



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

15 W Yakima Ave, Ste 200 • Yakima, WA 98902-3452 • (509) 575-2490

January 15, 2010

Earl and Kathy Drinkwater
1 Drinkwater Drive
Orondo, WA 98843-0000

Re: Surface Water Permit No. S4-29942P

Dear Mr. and Mrs. Drinkwater:

On December 17, 2009, the Department of Ecology (Ecology) received a request to extend the above Permit in the *Proof of Appropriation* (PA) stage. The Permit identifies that the system's parameters are 2.0 cubic feet per second (cfs), up to 356 acre-feet per year (af/yr) for frost protection and irrigation of 85 acres during irrigation season annually. In response to your request, you are hereby **denied** an extension of time in which to put the water to full beneficial use.

Surface Water Permit No. ^{ca} ~~S4-32349P~~ ^{S4-29942P} was issued October 3, 1989. A Permit contains a development schedule to ensure that due diligence and reasonable progress is made in putting water to full, beneficial use. The development schedule set by the Permit was to complete construction by October 1, 1990 and put the water to beneficial use by October 1, 1991. This schedule was subsequently amended eight times for completion of construction and proof of appropriation to be due no later than October 1, 2006.

A permit holder is required under RCW 90.03.320 to pursue the construction of a project as described in the Permit with due diligence. Your extension request, our records, and historical aerial photography indicate that since the early 1990s there has been little or no movement toward the development of approximately 40+ acres within the authorized place of use (POU) even though Ecology has granted previous extensions of time. Additionally, through the use of aerial photography it is obvious that continuous, unauthorized development is progressing outside the POU. As such, Ecology cannot conclude that the development of the permitted project is being pursued with good faith and due diligence, and is contrary to the public interest.

There have historically been several PCHB cases in which they ruled on criteria for granting extensions of time to develop under a Permit. The following examples are Ecology's reasons for denying this extension:

- Permittees may not maintain a Permit indefinitely, because to do so makes the water unavailable to others who might wish to put it to a beneficial use. The permit is by nature an intermediate stage in the creation of the water right and must be diligently pursued to be maintained. Oroville-Tonasket Irrigation District v. Ecology, PCHB Nos. 91-170 & 93-134 (1996).
- A Permit cancellation pursuant to RCW 90.03.320 is reasonable when the permittee is unable to timely complete construction because of his financial situation and has



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no assurance that the situation will change. Extension in such circumstances would be against the public interest involved in prohibiting reservation of water for speculative future use. Goldy v. Ecology, PCHB No. 938 (1976).

As stated above, the lack of due diligence and commitment to put water to beneficial use does not meet the statutory criteria. If you wish to keep active the portion of the project that is complete, approximately 66 acres, (noting only 41 acres are within the place of use as described on the Permit), both a **Proof of Appropriation form and a Application for Change/Transfer must be submitted to Ecology within sixty (60) days of this letter to avoid cancellation and enforcement actions of the Permit.** The quantity of water required by the project that has currently been put to beneficial use must be identified.

A Proof of Appropriation inspection will then be conducted. Elements of the proof inspection may include, as appropriate, the source(s), system instantaneous capacity, beneficial use(s), annual quantity, place of use, and satisfaction of provisions. The Certificate to follow will reflect the extent of the project perfected within the limitations of the Permit. According to *Department of Ecology v. Theodoratus*, 135 Wn. 2d 582, 957 P. 2d 1241 (1998):

Ecology may condition the extension of a water permit on the requirement that a certificate of vested water right will issue only to the extent that water has been put to an actual beneficial use, even though the original permit allowed the permittee to obtain a certificate of vested water right based on the capacity of the permittee's water delivery system.

You have a right to appeal this decision. To appeal this you must:

- File your appeal with the Pollution Control Hearings Board within 30 days of the "date of receipt" of this document. Filing means actual receipt by the Board during regular office hours.
- Serve your appeal on the Department of Ecology within 30 days of the "date of receipt" of this document. Service may be accomplished by any of the procedures identified in WAC 371-08-305(10). "Date of receipt" is defined at RCW 43.21B.001(2).

Be sure to do the following:

- Include a copy of this document that you are appealing with your *Notice of Appeal*.
- Serve and file your appeal in paper form; electronic copies are not accepted.

1. To file your appeal with the Pollution Control Hearings Board

Mail appeal to:

The Pollution Control Hearings Board
PO Box 40903
Olympia WA 98504-0903

OR

Deliver your appeal in person to:

The Pollution Control Hearings Board
4224 – 6th Ave SE Rowe Six, Bldg 2
Lacey WA 98503

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2. To serve your appeal on the Department of Ecology

Mail appeal to:

The Department of Ecology
Appeals & Application for Relief
Coordinator
PO Box 47608
Olympia WA 98504-7608

OR

Deliver your appeal in person to:

The Department of Ecology
Appeals & Application for Relief
Coordinator
300 Desmond Dr SE
Lacey WA 98503

3. And send a copy of your appeal to:

Mark C. Schuppe
Department of Ecology
Central Regional Office
15 W. Yakima Ave, Ste 200
Yakima, WA 98902-3452

For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>. To find laws and agency rules visit the Washington State Legislature Website: <http://www.leg.wa.gov/CodeReviser>.

If you have any questions, please contact Candis Graff at 509-454-4264 in the Central Regional Office or Tom Perkow at 509-662-0512 in the Wenatchee Field Office.

Sincerely,



Mark C. Schuppe
Section Manager
Water Resources Program

MCS:CLG:gh
100116

Cc: By email: Tom Perkow, Office of Columbia River

Enclosures: *Proof of Appropriation of Water
Your Right to Be Heard*

By certified mail: 7007 2560 0001 7674 9010

PA extension granted.doc