

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO	)	PRELIMINARY ORDER
AMEND ORDER VOIDING PERMIT	)	RESCINDING THE ORDER
NO. 63-7431	)	VOIDING PERMIT
_____	)	AND ISSUING LICENSE

This matter having come before the Department of Water Resources (Department) as a result of the filing of a petition to amend an order voiding a permit, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On June 18, 1971, the Department issued Permit 63-7431 (permit) to Lillian M. Terwilliger for the diversion of 3.24 cfs from ground water for stockwater and domestic purposes and for the irrigation of 160 acres of land in the NE¼ of Section 19, Township 1 North, Range 1 East, B. M., in Ada County.
2. The place of use for the permit was associated with Desert Land Entry No. I-3414.
3. On November 10, 1971, Lillian M. Terwilliger assigned the permit to John W. Baicy (permit holder).
4. Department records contain a Well Driller's Report showing that Hiddleston & Son drilled a 16-inch diameter well to a depth of 440 ft. for John Baicy in the NE¼ of Section 19, Township 1 North, Range 1 West, B. M., in the fall of 1973.
5. On May 12, 1978, the Department received the right holder's proof of beneficial use statement for the permit. In his proof of beneficial use statement, the permit holder stated that he used a 160 horsepower motor and pump to lift 3.25 cfs of ground water 310 feet into gated pipe to irrigated 148 acres of land.
6. On April 17, 1986, the Department sent the permit holder a notice by certified mail to inform him that legislation enacted by the 1986 Idaho state legislature required him to submit an examination fee within 60 days or risk having the priority date of the permit advanced one day for each day the fee is late.
7. On September 4, 1986, the Department sent the permit holder a letter notifying him that his examination fee was not submitted within the 60-day grace period and that the priority date of his permit would be advanced one day for each day until the examination fee is paid, starting with the 61st day after the original notification that a fee was required.

8. 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.

9. On September 22, 1986, the permit holder submitted an examination fee to the Department pursuant to the requirements of §42-217, *Idaho Code*.
10. On August 22, 1989, the permit holder claimed the permit in the Snake River Basin Adjudication (SRBA).
11. On June 1, 1992, a Department field examiner conducted an inspection to verify the beneficial use established in accordance with the permit. The field examiner reported, "No beneficial use. No cultivation apparent," and "No evidence of irrigation." The examiner also reported, however, that electric power was available, but she did not say for what purposes.
12. On November 17, 1992, and March 31, 1994, the Department sent the permit holder letters notifying him that his permit would be voided because he had not established a beneficial use of water in connection with the permit.
13. On December 14, 1992, and May 2, 1994, the Department received letters from the permit holder contending that he had met the permit requirements and that the permit should not be voided. The permit holder attributed the lack of recent water use on his land to "economic conditions."
14. On July 11, 1995, another Department field examiner conducted another field examination to verify the beneficial use that may have been established in connection with the permit. The examiner reported that there was evidence that irrigation may have occurred at the proposed place of use in the past, but that there was "no evidence of current irrigation" or any other beneficial use of water.

15. Section 42-219(1), *Idaho Code*, provides in pertinent part as follows:

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.

16. Section 42-219(8), *Idaho Code*, provides in pertinent part as follows:

In the event that the Department shall find that the applicant has not fully complied with the law and the conditions of the permit, it may issue a license for that portion of use which is in accordance with the permit, or may refuse issuance of a license and void the permit.

17. On July 17, 1995, the Department issued a Preliminary Order Voiding Permit No. 63-7431 (order). In the order, the Department found that the permit holder had not made a beneficial use of water in accordance with the permit and also that “water has not been applied to a beneficial use since 1985.”
18. All attempts by the Department to send the order to the permit holder by certified mail were returned to the Department by the postal service because the permit holder could not be located.
19. On November 18, 2004, the Department received a Petition to Amend Order Voiding Permit (petition) from the permit holder’s attorney, Charles L. Honsinger, of the firm Ringert Clark, Chtd. (Mr. Honsinger). The petition asks the Department to “reinstate permit no. 63-7431, and issue a license to Mr. Baicy for that water right.” Mr. Honsinger attached supporting documentation to the petition, including two affidavits, one from the permit holder and one from Mr. Honsinger, and 36 exhibits labeled A through JJ.
20. Exhibit H from the petition is a Well Testing and Report Agreement showing that Layne Pumps, Inc., of Twin Falls, Idaho, tested a well “South of Kuna” for John Baicy on December 5, 1973. The 16-inch diameter well produced up to 2513 gallons per minute was described on the document as a “Very strong well.”
21. Exhibit N from the petition is a United States Government memorandum from John E. Jorenby, Realty Specialist, to File I-3414 regarding the “Field Compliance Report, Desert Land Entry Final Proof, John Baicy” dated July 29, 1976. The memorandum provides much of the same information that is collected by Department field examiners who verify the beneficial use established in connection with a permit. The data collected includes the location and number of irrigated acres (116 acres in the NE¼ of Section 19, Township 1 North, Range 1 East, B. M.), the source of water (a well), the location of the point of diversion (the NW¼NE¼ of Section 19, Township 1 North, Range 1 East, B. M.), the method of irrigation (gated pipe), the quantity of water capable of being diverted (2513 gpm), and a diagram of the irrigation system.
22. Exhibit T from the petition is an aerial photograph accompanied by a letter from C. D. Slusser of the United States Department of Interior, Bureau of Land Management, National Science and Technology Center. In his letter, Mr. Slusser explains that the aerial image was created “from unretouched, original color negative film” dated July 22, 1976, and that it “centers over the boundary line between sections 23 and 24 in Township 1 North, Range 1

West in Ada County, Idaho.” The aerial photograph shows irrigation activity occurring on the permitted place of use in the NE¼ of Section 19, Township 1 North, Range 1 East, B. M.

23. Exhibit U from the petition is a black-and-white aerial photograph labeled “9-6-77 USDA 40 16001 677-85.” According to the November 15, 2004, affidavit of John W. Baicy submitted to the Department in connection with the petition, this aerial photograph depicts the proposed place of use for the permit on September 6, 1977.
24. Exhibit X from the petition is an infrared aerial photograph labeled “7-4-81 69-39 431613 HAP 81 F.”
25. On January 25, 2005, the Department received a copy of a memo from the United States Department of Agriculture, Farm Service Agency, dated October 19, 2004. The memo certifies that contact print 16001-677-85 was taken on September 6, 1977, over Ada County, Idaho. (See finding 23 above.)
26. Section 42-202(6), *Idaho Code*, provides in pertinent part as follows:

In case the proposed right of use is for agricultural purposes . . . no one shall be authorized to divert for irrigation purposes more than one (1) cubic foot of water per second of the normal flow for each fifty (50) acres of land to be so irrigated . . .

ANALYSIS

The aerial photography included in the exhibits for the petition is challenging to analyze and compare because they differ in scale and color schemes. (See findings 22, 23, and 24 above.) Nevertheless, it is clear that all of the photographs show irrigated agriculture occurring on the lands authorized for irrigation by the permit. The aerial photographs also show that the irrigation pattern changed over time and that more land was irrigated in 1977 and 1981 than in 1976 when John E. Jorenby of the United States Government reported that 116 acres were being irrigated. (See finding 21 above.) Using ArcView Geographic Information System software by Environmental Research Systems Institute, Inc., Department staff attempted to recreate the irrigation pattern shown on the 1977 aerial photograph because it is the closest in time to May 12, 1978, when the development permit for the permit ended. The Department used the aerial photographs from 1976 and 1981 as aids for interpreting the 1977 photography. The Department staff concluded that the permit holder irrigated 132 acres in connection with the permit during the authorized development period.

The irrigation system was removed from the permit holder’s land after several years of operation; there is no way to make a direct measurement of the rate of water that was diverted under the permit. The pump test done when the well was drilled suggests that the well is capable of producing at least 2513 gpm, or 5.6 cfs. On his proof of beneficial use statement, the right holder stated that he used a 160 horsepower motor and pump to lift water 310 feet into gated pipe. Using the permit holder’s data, a theoretical calculation suggests that his irrigation system had a diversion capacity of 2.75 cfs, which exceeds the statutory limit of 0.02 cfs per acre.

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 May 12, 1978, when the permit holder submitted his proof of beneficial use statement.
3. The permit holder complied with the requirements of the permit by diverting ground water and irrigating 132 acres of land at the proposed place of use within the authorized development period.
4. The permit holder submitted the required examination fee 98 days after the 60-day grace period granted in Section 42-217, *Idaho Code*.
5. The Department should rescind the order voiding the permit and advance the priority date of the permit 98 days to August 17, 1971, pursuant to Section 42-217, *Idaho Code*.
6. The Department should issue a water right license for the beneficial use of water established in connection with the permit.
7. The water right license issued in connection with the permit should limit the right to 2.64 cfs, or 0.02 cfs per acre, in accordance with Section 42-202(6), *Idaho Code*.

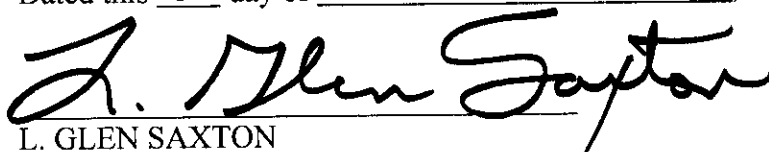
ORDER

IT IS HEREBY ORDERED that the order voiding Permit 63-7431 is **RESCINDED**.

IT IS FURTHER HEREBY ORDERED that the priority date of Permit 63-7431 is **ADVANCED** to August 17, 1971.

IT IS FURTHER HEREBY ORDERED that a Water Right License shall be issued for the diversion of 2.64 cfs from ground water for the irrigation of 132 acres of land in connection with Permit 63-7431 on this date in conjunction with this order.

Dated this 3rd day of March, 2005.


L. GLEN SAXTON
Administrator, Water Management Division