

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION TO )  
CORRECT WATER RIGHT LICENSE )  
NO. 65-7461 )  
\_\_\_\_\_)

**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 makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On June 4, 1974, the Department issued Permit 65-7461 (permit) to Lee C. Wright, Jr., authorizing the establishment of a right to divert 7.59 cfs of water from the Payette River within the SW¼SE¼ of Section 35, Township 8 North, Range 4 West, B.M., for the irrigation of 253 acres of land in Payette County.
2. The permitted diversion rate of 7.59 cfs exceeds the statutorily recommended maximum of 0.02 cfs per acre because the type of soil at the permitted place of use required 0.03 cfs per acre of irrigated land.
3. On April 27, 1977, Lee C. Wright, Jr., assigned the permit to Pat Higby and/or Charles Higby.
4. On June 26, 1979, the Department received a proof of beneficial use statement from Charles Higby for the permit.
5. On September 20, 1994, Pat Higby and/or Charles Higby assigned the permit to George Colwell and/or Cheryl Colwell (right holders).
6. On September 24, 1999, Department staff completed a beneficial use field report verifying the beneficial use of water established in connection with the permit. The field examiner found that water from the authorized point of diversion had been used to irrigate approximately 159 acres of land at a farm that also has land irrigated with water represented by a number of other water right filings, including Rights 65-3617, 65-8627, 65-11211, and 65-11261. The examiner could not determine the precise nature of the relationship of the water use developed under the permit to the use of water under the other irrigation rights used on the farm because the place of use for other rights had not been confirmed in the Snake River Basin Adjudication (SRBA) at that time.

7. On January 19, 2000, the Department issued an order advancing the priority date of the permit to April 8, 1975, because the required examination fee was paid 414 days late.
8. On February 3, 2000, the Department approved the right holder's application to amend the permit to make minor modifications to the authorized place of use.
9. Also on February 3, 2000, the Department issued Water Right License 65-7461 (license) to the right holders for the diversion of a maximum annual diversion volume of 925 af of water at a maximum diversion rate of 6.17 cfs for the irrigation of 159 acres in Payette County. The Department based the licensed diversion rate on the permitted rate of 0.03 cfs per acre plus a conveyance loss of 29.3% as recognized in the Payette River adjudication for the Johnson-Higby Ditch, which is used to convey water diverted under Right 65-7461 to the licensed place of use. The volume of 925 af was based on the Department's standard field headgate requirement of 4.5 af per acre for most irrigation in the area where this right is used, plus a conveyance loss component of 29.3%. The license also contained a condition of approval limiting the use of water under the license and all other irrigation rights appurtenant to the same lands to a diversion rate of 0.03 cfs per acre and 4.5 af per acre at the field headgate.
10. On September 18, 2001, the Department submitted recommendations for the elements of Claims 65-3617, 65-8627, 65-11211, 65-7461 and 65-11261 to the SRBA court.
11. On January 18, 2002, the right holder filed objections to recommendations for the elements of Claims 65-3617, 65-8627, 65-11211, 65-7461 and 65-11261 with the SRBA court.
12. On October 2, 2003, the right holder's attorney, Dana L. Hofstetter, submitted to the Department a petition to correct the license (petition) to remove "acreage under Water Right No. 65-7461 to the extent the same acreage is covered under Water Right Nos. 65-3617 or 65-8627" and to add acreage to the license "to fully cover the overlapping place of use with Water Right No. 65-11211" and also to address the overlap of the place of use listed on the license with the place of use recommended for Right 65-11261.
13. The petition also requested that the Department remove the condition limiting the license and all other irrigation rights appurtenant to the same lands to a diversion rate of 0.03 cfs per acre and 4.5 af per acre at the field headgate.
14. On May 11, 2004, the right holder and his representatives met with Department staff and reached an agreement in principle to resolve the objections filed on Claims 65-3617, 65-8627, 65-11211, 65-7461 and 65-11261 and to avoid a formal hearing and/or trial in the Snake River Basin Adjudication.

15. The place of use for the license includes 4 acres of land in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27, T8N, R4W, B.M. that is included in the recommended place of use for claim 65-8627, which is also diverted from the Payette River through the Johnson-Higby ditch.
16. The place of use for the license includes 11 acres of land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 20, T8N, R4W, B.M. that is included in the recommended place of use for claim 65-3617, which is also diverted from the Payette River through the Johnson-Higby ditch.
17. The place of use for the license does not include 7 acres of land in the SE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 20, T8N, R4W, B.M. that has historically been irrigated with water diverted from the Payette River through the Johnson-Higby ditch but is not covered by another water right filing for water diverted from the Payette River.
18. The place of use for the license does not include 1 acre of land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 27, T8N, R4W, B.M. that has historically been irrigated with water diverted from the Payette River through the Johnson-Higby ditch under the permit.
19. The recommended priority dates for claims 65-3617 and 65-8627 are senior to the priority date of the license.
20. On June 30, 2004, the right holder submitted a revised application to replace the application for amendment that was approved on February 3, 2000. The application to amend the permit requested minor modifications to the authorized place of use, an increase in the annual volume that can be diverted in connection with the license, and the recognition of a point of injection into Big Willow Creek at Govt. Lot 6 (SW $\frac{1}{4}$ SW $\frac{1}{4}$ ), Sec. 22, Township 8 North, Range 4 West, B.M. and a point of rediversion from Big Willow Creek at Govt. Lot 4 (NW $\frac{1}{4}$ NW $\frac{1}{4}$ ), Sec. 21, Township 8 North, Range 4 West, B.M., to the permit so that they can be included on the license.
21. The maps submitted by the Department's field examiner in connection with his permit show that water diverted under Right 65-7416 is injected into Big Willow Creek and rediverted from Big Willow Creek at the points described in the application for amendment.
22. Section 42-202(6), Idaho Code, says:

In case the proposed right of use is for agricultural purposes, the application shall give the legal subdivisions of the land proposed to be irrigated, with the total acreage to be reclaimed as near as may be; provided, that 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, or more than five (5) acre feet of stored water per annum for each acre of land to be so irrigated, unless it can be shown to the satisfaction of the department of water resources that a greater amount is necessary.

23. On July 1, 2004, the right holder's consultant submitted a detailed report showing that a diversion rate exceeding 0.03 cfs per acre and an annual volume of 1802 acre-feet of water, which exceeds the license amount of 4.5 acre-feet per acre, are necessary for optimal irrigation of the lands listed as the place of use on the license.

24. Section 42-219, *Idaho Code*, 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. Under Section 42-219, *Idaho Code*, the Department has a statutory obligation to issue a water right license that accurately portrays the extent of beneficial use of water developed in accordance with the permit.
2. Fifteen acres of land described in the place of use on the license are already authorized to be irrigated under the recommendations for Claims 65-3617 and 65-8627, which are senior in priority to the license.
3. Eight acres of land historically irrigated in connection with the permit are not described in the authorized place of use for the license.
4. The Department should revise the place of use description on the license to remove the fifteen acres already authorized for irrigation under prior rights and to add the eight additional acres that have historically been irrigated with water diverted in accordance with the permit.
5. A diversion rate greater than 0.03 cfs per acre is necessary for optimal irrigation of the lands listed as the place of use on the license.
6. An annual volume of 1802 acre-feet of water plus 29.3% for conveyance losses is necessary for optimal irrigation of the lands listed as the place of use on the license.
7. Water Right License 65-7461 incorrectly limited the right holder to a diversion rate no greater than 0.03 cfs per acre and a diversion volume greater than 4.5 af per acre for the irrigation of lands authorized to be irrigated under the license.

8. The Department should remove the condition limiting the right to a diversion rate no greater than 0.03 cfs per acre and a diversion volume no greater than 4.5 af per acre when used in combination with other rights for the irrigation of the lands listed as the place of use on the license.
9. The Department should approve the application to amend Permit 65-7461.
10. The Department should correct the license to authorize the diversion of 2330 acre-feet per year for irrigation of the lands authorized to be irrigated under the license.
11. The Department should correct the water right license to show a maximum diversion rate of 5.90 cfs, which is 0.03 cfs per acre plus 29.3% for conveyance losses in the Johnson-Higby Ditch.

ORDER

IT IS HEREBY ORDERED that the application to amend Permit 65-7461 submitted to the Department on June 30, 2004, is approved.

IT IS FURTHER HEREBY ORDERED that the place of use description, the maximum diversion rate, and the maximum annual diversion volume for Water Right License 65-7461 are **CORRECTED** as set forth in the Amended Water Right License issued on this date in conjunction with this order.

AND IT IS FURTHER HEREBY ORDERED that the point of injection into Big Willow Creek and the point of rediversion from Big Willow Creek shall be **ADDED** as set forth in the Amended Water Right License issued on this date in conjunction with this order.

AND IT IS FURTHER HEREBY ORDERED that the conditions of approval on Water Right License 65-7461 shall be **CORRECTED** as set forth in the Amended Water Right License issued on this date in conjunction with this order.

Dated this 23<sup>rd</sup> day of July, 2004.



L. GLEN SAXTON, P.E.

Administrator, Water Management Division