BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO CORRECT LICENSE NO. 02-02209 IN THE NAME OF COTTONWOOD CANAL COMPANY	)	**RECOMMENDED DECISION AND ORDER**
IN THE MATTER OF CROSS PETITION TO CORRECT AND PETITION TO CHANGE OWNERSHIP OF LICENSE NO 0202209 IN THE NAME OF BLACK MESA FARMS, LLC	)	

STANDARD FOR DECISION

This matter comes before the Idaho Department of Water Resources ("IDWR") on an *Petition to Correct License* dated October 31, 2000, filed by Cottonwood Canal Co. (the "Petitioner") seeking to amend water right license no. 02-02209, issued on February 11, 1970. In response, a *Cross-Petition to Correct License and Petition to Change Ownership of License* was filed by Black Mesa Farms, also seeking amendments to water right license no. 02-02209 (the "Cross-Petition"). The Petition and Cross-Petition request IDWR to modify license no. 02-02209 pursuant to I.C. § 67-5254, which provides, in part, that:

> (1) An agency shall not revoke, suspend, modify, annul, withdraw, or amend a license… unless the agency first gives notice and an opportunity for an appropriate contested case in accordance with the provisions of this chapter or other statute.

For purposes of this section, a license is "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes." I.C. §67-5201(9).

Although the language of I.C. § 67-5254 does not provide a direct authorization to amend a water right license, the language presupposes an agency may modify or amend a license, and then adds the condition that notice and opportunity for a contested case be provided before doing so. IDWR previously used this interpretation of I.C. §67-5254 to authorize the amendment of a water right license. *In the Matter of License No. 61-07189 in the Name of Magic West, Inc.,* Final Order (January 22, 1999); *In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay,* Preliminary Order Correcting License (February 1, 2000).

The authority to amend or modify a water right license under I.C. § 67-5254 is circumscribed by I.C. § 42-220, which provides that a water right license "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right…." IDWR cannot use I.C. § 67-5254 to increase or change the beneficial use described by a water right license. Such an amendment would be an unlawful enlargement of the beneficial use under the licensed priority date. *See* Fremont-Madison v. Ground Water Approp., 129 Idaho 454, 461 (1996). The time for making such substantive changes in 1970 was through an appeal filed within sixty days of license issuance. I.C. § 42-219 (1967 Supp.); § 42-224 (1948).

Amendments to water right licenses under I.C. § 67-5254 may be issued to correct errors made by IDWR in describing the licensed beneficial use. Such errors may be patent—as when there is an obvious transposition of numbers or two elements of the described beneficial use are obviously contradictory or incompatible.[1] Latent errors may also be corrected where

[1]For instance, a right to irrigate 50 acres which is described as using 0.01 cubic feet per second ("cfs") has a patent error in the description of the beneficial use. This was the case *In the Matter of License No. 61-07189 in the Name of Magic West, Inc.,* Final Order (January 22, 1999) where IDWR erroneously licensed an industrial use for 0.67 cfs, but only 12.9 acre feet per annum (afa). IDWR amended the license to correctly describe the annual volume of the use as 58 afa.

investigation reveals a licensing provision that does not correctly describe the beneficial use.[2] In each instance, the license to be amended must have given junior appropriators some notice of the extent of beneficial use under the license. Completely new beneficial uses may not be shoe-horned into a licenses' priority date, under the guise of a license amendment.

The Idaho Department of Water Resources (IDWR), having examined the Petition and the written record, and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Course of Proceedings

1. The *Petition to Correct License* was filed on October 31, 2000, by Petitioner seeking to amend water right license no. 02-02209 to include the irrigation of 400 acres in T. 6 S., R. 10 E, Sec. 14, with an additional 8.0 cfs and 1,338.95 AFA. A filing fee of $50 from Petitioner was received by IDWR on January 11, 2001. A Notice of Petition to Change Water Right License No. 02-02209 in the Name of Cottonwood Canal Company was published on January 24 and 31, 2001, in the Mountain Home News. A Notice of Protest was filed by Black Mesa Farms, LLC with IDWR on February 13, 2001.

2. Cross-Petitioner filed the *Cross-Petition to Correct License and Petition to Change Ownership of License* with IDWR on April 27, 2001, and also sought to amend water right license no. 02-02209 to include the irrigation of 400 acres in T. 6 S., R. 10 E, Sec. 14, with 8.0 cfs and 1,338.95 AFA, but requested such amended license be issued in the name of Cross-Petitioner.

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[2] This was the case *In the Matter of Petition to Correct Water Right License Submitted by Darwin McKay,* Preliminary Order Correcting License (February 1, 2000) where IDWR removed approval conditions requiring the use of appurtenant surface water before using the licensed groundwater right, when information revealed that the

3. On June 6, 2001, IDWR issued its *Order Authorizing Discovery and Order of Recusal.* On June 19, 2001, IDWR issued its *Order Appointing Hearing Officer*. Following a prehearing conference on July 20, 2001, the Hearing Officer issued a *Prehearing Order* on July 23, 2001, that, among other things, bifurcated the issues in this matter as follows:

> Two issues are raised by the Petitions and Cross-Petitions:
>
> 1. Whether License No. 02-02209 should be modified to include more acres and an increased quantity of water; and
> 2. Whether the additional acres and increase quantity of water should be shown on the License as owned by Cottonwood Canal Co. or Black Mesa Farms.
>
> Because *the* second issue need not be decided if IDWR does not modify License No. 02-02209, the parties agreed that the first issue should be processed prior to the second issue. If the Hearing Officer determines that License No. 02-02209 should not be modified, he will issue that decision in the form of a recommended order to the Director of IDWR. If the Hearing Officer determines that License No. 02-02209 should be modified, he will issue that decision in the form of a draft decision to the parties and set an additional prehearing conference to discuss resolution of the second issue.

4. The *Prehearing Order* also provided that the determination of whether License No. 02-02209 should be modified would be made upon a written record and established a schedule for submission of written materials.

5. On July 23, 2001, the Hearing Officer issued a *Request for Submission of IDWR Staff Memorandum.* IDWR responded with its *Response to Request for Submission of IDWR Staff Memorandum* on September 31, 2001. Cross-Petitioner submitted its inappropriately named *Black Mesa's Response to IDWR Staff Memorandum* on October

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right was never used with appurtenant surface water. The change in this case did nothing to change the beneficial use, it simply removed essentially meaningless approval conditions.

26, 2001.[3] The Petitioner filed its similarly name *Memorandum in Response to IDWR Staff Memorandum* on November 2, 2001, with supporting affidavits.

II. Evidence Considered.

6. IDWR considered the following evidence in making the substantive findings of facts:

a. Application for Permit to Appropriate the Public Waters of the State of Idaho No. 39069, including map. Approved as Permit No. 30990, and subsequently renumbered 02-2209.

b. Application for Amendment LAND LIST Permit No. 30990 received April 25, 1963.

c. State of Idaho Water License no. 30990/02-2209.

d. Notice of Proof of Completion of Works and Application of Water to Beneficial Use received on June 11, 1965, by the Department of Reclamation, with accompanying letter signed by Otis Williams on behalf of Cottonwood Canal Company.

e Letter dated June 15, 1965, from Carl E. Tappan, State Reclamation Engineer, to Cottonwood Canal Company re Permit No. 30990.

f. Affidavit of Publication received August 3, 1965 by the Department of Publication.

[3] This document is inappropriately named because the IDWR staff memorandum is not a pleading to which a "response" is filed. It is a factual memorandum by IDWR staff, akin to an affidavit. IDWR is not a party to this matter, it is the decision-maker.

g. Deposition of Holder signed by Otis Williams and notarized by Phyllis Butterfield on July 29, 1965.

h. Deposition of Witness signed by George R. Lake and notarized by Phyllis Butterfield on July 29, 1965.

i. Deposition of Witness signed by Lawrence Roemer and notarized by Phyllis Butterfield on July 29, 1965.

j. Letter dated August 4, 1965, from Carl E. Tappan, State Reclamation Engineer to Otis H. Williams, Secretary, Cottonwood Canal Co.

k. Draft Report of Examiner for Permit No. 30990, and loose map

l. Letter dated January 26, 1970 from Dorian Clay, Field Examiner, to Cottonwood Canal Company, c/o Wm. A. Anderson..

m. Memorandum dated August 24, 1984, from D. Shaff to D. Tuthill.

n. Inter-Department Memo dated August 28, 1984, from Dave Tuthill to Glen Saxton.

o. Inter-Department Memo dated August 29, 1984, from Dave Tuthill to Don Shaff.

p. Letter dated December 29, 2000, from Charles L. Honsinger to Glen Saxton, with attachments.

q. Response to Request for Submission of IDWR Staff Memorandum, dated September 13, 2001.

r. Affidavit of Shelley Keen, dated November 1, 2001.

s. Affidavit of Clifford Smith, dated October 22, 2001.

III. Permitting and Licensing Process

7. On February 25, 1963, Cottonwood Canal Company filed an Application for Permit to Appropriate the Public Water of the State of Idaho with the Idaho Department of Reclamation. Cottonwood Canal Company was identified as a non-profit corporation. The Idaho Department of Reclamation is a predecessor agency of the current Idaho Department of Water Resources, and will also be referred to as IDWR. That Application was assigned application no. 39069.

8. The Application requested authorization to develop a water right with which to irrigate 4480 acres, with 89.6 cfs of water to be diverted from the Snake River. The Application envisioned the construction of a pumping plant, canals ditches and pipeline over 5 years, and application of the water to the proposed use within an additional 5 years. The land to be irrigated was located in Township 5 South, Range 10 East and Township 6 South, Ranges 10 and 11 East. Among these lands, 400 acres was identified within Section 14 of Township 6 South, Range 10 East ("Section 14 lands").

9. The Application was approved and a permit issued for the development of this water use on March 1, 1963. The Permit was assigned no. 30990, subsequently renumbered to 02-2209, and required one-fifth of the work to be completed by September 1, 1965, and the remainder was to be completed by September 1, 1968. Beneficial use of all the water to be used under the Permit was required to be made by March 1, 1973.

10. A Notice of Proof of Completion of Works and Application of Water to Beneficial Use was submitted for publication by Otis Williams of the Cottonwood Canal Company on June 11, 1965. The Notice indicated that the place where the water was

used under Permit No. 30990 included the Section 14 lands. The Notice indicated that proof of completion was to be submitted to Phyllis Butterfield, Notary Public, on July 29, 1965, at 10:00 a.m. in Burley Idaho. On June 15, 1965, the State Reclamation Engineer sent three depositions to Cottonwood Canal Company. The first deposition was to be executed by Cottonwood Canal Company, as the "holder" and the other two by two disinterested witnesses. All three were to be submitted on July 29, 1965. The June 15, 1965, letter provided, "It is very important and necessary that each question be answered in detail." (Underscoring in original). The Notice of Proof of Completion of Works and Application of Water to Beneficial Use was published in the Mountain Home News and included reference to the Section 14 lands.

11. The Deposition of Holder for Permit No. 30990, signed by Otis Williams, Secretary of Cottonwood Canal Company, was submitted on July 29, 1965. In its answer to a portion of question 6. "If for irrigation, name each subdivision in which used and number of acres in each subdivision that have actually been irrigated with said water:" the Holder stated "See attached list." A listing of lands which was unattached to the first page of the Holder Deposition, but which was directly behind that page in the file and with staple holes that corresponded to the first page, did not include the Section 14 lands. Total land area listed in the Holder Deposition was 3985 acres.

12. The Deposition of Witness for Permit No. 30990, signed by George R. Lake, the supervisor of irrigators, was submitted on July 29, 1965. In his answer to a portion of question 6: "If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision:" George Lake stated "there (sic) are 14 320 acre tracts of which nearly all of each is irrigated as per attached list." A listing of

lands which was unattached to the first page of the Lake Deposition, but which was directly behind that page in the file and with staple holes that corresponded to the first page, did not include the Section 14 lands. Total land area listed in the Lake Deposition was 3985 acres.

13. The Deposition of Witness for Permit No. 30990, signed by Lawrence Roemer, farm manager and partial supervisor of irrigators, was submitted on July 29, 1965. In his answer to a portion of question 6: "If for irrigation, give each subdivision in which water has been used and number of acres irrigated in each subdivision:" George Lake stated "irrigation 14 - 320 acre tracts described below" and then there is a listing of lands, including the Section 14 lands. Total land area listed in the Roemer Depostion was 4350 acres, although he also indicates 14 -320 acre tracts as the total land area, which is 4480 acres.

14. On August 4, 1965, the State Reclamation Engineer wrote to the Cottonwood Canal Co. acknowledging the receipt of the Holder, Lake and Roemer Deposition and the affidavit of publication submitted in proof of completion of Permit No. 30990. The letter indicated that before final action could be taken a field examination had to be made by the department.

15. The form for the Report of Examiner requires in paragraph 7 as follows: "List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact numbers of acres under cultivation in each forty-acre tract. … (Submit map on attached plat, showing location and details of above description." The Report lists the lands to be irrigated as provided in Permit No. 30990, including the Section 14 lands. It does not list the exact number of acres under cultivation in each forty-acre tract, either in writing or on

the attached map (although the attached map does show some erased pencil figures on some of the "quarter-quarters" that could be irrigated acreages). It does indicate adjacent to the term "Area" the number 3,985 acres, which corresponds to the total number of acres indicated in both the Holder and Lake Depositions. Behind the Report of Examiner in the file is a map of Cottonwood Canal Co.'s proposed place of use with each "quarter-quarter" numbered, with acreage figures written in red. The red figures correspond to the Holder and Lake Depositions which indicated a total of 3985 irrigated acres, and does not include the Section 14 lands. By letter dated January 26, 1970, Field Examiner Dorian Clay indicated that the field examination for Permit 02-2209 found irrigation of 3,985 acres of irrigation within the lands under Permit 02-2209, including lands in Section 14. Mr. Clay found 79.70 cfs of water to be beneficially used. This amount was likely calculated by multiplying the statutory limit of 0.02 cfs per acre by 3,985 acres. The January 26, 1970, then indicated that upon the payment of a fee of $231.00 a water license would be issued consistent with the findings in the letter.

16. Water Right License No. 30990, issued on February 11, 1970. The License indicated that the proposed works of pumps, motors and sprinkler system with a capacity of 90.24 cfs were completed on May 10, 1965 The License indicates that on July 29, 1965, proof of beneficial use of 13,339.33 acre feet per season with a maximum rate of diversion of 79.70 cfs of Snake River water for irrigation was made to the satisfaction of the State Reclamation Engineer. The place of use was found to include 3,985 acres within Township 6 South, Ranges 10 and 11 East. The described place of use included no land within Section 14 of Township 6 South, Range 10 East. No appeal was filed by the Petitioner regarding the Section 14 lands.

IV. Irrigation of Section 14 Lands.

17. The Section 14 lands were irrigated commencing May 10, 1965, using the irrigation system of the Cottonwood Canal Co.

CONCLUSIONS OF LAW

Based upon the Findings of Fact, IDWR makes the following Conclusions of Law:

1. IDWR made no error regarding the Section 14 lands in the issuance of License No. 02-02209. The permit holder, Cottonwood Canal Co., did not include those lands in its deposition. IDWR could not issue the license for more acres than submitted by the permit-holder. There is no evidence that Cottonwood Canal Co. ever tried to change its deposition, or amend the attached list of irrigated lands. If Cottonwood Canal Co. disagreed with License No. 02-02209 it could have appealed that license pursuant to I.C. § 42-219 (1967 Supp.); § 42-224 (1948). If there was an error made in the licensing process, it was Petitioner's.

2. There is no patent error on the face of License No. 02-02209. The beneficial use described on the face of the license is internally consistent, with adequate instantaneous flow and yearly volume for the number of acres irrigated.

3. Neither Petitioner nor Cross-Petitioner have shown a latent error in the description of the beneficial use in License No. 02-02209. The beneficial use described on the face of the license is internally consistent, with adequate instantaneous flow and yearly volume for the number of acres irrigated.

4. The Petition and Cross-Petition request that an entirely new beneficial use, 400 acres of irrigation using 8 cfs and 1,338.95 AFA on the Section 14 lands, be licensed under the February 25, 1963, priority date of License No. 02-02209. Such a modification

would constitute an enlargement of the water use under License No. 02-02209 and injure junior water rights.

RECOMMENDED ORDER

Based upon these Findings of Fact and Conclusions of Law the Petition and Cross-Petition are **DENIED**.

PROCEDURAL RIGHTS

This is the Recommended Decision and Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any 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.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

i. The last day a timely petition for reconsideration could have been filed with the hearing officer;

ii. The service date of a denial of a petition for reconsideration by the hearing officer; or

iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before issuing a final order. The Director or Director's designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

DATED this18th day of January, 2002.

____ Signed_____
PETER R. ANDERSON
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of January, 2002, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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