

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF PETITION TO)
AMEND ORDER VOIDING PERMIT)
NO. 23-2080)
_____)

**PRELIMINARY ORDER
REINSTATING PERMIT
AND ISSUING LICENSE**

This matter having come before the Department of Water Resources (Department) as a petition to reinstate a permit to appropriate water, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On February 23, 1967, the Department issued Permit No. 33473 in the name of Archie McKay (permit holder) authorizing the development of a right to divert 6.4 cfs from groundwater within the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 5, and the NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec. 8, of T1N, R44E, B. M., to irrigate 320 acres in Bonneville County.
2. Permit No. 33473 was later designated Permit No. 23-2080 (permit) when the Department adopted a new numbering system for water rights.
3. A condition of the permit was that beneficial use of water in accordance with the permit was to be established on or before February 23, 1972.
4. On December 1, 1971, the Department sent the permit holder a Proof of Beneficial Use Due Notice informing him that he had to submit the required Proof of Beneficial Use affidavit by February 23, 1972.
5. On March 3, 1972, the Department sent the permit holder a notice that Permit 23-2080 had lapsed and could not be reinstated beyond 60 days.
6. On May 17, 1977, the permit holder submitted a Proof of Beneficial Use statement to the Department.
7. On June 3, 1977, the Department sent the permit holder a notice that Permit 23-2080 had lapsed and the Proof of Beneficial Use could not be accepted because it was more than 60 days late.

8. On September 29, 2003, Department employee, Allen Ruberry, found and photographed a well located in the SW¼SW¼, Sec. 5, T1N, R44E, B. M., which he concluded may have some connection to lapsed permit 23-2080.
9. On March 17, 2004, the Department received a request for reinstatement of the permit from Thomas M. Walsh, the current owner of the well and a portion of the property where Permit 23-2080 was authorized.
10. Section 42-218a, *Idaho Code*, was amended in 1983 to allow for the reinstatement of permits beyond 60 days under certain conditions. The text of the statute provides in pertinent part as follows:

A permit upon which the proof of beneficial use has not been submitted, or a request for extension of time has not been received on or before the date set for such proof, shall lapse and be of no further force nor effect. Notice of said lapsing shall be sent by the department to the applicant at the address of record by regular mail provided: ... That upon receipt of proof of beneficial use after sixty (60) days after such notice of lapsing, the director shall require sufficient evidence to be submitted by the permit holder to clearly establish the extent of beneficial use made during the time authorized by the permit and any extensions of time previously approved. Upon finding that beneficial use had occurred during the authorized period and upon a showing of reasonable cause for filing a late proof of beneficial use, the director may reinstate the permit with the priority date advanced to the day that proof of beneficial use was received; ...

11. On March 17, 2004, Mr. Walsh submitted evidence clearly establishing the extent of beneficial use made during the time authorized by the permit to the Department pursuant to the requirements of §42-218a, *Idaho Code*. The information includes:
 - a. Statement from Danell Weeks stating Mr. McKay pumped water with an irrigation pump from 1967 to 1972.
 - b. Statement from Darrel Ricks stating Mr. McKay used the irrigation well from 1967 to 1972.
 - c. Statement from Wayne S. Christiansen stating Mr. McKay put in an irrigation well in 1967 and used it until the time he sold his ranch.
 - d. Letter and copies of service applications for 25 and 30 hp irrigation pump motors from Archie McKay from Lower Valley Energy Company. Application documents are dated April 26, 1967, June 8, 1972 and July 30, 1973.

12. Section 42-217, *Idaho Code*, provides in pertinent part as follows:

Holders of permits who have submitted proof of beneficial use but have not had their project examined for beneficial use shall submit the fee required in section 42-221, *Idaho Code*, within sixty (60) days of notification by the director of the department of water resources that a license examination fee is required. Failure to submit the fee in the time

allowed shall be cause for the director to advance the date of priority of the permit one (1) day for each day that the fee is late.

13. On March 10, 2005, the Department sent a letter to Mr. Walsh notifying him that a field examination fee was required.
14. On April 5, 2005, Thomas M. Walsh submitted an examination fee to the Department pursuant to the requirements of §42-217, *Idaho Code*. Mr. Walsh also submitted ownership documentation showing his interest in a portion of the place of use authorized to be irrigated under the permit.

ANALYSIS

To determine the extent of beneficial use under Permit 23-2080, Department staff used 1976 and 1977 aerial photography because it is the closest in time, available to the Department, to February 23, 1972, when the development period for the permit ended. The aerial photos show irrigated agriculture occurring on the lands authorized for irrigation by the permit. Using ArcView Geographic Information System software by Environmental Research Systems Institute, Inc., Department staff was able to determine that 13 acres of the land now owned by Mr. Walsh was being irrigated in the mid-1970s under Permit 23-2080. It is possible that this irrigation could have been accomplished using surface water, but the affidavits provided by Mr. Walsh confirm the use of groundwater during the authorized development period.

There is no way to make a direct measurement of the rate of water that was diverted under the permit. On his proof of beneficial use statement, the permit holder, Archie McKay, stated that he used a 25 horsepower pump. The well log for Archie McKay's well indicates a static water level of 18.5 feet. Using the permit holder's data, information from the well log and assuming a negligible cone of depression in the coarse gravels reported, a theoretical calculation suggests that his irrigation system had a diversion capacity of 11.9 cfs at open discharge. Using the Department standard of 0.02 cfs/acre, this irrigation system would be able to irrigate 595 acres. The current owner of the well also reports a 25 hp pump.

CONCLUSIONS OF LAW

1. Under Section 42-219, *Idaho Code*, the Department has a statutory obligation to issue a water right license for the beneficial use of water developed in accordance with the permit.
2. The authorized development period for the permit ended on February 23, 1972, when the proof of beneficial use statement was due.
3. The permit holder complied with the requirements of the permit by diverting ground water and irrigating land at the proposed place of use within the authorized development period.
4. The Department should reinstate the permit and advance the priority date of the permit to

March 17, 2004, pursuant to Section 42-218a, *Idaho Code*.

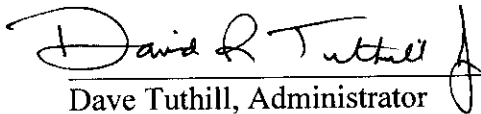
5. The Department should issue a water right license for the beneficial use of water established in connection with the permit.
6. The water right license issued in connection with the permit should limit the right to 0.26 cfs, or 0.02 cfs per acre, in accordance with Section 42-202(6), *Idaho Code*.

ORDER

IT IS HEREBY ORDERED that Permit No. 23-2080 is **REINSTATED** with the date of priority advanced to March 17, 2004.

IT IS FURTHER HEREBY ORDERED that a Water Right License shall be issued for the diversion of 0.26 cfs from ground water for the irrigation of 13 acres of land in connection with Permit 23-2080 on this date in conjunction with this order.

Dated this 3rd day of August, 2005.



Dave Tuthill, Administrator
Water Management Division