

STATE OF COLORADO

GROUND WATER COMMISSION

Division of Water Resources
Department of Natural Resources

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August 21, 2009 GWC meeting

To: Colorado Ground Water Commission

From: Commission Staff

RE: Request by Birdsall Young for a variance to Rules 7.5.3 and 7.10.2, involving an application for expanded acres on well permit no. 20171-FP, to allow the future annual appropriation of the well to be based on the historical depletion of the aquifer from the actual historical use of the well on 267 acres rather than on the permitted 160 acres.
Agenda Item 7

On April 7, 2009, Mr. Birdsall Young Jr. submitted an application to expand the irrigated acres under Final Permit No. 20172-FP from 160 acres to 267 acres. With that application, pursuant to Rule 11, Mr. Young submitted a request for a variance to Rules 7.5.3 and 7.10.2 to allow the future annual appropriation on the expanded acres be based on the historical depletion of the aquifer from the actual historical use of the well on 267 acres rather than on the permitted 160 acres.

The application for expanded irrigated acres was submitted to address the fact that the well has been found to be irrigating 267 acres, which is more than the 160 acres for which Final Permit No. 20172-FP is issued.

The variance request was submitted because Mr. Young desires to pump more water to the 267 acres under the expansion than would be allowed under Rules 7.5.3 and 7.10.2. Applying Rules 7.5.3 and 7.10.2 would restrict future pumping for the expanded 267 acres to the amount of water historically applied to the 160 acres for which Final Permit No. 20172-FP is issued. Mr. Young desires to pump the same amount of water to the 267 acres as he has historically pumped to supply that acreage.

Mr. Young claims he believed the well was permitted to irrigate 400 acres, and that he has irrigated 267 acres with the well since before the permit expiration date, and that Final Permit 20172-FP was issued for 160 acres in mistake or inadvertence.

Following is Staff's summary of permit file no. 20172-FP:

1. On October 15, 1975 well permit no. 20172-FP was issued to Carl Friend for the irrigation of 400 acres described as N1/2 of the NW1/4 of Section 15, portions of the W1/2 and portions of the W1/2 of the E1/2 of Section 10, all in T3S, R50W with an annual appropriation of 400 acre-feet. The permit expiration date was October 15, 1976.

2. On November 12, 1975 a well completion report was submitted showing that construction of the well was completed on November 4, 1975.
3. On September 29, 1976 Carl Friend submitted a Statement of Beneficial Use (SBU) claiming that the well had been used to irrigate 160 acres described as the N1/2 of the NW1/4 of Section 15, and the S1/4 [sic] of the SW1/4 of Section 10. A sketch on the back side of the SBU identifies the 160 acres as the N1/2 of the NW1/4 of Section 15 and the S1/2 of the SW1/4 of Section 10.
4. On September 29, 1976 Mr. Birdsall Young Jr., who identified himself as owner by contract, sent a letter to the Division of Water Resources, stating that the well had been constructed and a portion of the irrigated lands had been put to beneficial use. Mr. Young requested an extension of time to put the balance to beneficial use, and he asked to change the location of the land to be irrigated to an area indicated on an attached sketch. The sketch identifies a circle in Section 10, (miss-labeled as Section 15 on the sketch).
5. On October 26, 1976 Commission Staff responded to Mr. Young's letter, extending the beneficial use expiration date to October, 15, 1977, and stating that the remaining land would need to be irrigated and a SBU would need to be submitted for the remaining acres on or before October 15, 1977. The letter also granted Mr. Young's request to change the description of irrigated acres to the following: 400 acres described as the N1/2 of the NW1/4 of Section 15, and portions of the W1/2 and portions of the W1/2 of the E1/2 of section 10 (which is actually the same description as given on the original permit).
6. On July 28, 1977 Mr. Birdsall Young Jr. submitted a SBU signed on July 14, 1977 claiming the well had been used to irrigate 400 acres described as the N1/2 of the NW1/4 of Section 15 and portions of the W1/2 and portions of the W1/2 of the E1/2 of Section 10.
7. A Permit Information Sheet prepared by Staff in 1984 for the purpose of clarifying the water right for issuance of a Final Permit shows Staff identified 160 acres as irrigated. The sheet shows evidence of having originally been filled out with 400 acres irrigated, with the acreage subsequently changed to 160 acres. There are no notes in the file indicating why Staff determined the irrigated acres portion of the water right for well permit no. 20172-FP to be 160 acres.
8. On June 18 and 25, 1987, Mr. Young's proposed Final Permit was published in the Akron News-Reporter identifying the irrigated land as 160 acres in parts of the NW1/4 of Section 15 and the SW1/4 of Section 10, with an annual withdrawal of 400 acre-feet. The publication period ended on July 27, 1987 without objection.
9. On July 30, 1987 an invoice for publication costs was sent to Mr. Young stating that the data for the Final Permit was published in a newspaper of general circulation in the county in which the well is located for two consecutive weeks ending June 26, 1987. Payment for the publication was received on August 11, 1987.
10. On July 30, 1987 Final Permit No. 20172-FP was issued to Birdsall Young Jr. for the irrigation of 160 acres described as the N1/2 of the NW1/4 of Sec. 15 and the W1/2 and part of the W1/2 of the E1/2 of Sec. 10, with an annual withdrawal not to exceed 400 acre-feet of water.

11. In accordance with procedures in place at the time, Staff would have sent a copy of the Final Permit to Mr. Young either at the time the Final permit was issued, or at the time payment for publication was received.

Staff understands that if Mr. Young had protested issuance of the Final Permit within 30 days of its issuance in 1987 and presented evidence of error, corrective action may have been available at that time. There is currently no remedy under C.R.S. 37-90-114, given the last sentence of that section, for correcting any error in the final permit, if in fact there was any error.

The 267 acres Mr. Young claims to have irrigated with the well consist of two circles, one of approximately 84 acres in the N1/2 of the NW1/4 of section 15 and the S1/2 of the SW1/4 of section 10, and the other of approximately 183 acres in the W1/2 and the W1/2 of the E1/2 of section 10. The 84 acre sprinkler would cover the same lands claimed to have been irrigated by the first SBU submitted by Carl Friend and would be contained in the 160 acres for which the Final Permit was issued. The 183 acre sprinkler would add the additional acres needed to make up the 267 acres claimed by Mr. Young.

Mr. Young's variance request contains the following items that Staff believes support his claim that the well supplied the 183 acre sprinkler, and so irrigated a total of 267 acres, prior to October 15, 1977, the expiration date of the permit:

- A. An affidavit detailing the irrigation development of his land. (Exhibit C of Variance Request)
- B. A copy of an agreement, dated December 29, 1976, with Y-W Electric Association to provide electric service for a 200 HP motor in the NW1/4 of Section 15, Township 3 South, Range 50 West, and a copy of a cancelled check dated March 16, 1977 to Y-W Electric Association Inc. (Exhibits C and D of Exhibit C of Variance Request)
- C. A copy of an invoice from Northeast Irrigation, Inc., dated April 18, 1977, for two Pringle sprinklers, one with 8 towers (88.8 acres) and the other with 12 towers (189.2 acres). (Exhibit E of Exhibit C of Variance Request)
- D. Cancelled checks, dated January 14, February 22 and March 16, 1977, made out to Masters Backhoe and Trenching for 4,640 feet of irrigation pipe and machine hiring. (Exhibits F and G of Exhibit C of Variance Request)
- E. An affidavit from Anthony Niebur, former employee and current manager of Masters Backhoe and Trenching. In his affidavit Mr. Niebur attests to digging trenches for a water supply pipeline to a new sprinkler in the W1/2 of Section 10 in the spring of 1977. He also states that company ledgers indicate payment received from Mr. Young in the early part of 1977. (Exhibit F of Variance Request)
- F. An affidavit from Daniel Axsom attesting to shared labor for the installation of sprinklers. He states that he helped Mr. Young install a twelve (12) tower sprinkler in the W1/2 and portions of the W1/2 of the E1/2 of Section 10, Township 3 South, Range 50 West in the spring of 1977. He further states that the sprinkler was used to irrigate crops in 1977. (Exhibit G of Variance Request)

It appears to Staff that the information provided by Mr. Young supports his claim that 267 acres were irrigated by the well before October 15, 1977, the permit expiration date. The variance request was published in the Akron News-Reporter as required by Rule 11, and no objections have been received.

Based on the above Staff does not oppose the variance request and believes that strict application of Rule 7.5.3 and 7.10.2 to the pending change application would in this case cause unusual hardship to the applicant.