

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF AMENDMENT OF	)	ORDER GRANTING PETITION
PERMIT NO. 95-9036 IN THE NAME OF	)	FOR RECONSIDERATION
NORTHERN DEVELOPMENT, L.L.C.	)	AND REVISING AMENDED PERMIT
_____	)	

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

FINDINGS OF FACT

1. On August 28, 2000, the Department issued Permit 95-9036 (permit) authorizing Northern Development, L.L.C. (permit holder), to establish a right to divert 0.56 cfs from ground water in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 13, T51N, R6W, B. M., for the irrigation of 80 acres and for domestic use in 74 homes in Kootenai County.

2. On August 18, 2003, the permit holder submitted a proof of beneficial use statement to the Department for the permit.

3. On August 17, 2004, the permit holder applied to the Department to amend Permit 95-9036 (application). The permit holder sought to change the nature of use of the permit from irrigation and domestic purposes to municipal purposes and to add a third point of diversion for the permit.

4. The following four parties (protestants) protested the application.

- Thomas M. Inman and Janice A. Inman (Inmans)
- Curt Nead
- Hauser Lake Watershed Coalition
- Brent Lockhart

5. On October 25, 2005, Brent Lockhart withdrew his protest against approval of the application to amend the permit.

6. On October 26, 2005, the Department conducted a hearing about the application.

7. On December 2, 2005, the Department circulated a draft amendment approval document to facilitate a possible settlement between the permit holder and the remaining protestants.

8. Condition of Approval No. 1 on the draft approval document stated: "Proof of application of water to beneficial use shall be submitted on or before July 1, 2002."

9. Condition of Approval No. 4 on the draft approval document stated:

The place of use is limited to lots in the Hauser Lake Heights Subdivision as platted on the date of this approval and four lots in the Sheltered Pines Subdivision. Use of water outside the boundaries of the Hauser Lake Heights Subdivision as platted on the date of this approval and four lots in the Sheltered Pines Subdivision is not allowed unless: (a) the Hauser Lake Heights Homeowner's Association expressly consents, in writing, to the change in the place of use, and (b) the Department approves an amendment of the permit changing the place of use.

10. Condition of Approval No. 7 on the draft approval document stated:

Two points of diversion are located within Well Lot Blk. 3, Hauser Lake Heights Subdivision and one point of diversion is located within Lot 12, Block 1, Waterford Estates Subdivision.

11. On December 19, 2005, the Department received a notice from the Inmans stating: "After review of these documents I will concur with the conditional language and will withdraw my protest."

12. On January 17, 2006, the Department received a notice from Curt Nead stating: "I agree with the conditions of approval listed and hereby remove my protest from this application."

13. On January 31, 2006, the Department dismissed the Hauser Lake Watershed Coalition as a party to the contested case created by the protests to the application.

14. The "Record Drawings for Hauser Lake Heights Subdivision" prepared by Meckel Engineering & Surveying, Inc., and dated August 10, 2001, show two wells located in Lot 5, Block 9 of Hauser Lake Heights.

15. On February 10, 2006, the Department issued an amended permit for Permit No. 95-9036.

16. The Department did not include Condition of Approval No. 1 from the draft approval document on the amended permit.

17. Condition of Approval No. 3 on the approval document said:

The place of use for this water right is limited to the 82 lots in the Hauser Lake Heights Subdivision and the four lots in the Sheltered Pines Subdivision. Use of water diverted under this right on any other lot(s) is not allowed without the expressed, written consent of the Hauser Lake Heights Water Association.

18. Condition of Approval No. 6 on the approval document said:

Two points of diversion are located within Well Lot Blk. 9, Hauser Lake Heights Subdivision and one point of diversion is located within Lot 12, Block 1, Waterford Estates Subdivision.

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

20. Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

21. On February 22, 2006, the Department received a petition for reconsideration of the issuance of the amended permit from the Inmans. The Inmans sought to reinstate Condition of Approval No. 1 from the draft approval document circulated by the Department and to modify Condition of Approval No. 3 on the amended permit to match Approval Condition No. 4 of the draft approval document circulated by the Department.

22. On February 24, 2006, the Department received a petition for reconsideration of the issuance of the amended permit from Curt Nead. Mr. Nead sought to modify Condition of Approval No. 3 and Condition of Approval No. 6 on the amended permit to match Approval No. 4 and Condition of Approval No. 7, respectively, of the draft approval document circulated by the Department.

ANALYSIS

When issuing the amended permit for Permit No. 95-9036, the Department varied from the draft approval document it had circulated by removing one approval condition and modifying two others.

The Department dropped the condition requiring the permit holder to submit a proof of beneficial use statement because the permit holder had already complied with the condition. The Department would accomplish no purpose by restating the proof of beneficial use requirement.

The Department modified the condition describing the location of the well lot within Hauser Lake Heights Subdivision because it had engineering drawings showing the wells in Block 9 of Hauser Lake Height Subdivision, not in Block 3 as indicated on the draft approval document. Thomas M. Inman and Janice A. Inman state in their petition for reconsideration that they concur with this correction to the description of the well lot. In fact, the engineering drawings show the location of the wells as **Lot 5**, Blk 9, Hauser Lake Heights Subdivision, not as "Well Lot, Blk. 9, Hauser Lake Heights Subdivision," which was stated on the amended permit. Changing the description of the well lot back to the draft version would reintroduce incorrect information to the permit. Instead, the Department should further revise the well lot description on the amended permit to specify Lot 5, Block 9, Hauser Lake Heights Subdivision.

The Department should modify Condition of Approval No. 3 on the amended permit. This condition did not accurately state two important requirements stated in the draft approval document supported by the Inmans and Mr. Nead. The first of these requirements was that the Hauser Lake Heights Homeowner's Association must approve any use of water outside the boundaries of the Hauser Lake Heights Subdivision and four lots in Sheltered Pines Subdivision. The approval document mistakenly stated that the Hauser Lake Heights Water Association must grant approval for a change in the place of use for the right. Hauser Lake Heights Water Association is a different entity from the Hauser Lake Heights Homeowner's Association. The second of these requirements was that the Department approves an amendment of the permit changing the place of use. The Department should maintain this requirement, but it should alter the language to account for the fact that the permit holder has submitted proof of beneficial use and the permit may soon be replaced by a water right license.

CONCLUSIONS OF LAW

1. Both the petition for reconsideration filed by Thomas M. Inman and Janice A. Inman and the petition for reconsideration filed by Curt Nead were filed timely.

2. The Department should grant the petitions for reconsideration filed by Thomas M. Inman and Janice A. Inman and by Curt Nead.

3. The Department should modify Condition of Approval No. 3 on the amended permit to conform more closely to condition of approval no. 4 on the draft circulated by the Department.

4. The Department should not include a condition restating the proof of beneficial use requirement for the permit.

5. The Department should further modify Condition of Approval No. 6 on the amended permit to specify Lot 5, Block 9, Hauser Lake Heights Subdivision.

ORDER

IT IS HEREBY ORDERED that the petitions for reconsideration of the preliminary order amending water appropriation Permit No. 95-9036 are **GRANTED** pursuant to Idaho Code § 67-5243.

IT IS FURTHER HEREBY ORDERED that approval condition no. 3 on the amended permit is **MODIFIED** to say:

The place of use is limited to lots in the Hauser Lake Heights Subdivision as platted on the date of this approval and four lots in the Sheltered Pines Subdivision. Use of water outside the boundaries of the Hauser Lake Heights Subdivision as platted on the date of this approval and four lots in the Sheltered Pines Subdivision is not allowed unless: (a) the Hauser Lake Heights Homeowner's Association expressly consents, in writing, to the change in the place of use, and (b) the Department approves a change in the place of use pursuant to its statutory authority.

IT IS FURTHER HEREBY ORDERED that approval condition no. 6 on the amended permit is **MODIFIED** to say:

Two points of diversion are located within Lot 5, Block 9, Hauser Lake Heights Subdivision and one point of diversion is located within Lot 12, Block 1, Waterford Estates Subdivision.

IT IS FURTHER HEREBY ORDERED that a revised Amendment of Permit document shall be **ISSUED** on this date in connection with this order.

Dated this 22nd day of March, 2006.


GARY SPACKMAN
Chief, Water Allocation Bureau

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March, 2006, a true and correct copy of the documents described below were served on the following as noted:

Document(s) Served: Order Granting Petition for Reconsideration and Revising Amended Permit and a Statement of Available Procedures and Applicable Time Limits Responding to Preliminary Orders ...

NORTHERN DEVELOPMENT LLC
460 E OAK STE A
POCATELLO ID 83201

HAUSER LAKE WATERSHED
COALITION
C/O JOHN WALLIS
11392 N HAUSER LK RD
HAUSER ID 83854

CURT NEAD
18582 W RICE AVE
HAUSER ID 83854

BRENT LOCKHART
C/O MICHAEL REAGAN
LIESCHE & REAGAN PA
1044 NORTHWEST BLVVD #D
COEUR D ALENE ID 83814

THOMAS INMAN
18520 W RICE AVE
HAUSER ID 83854-6397

IDWR – NORTHERN REGION
1910 NORTHWEST BLVD STE 210
COEUR D ALENE ID 83814-2615


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

CERTIFICATE OF SERVICE

Statement of Available Procedures and Applicable Time Limits

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES (To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **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 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case 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 this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.