

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT)
LICENSE NO. 37-20628 IN THE NAME) **FINAL ORDER**
OF WILLIAM FRUEHLING)
_____)

This matter is before the Director (“Director”) of the Idaho Department of Water Resources (“Department”) on exceptions to the February 27, 2014 *Order Denying Petition for Reconsideration* (“Order”) of Water Right License 37-20628 (“License”).

PROCEDURAL HISTORY

On June 4, 2002, the Department issued Permit 37-20628 (“Permit”) authorizing William Fruehling (“Fruehling”) to develop a right to divert 4.00 cubic feet per second (“cfs”) from a ground water source for wildlife, wildlife storage, recreation, recreation storage, aesthetic, and aesthetic storage purposes. The Permit included a condition requiring Proof of Beneficial Use to be submitted on or before June 1, 2007. On May 21, 2007, the Department received a proof statement for the permit.

On June 28, 2012, a Department field examiner conducted an examination to verify the beneficial use of water established in connection with the Permit.

On January 27, 2014, the Department issued License 37-20628 for the diversion of up to 4.00 cfs of ground water for uses authorized by the Permit. The Department issued the License as a preliminary order pursuant to Rule 730 of the Department’s Rules of Procedure (IDAPA 37.01.01.730).

On February 12, 2014, Fruehling timely filed a petition for reconsideration of the License. On February 27, 2014, the Department issued an *Order Denying Petition for Reconsideration*.

On March 14, 2014, Fruehling and interested parties Mitchell B. Schmidt, Gordon Schmidt, and Dorothy Schmidt (“Schmidts”) filed *Exceptions to Order Denying Petition for Reconsideration Dated February 27, 2014 and Brief in Support of Exceptions* (“Exceptions”).

EXCEPTIONS TO ORDER DENYING RECONSIDERATION

Fruehling and the Schmidts take exception to the following paragraphs in the Order:

- 1) Findings of Fact, paragraph nos. 4, 7 and 9; and
- 2) Conclusions of Law, paragraph nos. 1, 2, and 3.

Exceptions at 3-5. The exceptions stem from the inclusion of Condition of Approval #9 (“Condition 9”) in the License. *Exceptions at 5-7.* Condition 9 states, “rights 37-7282B, 37-733B, 37-13251 and 37-20628 when combined shall not exceed a total diversion rate of 6.52 cfs.” *License at 2.*

Water right nos. 37-7282B, 37-733B, and 37-20628 are owned by Fruehling and diverted out of what is commonly referred to as the north well (T01S R15E, B.M., NENESW in Camas County). Water right no. 37-13251 is owned by the Schmidts and has two points of diversion: the north well and what is commonly referred to as the south well (T01S R15E, B.M., NESESW in Camas County).

The main argument against inclusion of Condition 9 is that “IDWR does not have jurisdiction in the pending proceedings to license 37-20628 to Fruehling to alter the elements of Water Right No. 37-13251... .” *Exceptions at 4.* Fruehling and the Schmidts argue that Condition 9 alters the partial decree for 37-13251 “by limiting the diversion rate of water [the Schmidts] can withdraw from the South Well.” *Exceptions at 5.* They also argue that “the current capacity of either the South Well or the North Well should not be a limiting factor on the Schmidts’ rights under the Partial Decree.” *Exceptions at 4.* In addition, Fruehling and the Schmidts explain, the Fruehling system “is NOT now, and was not during the period of development of 37-20628, connected to the system that delivers water to 37-13251.” *Exceptions at 5* (emphasis in original).

Upon review, the Director agrees there is cause for concern and Condition 9 should be removed from the License. Water right no. 37-13251 relies on the north well in order to pump the maximum amount of water authorized under the right. The north well has insufficient capacity to satisfy all the rights using it as a point of diversion which could have resulted in limiting beneficial use under the combination of rights, if the Schmidts had fully utilized right 37-13251. This justification for the use of Condition 9 is not sufficient to overcome the possible issues arising from the condition’s inclusion on the License.

Having considered the information and evidence in this matter, including arguments set forth in the Exceptions, the Director finds, concludes, and orders as follows:

FINDINGS OF FACT

1. The examiner reported that the north well has a diversion capacity of 4.17 cfs.
2. The examiner also reported that the north well is used as a point of diversion for three water rights in addition to the License. Two of the water rights sharing the point of diversion with the License (north well) are owned by Fruehling. They are numbered 37-7282B and 37-7333B and have a combined diversion rate of 1.52 cfs. The third right sharing a point of

diversion with the License is number 37-13251, owned by Schmidts. Right 37-13251 authorizes the diversion of water from a second point of diversion (south well) in addition to the north well.

3. The delivery system for Fruehling's water rights is separate from the delivery system used by the Schmidts for right 37-13251.

4. The Schmidts have not diverted water from the north well in connection with Right 37-13251 in approximately twenty years. There are 263.4 acres of the place of use for Right 37-13251 enrolled in the federal Conservation Reserve Enhancement Program ("CREP").¹

5. Condition 9 as originally included in Water Right License 37-20628 states: "Rights 37-7282B, 37-733B, 37-13251 and 37-20628 when combined shall not exceed a total diversion rate of 6.52 cfs."

CONCLUSIONS OF LAW

1. Condition 9 should be removed from License 37-20628.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the exceptions are GRANTED and Condition 9 should be removed from License 37-20628.

Dated this 7th day of May, 2014.



GARY SPACKMAN
Director

¹ Pursuant to Idaho Code § 42-223(1), the water rights appurtenant to land in a federal cropland set-aside program such as the CREP are not subject to forfeiture.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ^{7th}7th day of May, 2014, I mailed a true and correct copy of the foregoing FINAL ORDER, postage pre-paid, to the following:


WILLIAM FRUEHLING
PO BOX 4508
KETCHUM ID 83340

BROCKWAY ENGINEERING PLLC
2016 WASHINGTON ST N STE 4
TWIN FALLS ID 83301

GORDAN SCHMIDT
630 E HWY 20
FAIRFIELD ID 83327

ROBERT E. WILLIAMS
P.O. BOX 168
JEROME, ID 83338

JAMES P. SPECK
P.O. BOX 987
KETCHUM, ID 83340


Deborah Gibson
Administrative Assistant, IDWR

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.