

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

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| IN THE MATTER OF APPLICATION) | |
| FOR PERMIT NO. 27-7568 IN THE NAME) | PRELIMINARY ORDER |
| <u>OF TANNER LANE RANCH, LLLP)</u> | DENYING PERMIT |

On June 16, 1993, Chris Drakos (“Drakos”) dba Lambert Produce Co. Inc. filed Application for Permit No. 27-7568 with the Idaho Department of Water Resources (“Department”). At the time it was filed, the application was held unprocessed due to an existing moratorium. An amended application was filed by Tanner Lane Ranch, LLLP (“TLR”) on April 11, 2014. Chris Drakos is a partner in TLR.

Amended Application 27-7568 was advertised to the public beginning on May 1, 2014. A joint protest was filed by A&B Irrigation District, Burley Irrigation District, Milner Irrigation District, North Side Canal Company and Twin Falls Canal Company, represented by attorney Paul Arrington; and by American Falls Reservoir District #2 and Minidoka Irrigation District, represented by attorney Kent Fletcher. TLR was represented in this contested case by attorney Robert Harris.

A pre-hearing conference was conducted on June 9, 2014. The parties were unable to resolve the issues of protest at that time and requested that a hearing be held to decide the contested case. An administrative hearing was held on April 8, 2015, in Idaho Falls, Idaho. Although the proposed point of diversion is located in Bingham County, the parties agreed to hold the hearing in Bonneville County. During the hearing, the parties offered testimonial and documentary evidence into the record. After carefully considering the evidence in the record, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for Permit 27-7568 was filed on June 16, 1993. Ex. 100. The original application proposed diverting 8.84 cfs from ground water for the irrigation of 442 acres in Sections 34 and 35, T02S, R36E. *Id.* The application proposed two points of diversions, one in the SWSE of Section 27, T02S, R36E and one in the NWNE of Section 34, T02S, R36E. *Id.*
2. The original application was held unprocessed because it proposed a new consumptive use of water from the Eastern Snake Plain Aquifer (“ESPA”) and did not include a mitigation plan to address injury concerns associated with the ESPA and its tributaries.
3. Amended Application for Permit 27-7568 was filed on April 11, 2014. Ex. 101. The amended application proposed diverting 8.84 cfs from ground water for the irrigation of 314.1 acres in Sections 26, 34 and 35, T02S, R36E. *Id.* The application proposed a single point of diversion in the SENENE of Section 34, T02S, R36E. *Id.* TLR owns the property at the proposed point of diversion and place of use. Drakos Testimony.

4. The amended application included a mitigation plan proposing to hold water right 27-13B from the Blackfoot River unused to offset the impacts caused by diversion of ground water under the proposed permit. Ex. 119, page 1.

5. The amended application seeks a diversion rate of 0.028 cfs per acre (8.84 cfs / 314.1 acres). Ex. 101, page 1. TLR asserts that the higher diversion rate is warranted because of the sandy soils on the property. Ex. 119, page 1.

6. TLR proposes to shorten the authorized season of use for the proposed water right to be April 1 to September 30, instead of using the standard season of use for the area (April 1 to October 31). Ex. 119, page 3.

7. TLR owns approximately 1,500 contiguous acres in area of the proposed place of use. Drakos Testimony. Some of these acres are irrigated with existing ground water rights. *Id.* The proposed place of use is not covered by any existing ground water rights. *Id.* It is only covered by water right 27-13B from the Blackfoot River. *Id.*

8. The TLR property is bordered on the southeast side by the Blackfoot River over a 3-mile stretch of the river. Ex. 114. The Blackfoot River flows from the northeast to the southwest in this area. *Id.*

9. The proposed point of diversion is a well drilled by Cushman Drilling in May, 1994. Ex. 101, page 5. The Well Driller's Report for the well states that the driller first encountered ground water at a depth of 17 feet and that the static water level in the well at the time of completion was 11 feet below land surface. *Id.*

10. The proposed well was drilled in conjunction with water right Permit 27-7549, which was issued by the Department in April, 1992. The amended application states that ground water right 27-7549 is also used at the proposed place of use. Ex. 101, page 2. Permit 27-7549 was voided by the Department for failure to develop a beneficial use during the authorized development period. *Preliminary Order Voiding Permit (27-7549)* (Issued January 2, 2015). The order voiding Permit 27-7549 is currently being appealed by TLR.

11. The proposed well is located approximately 0.6 miles from the Blackfoot River. Ex. 104, page 1.

12. Water right 27-13B bears a priority date of July 1, 1870 and authorizes the diversion of 4.00 cfs from the Blackfoot River for the irrigation of 314.1 acres. The irrigated acres described under water right 27-13B match the irrigated acres proposed in the pending application.

13. Historically, water right 27-13B was diverted from the Blackfoot River through the Hansen Ditch which diverted from the river approximately ½ mile upstream of the TLR property. Ex. 114. The Hansen Ditch and the associated diversion dam are in disrepair and have not been used since the early 1990s. Drakos Testimony.

14. Water right 27-13B still lists the head of the Hansen Ditch as an authorized point of diversion. Ex. 118. It is the only water right associated with the Hansen Ditch. Drakos Testimony.

15. On January 13, 2014, the Department approved Transfer 78967 which added a second point of diversion on the Blackfoot River to water right 27-13B. The added point of diversion is for a pump station to be located on the river near the middle of the reach bordering the TLR property. The pump station has not been constructed. Drakos Testimony.

16. There are three water rights from the Blackfoot River senior to water right 27-13B. These are water rights 27-11375, 27-12A and 27-12B.

17. Water right 27-11375, held by the Shoshone-Bannock Tribes, bears a priority date of June 14, 1867 and authorizes the diversion of 1,380 cfs. However, water right 27-11375 includes a condition which subordinates the water right to certain junior water rights from the Blackfoot River. *See* Partial Decree for Water Right 27-11375 (subordination clause identified as “paragraph x.d” in the Fort Hall Indian Water Rights Agreement).

18. Water right 27-13B includes the following condition. “This water right is entitled to the protections of paragraph x.d of water right 27-11375.” Based on the subordination clause contained in water right 27-11375, water right 27-13B may be delivered before the Tribes’ water right 27-11375.

19. Water right 27-12A bears a priority date of July 6, 1869 and authorizes the diversion of 0.96 cfs. Water right 27-12B also bears a priority date of July 6, 1869 and authorizes the diversion of 1.80 cfs. These two irrigation water rights are senior to and may be delivered before water right 27-13B.

20. As long as there is at least 2.76 cfs of flow available in the Blackfoot River, water right 27-13B may be diverted. Flows in the Blackfoot River were 85 cfs on March 18, 2015. Ex. 113. It is highly unlikely that water right 27-13B will ever be curtailed due to a water shortage.

21. There are no water rights downstream of the point of diversion for water right 27-13B which authorize diversion from the Blackfoot River during the non-irrigation season (except for de minimus stockwater rights).

22. The Blackfoot River loses water to the aquifer through seepage upstream of the TLR property for at least six miles. Ex. 102, Attachments 5-7; Ex. 114. “[G]round water elevation significantly exceeds the elevation of the incised Blackfoot River channel along the southeast portion of the [TLR] property.” Ex. 102, page 3. In the area of the TLR property, the water table is above the elevation of the Blackfoot River during the entire year. Ex. 104, pages 8-9. In the area of the TLR property, the Blackfoot River is a gaining reach, with water flowing from the aquifer into the river. Ex. 102, page 3; Ex. 104, page 9; Ex. 114.

23. The ground at the TLR property is comprised of sand and gravel between 0 and 100 feet and basalt below 100 feet. Ex. 104, page 5; Ex. 105. “Most wells near the [TLR property] access water from sand and gravel within 80 feet of land surface.” *Id.* “Existing wells in the area are capable of producing significant amounts of water . . .” Ex. 102, page 4.

24. There is a strong hydraulic connection between the Blackfoot River and the local aquifer beginning near the TLR property and extending to the southwest. Ex. 102, Attachments 5-7. Ground water levels are correlated to river levels in this area. *Id.*

25. On August 7, 2014, Mike McVay, a technical hydrologist with the Department, prepared a memo which, among other things, evaluated the interaction between ground water wells on the TLR property and flow in the Blackfoot River. Ex. 104 (also referred to as the “McVay Memo”). The McVay Memo was prepared in conjunction with a Water Supply Bank rental application and was not prepared for the pending contested case. *Id.* at page 1.

26. McVay prepared a model using Alluvial Water Accounting System software to estimate the depletion impacts to the Blackfoot River caused by pumping from two existing wells on the TLR property. Ex. 104, page 9. McVay’s analysis incorporated a number of assumptions about the local aquifer and the Blackfoot River. *Id.* Jason Helms, the expert witness for TLR, and Greg Sullivan, the expert witness for the protestants, do not disagree with the model assumptions used by McVay. Helms Testimony; Sullivan Testimony.

27. In his analysis, McVay assumed a daily diversion volume of 11.42 acre-feet from the TLR wells (pumping at 5.76 cfs for 24 hours per day). Ex. 104, Figures C-2 and C-3. TLR proposes a diversion rate of 8.84 cfs, which equates to a daily diversion volume of 17.53 acre-feet if the proposed water right is pumped continuously.

28. According to McVay, if 2,444 acre-feet are pumped from ground water wells on the TLR property, flow in the Blackfoot River will be reduced by 1,363 acre-feet during the irrigation season (April 1 – October 31) and may be reduced by as much as 417 acre feet during the non-irrigation season (November 1 – March 31). Ex. 104, Figures C-2, C-3 and C-4.¹

29. Even though the McVay analysis assumes 2,444 acre-feet being diverted from the wells on the TLR property, only about 1,780 acre-feet appear as depletions to the Blackfoot River. This means the remaining 664 acre-feet are being supplied to the wells from the ESPA. 73% of the water pumped from wells on the TLR property is drawn from the Blackfoot River. The remaining 27% comes from the ESPA.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A(5) states in pertinent part:

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 itself 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 . . . the director of the

¹ The McVay Memo does not include a complete depletion summary. It ends on December 30th (even though depletion is still showing for that date). Non-irrigation season depletions were estimated assuming a linear reduction in depletion from December 30th to April 1st of the following year.

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. The applicant bears the burden of proof regarding all factors set forth in Idaho Code § 42-203A(5). See IDAPA 37.03.08.040.04.

Reduction to Existing Water Rights – Review Criteria

3. Rule 45.01.a of the Department’s Water Appropriation Rules sets forth the criteria used to determine whether a proposed use will reduce the quantity of water under an existing water right:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

- i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded rights, whichever is less.

IDAPA 37.03.08.45.01.a

4. “An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.” IDAPA 37.03.08.45.01.a.iv

5. An adequate mitigation plan must offset depletions to impacted water sources at the time, location and in the quantity of the depletions. The applicant bears the burden of showing the time, location and quantity of depletions resulting from the proposed water use and explaining how those depletions will be offset.

Reduction to Blackfoot River Water Rights

6. The only evidence in the record addressing the timing, location and quantity of depletion of any source is the McVay Memo, which only presents information about depletions to the Blackfoot River. Ex. 104, Figures C-2, C-3 and C-4.

7. Pumping under the proposed permit will reduce the quantity of water available during the irrigation season to fill existing water rights on the Blackfoot River. If the proposed permit is limited and conditioned properly, the losses to the Blackfoot River during the irrigation season can be fully mitigated.

8. TLR proposes to mitigate to the Blackfoot River water users by holding water right 27-13B unused. Therefore, the instantaneous depletions to the Blackfoot River cannot exceed 4.00 cfs, the diversion rate authorized by water right 27-13B. Similarly, the daily depletion to the Blackfoot River cannot exceed 7.93 acre-feet (4.00 cfs x 1.9835 acre-feet/cfs-day).

9. The McVay Memo indicates that depletions to the Blackfoot River begin to exceed 7.93 acre-feet per day when the total volume pumped from the TLR wells reaches 1,941 acre-feet. This far exceeds the annual volume limit which would be placed on the right (1,256.4 acre-feet).

10. The McVay Memo shows depletions to the Blackfoot River extending into the non-irrigation season.

11. There are no water rights on the Blackfoot river downstream of the TLR property authorizing diversion during the non-irrigation season (except for de minimus uses). Therefore the non-irrigation season depletions to the Blackfoot River will not reduce any water rights on the Blackfoot River below decreed amounts.

12. Because the Blackfoot River will be fully mitigated during the irrigation season and no water rights on the Blackfoot River will be reduced in the non-irrigation season, the proposed water right will not injure water rights on the Blackfoot River.

Reduction to ESPA Based Water Rights

13. Evidence indicates as much as 27% of the total volume pumped under the proposed permit will come from the ESPA, not from the Blackfoot River. TLR did not provide any evidence about the timing, location or quantity of depletions to the ESPA or ESPA-dependent sources. Perhaps, this is because TLR believes all of its pumping impacts will accrue to the Blackfoot River and will not propagate to other sources. *See Helms Testimony.*

14. Some evidence in the record suggests that TLR seeks to offset impacts to the ESPA “through recharge in the Blackfoot River.” Ex. 101, page 3. TLR asserts that not diverting water right 27-13B during the month of October will result in additional recharge to the aquifer. *See Ex. 119, page 3.* TLR did not provide evidence that the Blackfoot River has a losing reach downstream of the TLR points of diversion.

15. Idaho Code § 42-234(5) states: “The legislature further recognizes that incidental ground water recharge benefits are often obtained from the diversion and use of water for various beneficial purposes. However, such incidental recharge may not be used as the basis for claim of a separate or expanded water right.”

16. TLR cannot obtain recharge credit for the losses occurring in the Blackfoot River upstream of its most downstream point of diversion. These losses would occur whether or not water right 27-13B is actively diverted from the Blackfoot River.

17. In-stream losses occurring upstream of the existing points of diversion are incidental to the delivery of water right 27-13B and cannot be used in a mitigation plan to offset depletions to the ESPA. Recharge will not occur immediately downstream of the authorized points of diversion for water right 27-13B because that area is a gaining reach of the Blackfoot River.

18. There is no evidence in the record supporting the assertion that additional recharge will occur above or below the TLR property if water right 27-13B is not diverted in the month of October. TLR has not demonstrated that depletions to the ESPA will be offset through its proposed mitigation plan.

Reduction to Snake River Water Rights

19. There are water rights on the Snake River, downstream of the confluence of the Blackfoot River and Snake River, which authorize diversion during the non-irrigation season. Flow from the Blackfoot River (into the Snake River) is used to satisfy these water rights during the non-irrigation season. These Snake River water rights may be reduced below the amount listed on decree or license if the proposed permit is issued.

20. The McVay Memo is the only evidence in the record relating to the quantity of depletions to the Blackfoot River (and therefore the Snake River) during the non-irrigation season. The McVay Memo shows depletion to the Blackfoot River extending for multiple months after irrigation on the TLR property is stopped.

21. TLR proposes to limit the season of use of the proposed permit from April 1 to September 30 to shift the anticipated residual depletions forward by one month and to provide additional mitigation (during the month of October). TLR did not provide any evidence about the timing, location or quantity of depletions during the non-irrigation season if its proposal to shut-off by September 30 were adopted.

22. Providing additional water in the month of October, during the irrigation season, does not necessarily mitigate for water rights which may be impacted during the non-irrigation season. TLR has not demonstrated that depletions which may occur to the Snake River during the non-irrigation season will be mitigated.

Sufficiency of Water Supply

23. Rule 45.01.b of the Departments Water Appropriation Rules (IDAPA 37.03.08) sets forth the criteria for determining whether the water supply is not sufficient for the proposed project. “The water supply will be determined to be insufficient for the proposed use if water is not available for an adequate time interval in quantities sufficient to make the project economically feasible” (IDAPA 37.03.08.045.01.b)

24. TLR met its burden of showing that the water supply is sufficient for the proposed beneficial use. Because of the shallow water table and high transmissivity rates, the local aquifer is capable of supplying the amount of water described in the proposed permit.

Good Faith / Speculation

25. Prior to the hearing, the parties stipulated that the good faith/speculation element of Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record suggesting that the application was not filed in good faith or that it was filed for delay or speculative purposes. TLR owns the property at the proposed point of diversion and place of use. Further, the diversion infrastructure has already been completed and has been used for many years under Permit 27-7549.

Sufficient Financial Resources

26. Prior to the hearing, the parties stipulated that the sufficient financial resources element of Idaho Code § 42-203A(5) is not at issue in this contested case. There is no evidence in the record suggesting that TLR lacks sufficient financial resources to complete the proposed project. Most of the proposed infrastructure has already been developed.

Local Public Interest

27. The local public interest analysis under Idaho Code § 42-203A(5)(e) is meant to be separate and distinct from the injury analysis under § 42-203A(5)(a). 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.” (Idaho Code § 42-202B(3))

28. The evidence presented by the protestants was focused on the question of injury (addressed above). There was no evidence presented by the protestants pertaining to the question of local public interest. The protestants do not reside in the local area. Application 27-7568 states that ground water will be used for irrigation, a common ground water use in the local community. TLR met its burden of proof for this element.

Conservation of Water Resources

29. TLR met its burden of showing that the proposed use will be compatible with the conservation of water resources within the state of Idaho. The proposed project incorporates sprinkler irrigation, a conservative use of water.


Summary

Based on the evidence in the administrative record, TLR has not sufficiently demonstrated that the proposed project will not reduce the quantity of water under existing water rights. Specifically, TLR did not address reductions to existing water rights in the ESPA (including water sources emanating from the ESPA) or reductions to the Snake River during the non-irrigation season. Therefore, the pending application should be denied.

ORDER

IT IS HEREBY ORDERED that Application for Permit No. 27-7568 in the name of Tanner Lane Ranch, LLLP is DENIED.

Dated this 13th day of May, 2015.



James Cefalo
Hearing Officer

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 13th day of May 2015, a true and correct copy of the document described below was served by placing a copy of the same with the United States Postal Service, certified with return receipt requested, postage prepaid and properly addressed, to the following:

Document Served: Preliminary Order Denying Permit (27-7568)

Holden Kidwell Hahn & Crapo
Robert L. Harris
PO Box 50130
Idaho Falls ID 83405-0130

Barker Rosholt & Simpson
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Sharla Cox
Administrative Assistant

Courtesy Copy Sent via Regular Mail to:

Tanner Lane Ranch LLLP
PO Box 793
Blackfoot ID 83221

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was held)

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 petitions for reconsideration or files an exception and brief as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer 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 to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

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, request 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 Rules of Procedure 302 and 303.

FINAL ORDER

The Department 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.