



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

August 30, 2012

RE: Preliminary Order Appointing Lateral Manager for P-7 Ditch

Dear Water User:

The accompanying order is a **"preliminary order"** issued by the Idaho Department of Water Resources (Department) pursuant to Section 67-5243, Idaho Code. It can and will become a final order without further action of the Department unless a party submits a petition for reconsideration within fourteen (14) days after issuance as described in the enclosed information sheet.

Sincerely,

Tim Luke
Water Compliance Bureau

Enclosures

C: Ted O'Neal, Water District 73 Watermaster
IDWR Eastern Region

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO**

**IN THE MATTER OF THE)
APPOINTMENT OF A LATERAL)
MANAGER FOR THE P-7 DITCH)
_____)**

PRELIMINARY ORDER

This matter having come before the Department of Water Resources (“IDWR” or “Department”) as a result of the filing of a petition to appoint a lateral manager, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On August 7, 2012, the Department received a petition (“petition”) from Judd Whitworth (“petitioner”), lessee of certain irrigated lands using water rights from the Pahsimeroi River delivered through the P-7 Ditch, requesting appointment of a lateral manager for the ditch.
2. The petitioner leases irrigated land from Donald Gregory and Patricia Gunther (hereinafter referred to as “Gregory”) who own water right no.s 73-76, 73-81, 73-4017, 73-12115, 12117, and 73-12119. The heading of the P-7 Ditch, located about 4 miles southeast of Ellis in Custer County, is listed as the authorized point of diversion for these water rights. The P-7 Ditch heading is also the listed point of diversion for additional water rights held by River Valley Ranch, and Sydney and Karen Dowton.
3. The petitioner submitted with his petition a copy of payment to Donald Gregory dated March 1, 2012 for lease of the Gregory ranch. The lease payment provides adequate evidence of petitioner’s financial interest in the water rights used on the leased lands and qualifies the petitioner as a water user who may lawfully petition for the appointment of a lateral manager.
4. The water users on the P-7 Ditch have been unable to select a lateral manager as provided by law.
5. The petitioner uses the above referenced water rights for irrigation of the Gregory Ranch.

Water is delivered through the P-7 Ditch to the Gregory Ranch at or near the end of the P-7 Ditch.

6. The petitioner alleged that water has not been getting down the ditch to the pasture ground that petitioner leases from Gregory and that the Gregory water rights on the P-7 Ditch are being injured.
7. On August 8, 2012 the Department provided written notice of the petition to water users from the P-7 Ditch and to the watermaster of Water District 73. The notice provided fourteen (14) days for written response to the petition.
8. Between August 6 and about August 10, 2012, Water District 73 watermaster, Ted O'Neal, contacted IDWR to discuss questions about the delivery of water down the P-7 Ditch to the Gregory Ranch that is leased by the petitioner. The watermaster stated that he was delivering all of the water rights authorized for delivery at the P-7 Ditch, or about 14 cfs total. The watermaster stated that water was not reaching the petitioner's leased lands and that water was not being properly distributed along the ditch. The watermaster supported the need to appoint a lateral manager and advised that he was available to serve as lateral manager for the P-7 Ditch. The watermaster further advised IDWR that the P-7 Ditch is capable of delivering water to the Gregory Ranch.
9. On or about August 9, 2012, IDWR staff contacted Sydney Dowton, one of the other water right holders on the P-7 Ditch, regarding the petition received for appoint of a lateral manager. Mr. Dowton also leases the River Valley Ranch water rights and lands that are served by the P-7 Ditch. Mr. Dowton advised IDWR that the lower end of the P-7 Ditch needs maintenance and that water in the P-7 Ditch will not reach the Gregory Ranch unless the ditch is cleaned or improved.
10. As of August 29, 2012, the Department had not received any written response to the IDWR notice dated August 8, 2012 regarding appointment of a lateral manager for the P-7 Ditch.
11. On August 29, 2012, IDWR contacted the petitioner to inquire about petitioner's continued interest in appointing a lateral manager. The petitioner stated that he was still not receiving water and wanted appointment of a lateral manager.
12. On August 29, 2012, IDWR contacted the watermaster regarding the status of water delivery to the P-7 Ditch and any on-going need to appoint a lateral manager. The

watermaster advised that he has continued to deliver 14 cfs of water to the head of the P-7 Ditch but most of the water delivered to the head of the ditch under the Gregory Ranch water rights was not reaching the intended place of use.

13. The Department has reviewed the petition and other available information, including review of the water rights on the P-7 Ditch, and the statements provided by the watermaster and the ditch users.

CONCLUSIONS OF LAW

1. Idaho Code § 42-1301 provides in pertinent part:

Where three (3) or more parties take water from the same canal or reservoir at the same point to be conveyed to their respective premises for any distance through a lateral or distributing ditch or laterals or distributing ditches such parties shall constitute a water users' association known as "Water Users Association of Lateral or Laterals."

2. Idaho Code § 42-1308(1) provides in pertinent part:

(1) In the event that the water users or the board of directors of any lateral or ditch association do not meet and elect a lateral manager as provided for in this chapter or a lateral manager is not selected as otherwise provided by law, then, the director of the department of water resources may appoint and fix the compensation of a lateral manager, upon the written petition of a water user alleging that water is not being apportioned and distributed properly among the users from the ditch or lateral and that the rights of the water user are being injured thereby.

(2) If the water users also have failed to elect association officers, the lateral manager appointed by the director may exercise the duties of the association officers, including the making and collection of assessments, but not the borrowing of money, as is necessary to achieve the proper allocation and distribution of water from the ditch or lateral and without regard to the statutory dates of the performance of these duties.

(3) The lateral manger appointed by the director shall hold office only for the period of time fixed by the order of appointment and in no event beyond the remainder of the year in which appointed.

* * *

(6) Based upon a review of the petition, the responses thereto, the recommendations of the watermaster, if any, and any investigation by the department of water resources, the director shall issue an order with findings either appointing a lateral manager or declining to appoint a lateral manager. Any person aggrieved by the order of the director shall be entitled to request a hearing before the director pursuant to section 42-1701A, Idaho Code.

3. The Department should appoint a lateral manager for water right holders on the P-7 Ditch for the remainder of the 2012 irrigation season.

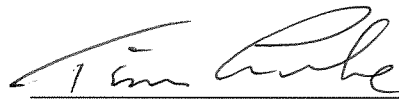
ORDER

NOW THEREFORE, pursuant to Idaho Code § 42-1308, the Department does HEREBY ORDER and APPOINT Ted O'Neal, to serve as lateral manager of the P-7 Ditch until October 31, 2012.

The lateral manager shall have the authority to act as established under Title 42, Section 13, Idaho Code to provide for the proper distribution of valid water rights for each of the water right holders on the P-7 Ditch.

IT IS FURTHER ORDERED that the lateral manager be compensated for services as follows: An amount of \$15.00 per hour plus mileage at 30 cents per mile. Compensation to the lateral manager shall be divided evenly among the users and payable on a monthly basis as determined by the lateral manager.

Dated this 30th day of August, 2012.



Tim Luke, Chief
Water Compliance Bureau

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(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 service date 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

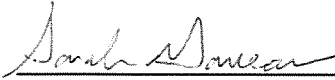
Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district 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.

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 30th day of August, 2012, the attached Preliminary Order In the Matter of the Appointment of a Lateral Manager for the P-7 Ditch was served upon the following individuals, unless otherwise noted, by placing a copy of the same in the United States mail.



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Technical Records Specialist, Water Distribution
Compliance Bureau
Idaho Department of Water Resources

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