE, the Hubsmiths respectfully request correction of License Nos. 37-7268, 37-7454, 37-7602, and 37-8679, as specifically indicated on *Exhibits 1-4*, which are incorporated herein as if set forth in full.

DATED this 23rd day of February, 2005.

HOFSTETTER LAW OFFICE, LLC

By 
Dana L. Hofstetter
Attorney for Louis L. "Leon" and Iris B. Hubsmith

CERTIFICATE OF SERVICE

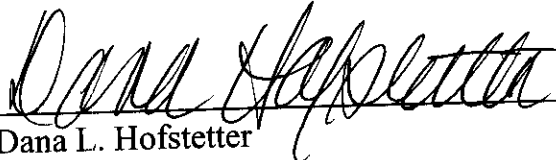
I HEREBY CERTIFY that on the 23rd day of February, 2005, I caused the foregoing **PETITION TO CORRECT AND AMEND LICENSES** and the associated **VOLUME OF EXHIBITS** to be served by the method(s) indicated on the following:

Original to:

Karl J. Dreher, Director
Idaho Department of Water Resources
The Idaho Water Center
322 East Front Street
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☐ U.S. Mail ☐ Fed Ex ☒ Hand ☐ Fax

Copy to:

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Dana L. Hofstetter

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