

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
PERMIT NOS. 55-07440, 55-07441, 55-07442)
55-07443, 55-07444, 55-07445, 55-07446,)
55-07447, 55-07448, 55-07449, 55-07450,) **FINAL ORDER**
55-07451, 55-07452, 55-07454, 55-07455)
AND 55-07456 IN THE NAME OF HANLEY)
RANCH)
_____)

On March 7, 2000, the Department of Water Resources (“IDWR”) conducted a hearing for protests against the above referenced applications for water rights. Based on the evidence submitted at the hearing and the records of IDWR, the Director (“Director”) of IDWR finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Hanley Ranch filed applications for permit nos. 55-07440, 55-07441, 55-07442, 55-07443, 55-07444, 55-07445, 55-07446, 55-07447, 55-07448, 55-07449, 55-07450, 55-07451, 55-07452, 55-07454, 55-07455 and 55-07456, seeking to appropriate surface water for instream stock watering. The United States of America, Bureau of Land Management (“BLM”) protested the applications. At a hearing conducted on March 7, 2000, Michael Hanley (“Hanley”) appeared on behalf of Hanley Ranch. William Ferry, attorney at law, represented BLM.

2. The places of use and points of diversion proposed by all 16 applications describe lands owned primarily by the federal government, although one of the applications also describes parcels of land owned by the State of Idaho. Hanley Ranch is a permittee of the federal government for grazing allotment no. 539. Most of the described places of use are within the grazing allotment.

3. For the stream segments located on federal lands, the applications include two categories: (1) streams for which BLM has not claimed or established a water right, and (2) streams described as a place of use by a partial decree issued to BLM in the Snake River Basin Adjudication (“SRBA”). The following table lists each water right application number, and, for each application, summarizes whether the application proposes a use of water on federal lands, whether it overlaps an existing federal decreed instream stock water right, and whether the proposed places of use are within the grazing allotment held by Hanley Ranch.

WATER RIGHT NO.	OVERLAPPING FEDERAL WATER RIGHT	ON FEDERAL LANDS	INSIDE GRAZING ALLOTMENT
55-07440	NO	YES	YES
55-07441	YES	YES	YES
55-07442	Part. NWNE & NWSW Sec. 19; NWNE Sec. 20; T11S, R04W not decreed to feds.	YES	YES
55-07443	Part. SESW, NWSE, Sec. 21, T11S, R04W not decreed to feds.	YES	Part. SWNE, NWSE, Sec. 21, T11S, R04W not in allotment.
55-07444	NO	YES	YES
55-07445	Part. SWNW, NWSW, Sec. 10, T10S, R05W not decreed to feds	YES	YES
55-07446	YES	YES	YES
55-07447	NO	YES	YES
55-07448	Part. E½ NE, NESE, Sec. 16, T11S, R05W not decreed to feds.	Part. Land in Sec. 16, T11S, R05W is state land.	Part. E½ NE, NESE, Sec. 16, NESE, SESE, Sec 9; T11S R05W not in allotment.
55-07449	YES	YES	YES
55-07450	Part. N½SE, SESE, Sec. 10, SWSW, Sec 11; N½ NW SENE, W½SE, Sec. 14; N½NE, Sec. 23; N½NW, Sec 24; T11S, R05W not decreed to feds.	YES	YES
55-07451	Part. E½NW, SWNE, W½SE, Sec. 31, T11N, R05W not decreed to feds.	YES	YES
55-07452	Part. N½NW, SWNW, Sec. 25, T11N, R05W not decreed to feds.	YES	YES
55-07454	Part. N½SW, W½SE, SESE, Sec. 27, T10S, R05W not decreed to feds.	YES	Part. SWSW, Sec 26, T10S, R05W not inside allotment.
55-07455	Part. E½NE, SENE, S½NW, Sec. 34, T10S, R05W not decreed to feds.	YES	YES
55-07456	Part. SWSE, Sec 27; N½NE, NENW, Sec 34; T10S, R05W not decreed to feds	YES	YES

4. Hanley testified that cattle drinking water from the proposed source streams will not significantly reduce the flow of water in those streams and will not injure other downstream water users.

5. Hanley testified that there is always enough water in the proposed source streams for the stock to water.

6. Hanley stated that he and his family have ranched in the area for years, and that he has no intention of leaving.

7. No physical structures will be constructed to divert water from the proposed source streams. As a result, Hanley Ranch has the financial ability to complete the proposed appropriations of water.

8. Ranching provides a major part of the economy of Jordan Valley and the surrounding area.

9. Hanley testified that he is trying to make the best use of the waters of the state of Idaho.

10. BLM did not call any witness to testify at the hearing. However, BLM raised a number of legal arguments as to why IDWR must deny the applications. The arguments are addressed below.

CONCLUSIONS OF LAW

1. Idaho Code §42-203A states:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. Idaho Code § 42-202B(3) states:

"Local public interest" is defined as the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.

3. The applicant bears the burden of proof regarding the factors set forth in Idaho Code § 42-203A.

4. Idaho Code § 42-114 states:

Any permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefore and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a beneficial use of water.

5. A federal rule found in 43 C.F.R. §4120.3-9 (1995); 60 F.R. 9965¹ states:

Any right acquired on or after August 21, 1995 to use water on public land for the purpose of livestock watering on public land shall be acquired, perfected, maintained and administered under the substantive and procedural laws of the state within such land is located. To the extent allowed by the law of the state within which the land is located, any such water right shall be acquired, perfected, maintained, and administered in the name of the United States.

6. Hanley Ranch's application meets the criteria outlined in Idaho Code §42-203A:

a. Reduction of quantity of water to existing water rights: Hanley testified that there is always enough water in the streams for the stock to water. BLM did not assert that Hanley's diversion would deprive another water user of water. Hanley Ranch's proposed use of water will not result in a reduction of the quantity of water available to existing water rights.

b. Sufficiency of supply: Hanley testified there is always enough water in the proposed source streams for the stock to water. There is sufficient water to satisfy the needs of Hanley Ranch's stock.

c. Good faith, delay, speculation: BLM argues Hanley Ranch's attempt to acquire a water right for lands to which he may not have a grazing allotment permit in the future is speculation. *BLM Oral Argument*, Hearing (March 7, 2000). Just because someone may lose the right of entry onto property *in the future*, does not mean the person cannot establish a water right today. Someone can establish a water right on property they lease, rent or otherwise have permission to access and use. *Sanderson v. Salmon River Canal Co.*, 34 Idaho 145, 160 (1921). Should Hanley Ranch lose the right of access to the BLM property in the future, that simply means Hanley Ranch may be restricted from exercising its water right. Speculation is determined at the time an appropriation of water is sought. An application to appropriate water is not speculative just because there is a possible hypothesis that would create uncertainty of use in the future.

¹ 43 C.F.R. §4120.3-9 was amended in 2006 (71 F.R. 39505) but the amendment was enjoined from going into effect by order from the 9th Circuit in *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472 (9th Cir. 2011).

BLM further argues that because Hanley Ranch's applications for permit seek to appropriate water that has already been appropriated by the United States, the applications are speculative. *BLM Hearing Memoranda* at 3. In essence, BLM is arguing that because it has already established water rights on some of the allotment lands, Hanley Ranch should not be allowed to establish water rights at the same points of diversion. This argument is contrary to established Idaho law. In Idaho, "two or more parties can obtain a right to use water from the same source." *Joyce Livestock Co. v. U.S.*, 144 Idaho 1, 7 (2007). The existence of the federal instream stock water rights does not prevent Hanley Ranch from appropriating water for the use of its cattle, even if the federal water rights directly overlap the place of use and point of diversion described by its applications.

A valid grazing allotment permit issued by BLM authorizes Hanley Ranch to graze cattle on the allotment lands. Because of its grazing allotment permit, Hanley Ranch has the ability to beneficially use water as proposed. The applications are not speculative. Furthermore, there is no allegation that Hanley Ranch's applications are filed for purposes of delay or in bad faith.

d. Sufficient financial resources: Because the applications do not require construction, and the cattle are already on the grazing allotment, Hanley Ranch has sufficient financial resources to complete the appropriation.

e. Local public interest: Because the applications are for the instream watering of livestock, the impact of the diversions on the public water resource are not significant. The applications are in the local public interest.

f. Conservation of water resources: BLM argues that Hanley Ranch's application is contrary to the conservation of water because it seeks to appropriate water that has already been appropriated by the United States. *BLM Hearing Memoranda* at 3. BLM fails to explain, beyond its conclusory statement, how approving Hanley Ranch's application would negatively affect the conservation of water resources of Idaho. As stated in point 6(c) above, Idaho law permits multiple water rights on the same source. The Hanley Ranch applications are consistent with the principles of conservation of the waters of the state of Idaho.

7. Citing federal rule 43 C.F.R. § 4120.3-9, BLM argues because Hanley Ranch did not have vested water rights on BLM land prior to August 21, 1995, IDWR must deny all of the Hanley Ranch water right applications. The first sentence of 43 C.F.R § 4120.3-9 provides that any water right acquired on or after August 21, 1995 for livestock watering on public lands shall be acquired under the "substantive and procedural laws of the state within such land is located." Hanley Ranch is seeking water rights based on the substantive and procedural laws of Idaho. Hanley Ranch's applications for permit comport with this part of the rule.

BLM argues that the second sentence of the rule (43 C.F.R. §4120.3-9 (1995); 60 F.R. 9965) requires that IDWR must reject Hanley Ranch's applications. The second sentence provides: "To the extent allowed by the law of the state within which the land is located, any such water right shall be acquired...in the name of the United States." In essence, BLM argues that in Idaho, a post-August 21, 1995 permit cannot be issued unless it is issued to the United

States. BLM's argument glosses over the second sentence's introductory language. The introductory language expressly qualifies its applicability. The mandate applies only "[t]o the extent allowed by the law of the state within which the land is located..." The key question is whether Idaho state law preempts the rule's mandate that the water right be in the name of the United States. The language of Idaho Code § 42-114 is express and unambiguous. It provides that any permit issued for the watering of livestock by IDWR "shall be issued to the person or association of persons making application therefore" In this case, Hanley Ranch has applied for water rights and, to the extent IDWR deems the other criteria of Idaho Code § 42-203A are met, the water right "shall be issued" to Hanley Ranch. Idaho Code § 42-114.

Idaho Code § 42-114 was passed to address the issue being raised in this proceeding. The purpose of the bill was to place the beneficial use "with the consumption and the ownership of the cattle and not with the land management agencies." Statement of Purpose, H.B. 630 (1986). Idaho Code § 42-114 and its legislative purpose recognize that watering livestock is a beneficial use and, if an association such as Hanley Ranch applies for a permit for such a beneficial use, it shall be issued such a permit. 43 C.F.R. § 4120.3-9 does not bar approving the Hanley Ranch applications for permit.

The grazing allotment permit held by Hanley Ranch is subject to changes in the period within which the cattle can graze and the number of cattle that can graze. It is also ultimately subject to cancellation or refusal for renewal. A condition should be included on the permit recognizing that issuance of an instream flow permit or license does not provide independent authorization for entry onto federal lands.

8. Hanley Ranch is not entitled to a permit or water right for lands outside of the grazing allotment or for lands to which Hanley Ranch did not show a right to graze cattle. Any permit or license should not include such lands.

ORDER

IT IS HEREBY ORDERED that application for water right numbers 55-07440, 55-07441, 55-07442, 55-07444, 55-07445, 55-07446, 55-07447, 55-07449, 55-07450, and 55-07451, are **APPROVED**.

IT IS FURTHER ORDERED that application for water right number 55-07443 is **APPROVED**, but the place of use and points of diversion shall not include the SWNE and the NWSE of Sec. 21, T11S, R04W.

IT IS FURTHER ORDERED that application for water right number 55-07448 is **APPROVED** but the place of use and points of diversion shall not include the NESE and the SESE, of Sec. 9; and E½NE and NESE Sec. 16; T11S, R05W.

IT IS FURTHER ORDERED that application for water right no. 55-07454 is **APPROVED** but the place of use and points of diversion shall not include the SWSW, Section 26, T10S, R05W.

IT IS FURTHER ORDERED that all of the permits approved above are subject to the following conditions:

Proof of application of water to beneficial use shall be submitted on or before October 1, 2018.

Subject to all prior rights.

This water right does not provide independent authorization for entry onto federal lands.

The number of cattle drinking water shall be limited to the number of cattle allowed by the federal government on the grazing allotment.

This right authorizes the watering of livestock directly from the stream without a diversion.

This right, when considered with all other rights common to the same grazing allotment, is limited to the quantity of water beneficially used by the number of stock within the allotment.

Dated this 29th day of October, 2013.

A handwritten signature in cursive script, reading "Gary Spackman", written over a horizontal line.

Gary Spackman, Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of October, 2013, a true and correct copy of the document(s) described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: FINAL ORDER and Explanatory Information to Accompany a Final Order.

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Deborah J. Gibson
Admin. Assistant for the Director

EXPLANATORY INFORMATION TO ACCOMPANY A FINAL ORDER

(Required by Rule of Procedure 740.02)

The accompanying order is a "Final Order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

- (1) If the presiding officer is the agency head, the presiding officer shall issue a final order.
- (2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.
- (3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.
- (4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the service date of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.
- (5) 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.
- (6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.
- (7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order as shown on the certificate of service. **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 67-5246(4) Idaho Code.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter 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: a) of the service date of the final order, b) the service date of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.