

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO)
CORRECT WATER RIGHT LICENSE)
NO. 67-7420)
_____)

**PRELIMINARY ORDER
CORRECTING LICENSE**

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

FINDINGS OF FACT

1. On December 7, 1978, the Department issued Permit 67-7420 (permit) to Wilkerson Brothers (right holder) authorizing the establishment of a right to divert water from the Little Weiser River within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 14 North, Range 2 West, B.M.

2. On June 11, 1985, the Department received the right holder's proof of beneficial use statement for the permit.

3. On September 18, 1989, the permit was claimed in the Snake River Basin Adjudication of water rights (SRBA).

4. On November 8, 1999, a Department field examiner submitted a Beneficial Use Field Report verifying the beneficial use of water established in connection with the permit. The field examiner reported that the permit holder shared a point of diversion within Government Lot 2 (NW $\frac{1}{4}$ NE $\frac{1}{4}$) of Section 1, Township 14 North, Range 2 West, B.M., with holders of other water rights diverted from the Little Weiser River.

5. On August 3, 2005, a Department reviewer prepared a memorandum indicating that the point of diversion used in connection with the permit was probably in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 14 North, Range 2 West, B.M., as permitted because other water rights sharing the point of diversion described it there and because it appeared in that location on aerial photography available in the Department's geographic information system.

6. On August 3, 2005, the Department issued Water Right License 67-7420 (license) for the beneficial use of water established in connection with the permit. The license described the point of diversion as Government Lot 3 (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 1, Township 14 North, Range 2 West, B.M.

7. The Department issued the license 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).

8. 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.

9. A few days after the Department issued the license, a representative of the right holder telephoned the Department to discuss some concerns about the license. The list of concerns included the legal description for the point of diversion described on the license.

10. On August 22, 2005, Charles Russell Wilkerson amended the SRBA claim for the permit to describe the point of diversion as Government Lot 3 (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 1, Township 14 North, Range 2 West, B.M.

11. The SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 14 North, Range 2 West, B.M., is not Government Lot 3.

12. High resolution aerial photography recently made available in the Department's geographic information system appears to show the point of diversion used by the right holder as being in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 14 North, Range 2 West, B.M., but very close to line separating it from Government Lot 3 (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 1, Township 14 North, Range 2 West, B.M.

13. The Department is recommending that other water rights sharing the point of diversion used by the right holder be decreed in the SRBA with the point of diversion described as the NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 14 North, Range 2 West, B.M.

14. On October 5, 2005, the Department sent Charles Russell Wilkerson a letter asking him if he concurred with the conclusion that the point of diversion is actually within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 14 North, Range 2 West, B.M.

15. On July 30, 2003, the Department received the right holder's application for amendment to change the permitted point of diversion to the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 14 North, Range 2 West, B.M.

16. Idaho Code § 42-219 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.

CONCLUSIONS OF LAW

1. Idaho Code § 42-219 directs the Department to issue a water right license that accurately portrays the beneficial use of water developed in accordance with the permit.

2. The right holder did not file a written petition for reconsideration of the license within the 14-day period specified in Rule 730.02.a. of the Department's Rules of Procedure. However, the right holder acted in good faith to achieve a correction to the water right by telephoning the Department to discuss the license within the 14-day period and by amending the SRBA claim for the license within 19 days of the issuance of the license. In this instance, these contacts with the Department should be construed as a petition for reconsideration of the license pursuant to Rule 730.02.a. of the Department's Rules of Procedure.

3. The water used in connection with Water Right 67-7420 is diverted within the SE¼NW¼ of Section 1, Township 14 North, Range 2 West, B.M.

4. The current license does not accurately depict the beneficial use of water established in connection with the permit.

5. The Department should grant the right holder's petition for reconsideration.

6. The Department should approve the application to amend Permit 67-7420.

7. The Department should revise the point of diversion description on the license.

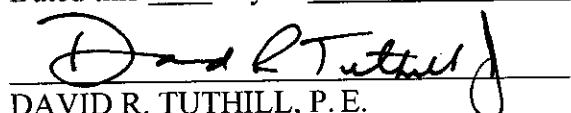
ORDER

IT IS HEREBY ORDERED that the right holder's petition for reconsideration of the license is **GRANTED**.

IT IS HEREBY ORDERED that the application to amend Permit 67-7420 submitted to the Department on October 19, 2005, is **APPROVED**.

IT IS FURTHER HEREBY ORDERED that the point of diversion description for Water Right License 67-7420 is **CORRECTED** as set forth in the Amended Water Right License issued on this date in conjunction with this order.

Dated this 21st day of October, 2005.


DAVID R. TUTHILL, P. E.
Administrator, Water Management Division