

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

IN THE MATTER OF DISTRIBUTION OF
WATER TO VARIOUS WATER RIGHTS
HELD BY OR FOR THE BENEFIT OF
A&B IRRIGATION DISTRICT,
AMERICAN FALLS RESERVOIR
DISTRICT #2, BURLEY IRRIGATION
DISTRICT, MILNER IRRIGATION
DISTRICT, MINIDOKA IRRIGATION
DISTRICT, NORTH SIDE CANAL
COMPANY, AND TWIN FALLS CANAL
COMPANY

Docket No. CM-DC-2010-001

**FINAL ORDER DENYING JENCO
ACRES BOARD OF DIRECTORS'
PETITION FOR RECONSIDERATION**

BACKGROUND

On May 5, 2022, the Director of the Idaho Department of Water Resources (“Department”) issued in this proceeding a *Final Order Curtailing Ground Water Rights Junior to December 25, 1979* (“Curtailment Order”). The Curtailment Order states in pertinent part:

IT IS HEREBY ORDERED that, at 12:01 a.m. on or before May 20, 2022, ground water users holding water rights bearing priority dates junior to December 25, 1979, within the ESPA ACGWS listed in Attachment A to this order shall curtail/refrain from diversion and use of ground water pursuant to those water rights unless notified by the Department that the order of curtailment has been modified or rescinded as to their water rights. This order shall apply to consumptive ground water rights, including but not limited to, agricultural, commercial, industrial, and municipal uses. This order excludes ground water rights used for *de minimis* domestic purposes where such domestic use is within the limits of the definition set forth in Idaho Code § 42-111 and ground water rights used for *de minimis* stock watering where such stock watering use is within the limits of the definitions set forth in Idaho Code § 42-1401A(11), pursuant to IDAPA 37.03.11.020.11.

Curtailment Order at 3.

Among the water rights subject to curtailment is water right 25-7454, which has a November 14, 1988 priority date and is owned by the “Jenco Acres Water Board Assn.” *Id.* at Attach. A. As required by the Rules of Procedure of the Idaho Department of Water Resources, IDAPA 37.01.01 (“Rules of Procedure”), the Curtailment Order included explanatory information describing, among other things, how “[a]ny party may file a petition for reconsideration . . . within fourteen (14) days of the service date of this order as shown on the certificate of service.” *Id.* at Explan. Info. to Final Order. The service date shown on the Curtailment Order’s certificate of service is May 5, 2022. *Id.* at 5. On that date, the Department mailed the Curtailment Order along with a cover letter to the “Jenco Acres Water Board Assn” at its last known address. Letter from Gary Spackman to Water Right Holders (May 5, 2022).

On May 20, 2022, a Department employee received via email a one-page electronic document titled “Petition For Reconsideration” (“Petition”) from the “Jenco Acres Board of Directors.” The Petition is not dated or signed. It does not identify the members of the board or any water right owned by the board. It does not explain what, if any, relationship exists between the Jenco Acres Board of Directors and the Jenco Acres Water Board Assn, the owner of water right 25-7454. The petition does, however, assert Jenco Acres is exempt from curtailment.

ANALYSIS

The Petition must be denied for multiple reasons. First, the Jenco Acres Board of Directors is not entitled to seek reconsideration because it is not a party to this proceeding. Under both statute and the Rules of Procedure, only a party may seek reconsideration of a final order in this proceeding, including the Curtailment Order. Idaho Code § 67-5246(4); IDAPA 37.01.01.740.02.b. While “Jenco Acres Water Board Assn.” is a party, nothing in the Petition indicates the “Jenco Acres Board of Directors” owns a water right subject to the Curtailment Order, has properly sought to intervene in this contested case, or otherwise qualifies as a party. It is possible the person who filed the Petition intended to file it on behalf of Jenco Acres Water Board Assn. instead of Jenco Acres Board of Directors, but because they did not, the Petition must be denied.

Even if the Petition was intended to be filed on behalf of Jenco Acres Water Board Assn., the Petition is untimely and not properly filed. As stated in the explanatory information accompanying the Curtailment Order, parties to this proceeding had to file a petition for reconsideration of the Curtailment Order within 14 days after the service date. Under both statute and the Rules of Procedure, service was complete on May 5, 2022, when the Curtailment Order was mailed to the Jenco Acres Water Board Assn’s last known address. Idaho Code § 67-5246(6); IDAPA 37.01.01.053.06. Therefore, any petitions for reconsideration were due on May 19, 2022—14 days after the May 5 service date. The Jenco Acres Board of Directors emailed the Petition to a Department employee after the 14-day deadline on May 20, 2022. Furthermore, the Petition was improperly filed because emailing individual Department employees is not an authorized means of filing documents with the Department. *See* IDAPA 37.01.01.053.01. The Petition also violates other filings requirements because it was not served on the representatives of each party in this proceeding, is not in the Portable Document Format required for electronic filings, and is not accompanied by a proof of service. IDAPA 37.01.01.053.02, .04, .05.

The Petition also fails to establish an exemption from curtailment. Assuming the Petition pertains to curtailment of water right 25-7454, that right is subject to curtailment because its November 14, 1988 priority date is junior to December 25, 1979, the curtailment date set by the Curtailment Order. Yet the Petition argues the licensed 1988 priority date is “in error” because the “well has been in operation since 1976” The Department’s records for water right 25-7454 indicate there was an opportunity to seek reconsideration of any alleged errors during the licensing proceeding. But, because the Jenco Acres Water Board Assn did not seek reconsideration before the license for 25-7454 became final, the license, including the priority date, is now “binding upon the state.” Idaho Code § 42-220. The Jenco Acres Board of Director’s assertion of an earlier priority date is an impermissible collateral attack on the license. *McInturff v. Shippy*, 165 Idaho 489, 494–96, 447 P.3d 937, 942–44 (2019).

The Jenco Acres Board of Directors further claims to be exempt from curtailment because “Jenco Acres” owns shares in the Rudy Canal and “meets the main requirements for [Idaho] Code 42-111 for the amount of water being used by each home owner [sic].” Ownership of shares in a surface water source is irrelevant to whether water right 25-7454, a ground water right, is subject to curtailment. Regarding Idaho Code § 42-111, the statute expressly excludes multiple ownership subdivisions such as Jenco Acres unless the “total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.” Idaho Code § 42-111(1)(b)–(2). The license for 25-7454 authorizes irrigation of 33 acres between April 15 and October 15, at a diversion rate of 0.25 cubic feet per second with a maximum annual volume of 132 acre-feet. The diversion rate and volume authorized by the license both exceed the limits in Idaho Code § 42-111(1)(b), and the Petition presents no evidence that Jenco Acres’ actual total use does not exceed the limits.

The Director finds and concludes that because the Petition violates multiple Rules of Procedure and does not establish that water right 25-7454 is exempt from curtailment, the Petition must be denied.

ORDER

IT IS HEREBY ORDERED that the Jenco Acres Board of Directors’ Petition for Reconsideration is DENIED.

Dated this 10th day of June 2022.



GARY SPACKMAN
Director


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June 2022, the above and foregoing, was served by the method indicated below, and addressed to the following:

<p>Jenco Acres Board of Directors c/o Randy Opheikens eatrocks@yahoo.com</p>	<p><input checked="" type="checkbox"/> Email</p>
<p>Jenco Acres Water Board Assn. Vince Cramer, President 4133 E 140 N Rigby, ID 83442-5815</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid</p>
<p>John K. Simpson Travis L. Thompson BARKER ROSHOLT & SIMPSON, LLP P. O. Box 63 Twin Falls, ID 83303-0063 jks@idahowaters.com tlt@idahowaters.com nls@idahowaters.com jf@idahowaters.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>W. Kent Fletcher FLETCHER LAW OFFICE P.O. Box 248 Burley, ID 83318 wkf@pmt.org</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Randall C. Budge Thomas J. Budge RACINE OLSON P.O. Box 1391 Pocatello, ID 83204-1391 randy@racineolson.com tj@racineolson.com</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>
<p>Kathleen Marion Carr US Dept. Interior 960 Broadway Ste 400 Boise, ID 83706 kathleenmarion.carr@sol.doi.gov</p>	<p><input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input checked="" type="checkbox"/> Email</p>

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<p>Tony Olenichak IDWR—Eastern Region 900 N. Skyline Drive, Ste. A Idaho Falls, ID 83402 Tony.Olenichak@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> Email</p>
<p>Corey Skinner Nathan Erickson IDWR—Southern Region 1341 Fillmore St., Ste. 200 Twin Falls, ID 83301-3033 corey.skinner@idwr.idaho.gov nathan.erickson@idwr.idaho.gov</p>	<p><input checked="" type="checkbox"/> Email</p>
<p>COURTESY COPY TO: William A. Parsons PARSONS SMITH & STONE P.O. Box 910 Burley, ID 83318 wparsons@pmt.org</p>	<p><input checked="" type="checkbox"/> Email</p>



Sarah Tschohl
Legal Assistant

**EXPLANATORY INFORMATION TO ACCOMPANY AN
ORDER DENYING PETITION FOR RECONSIDERATION**

(To be used in connection with actions when the statutory time allowed to request a hearing has passed)

The accompanying order is an **Order Denying Petition for Reconsideration** of the "final order" or "amended final order" issued previously in this proceeding by the Idaho Department of Water Resources ("department") pursuant to section 67-5246, 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 of: a) 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.