

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF LICENSE NO. 61-07189)
IN THE NAME OF MAGIC WEST, INC.)
_____)

FINAL ORDER

On September 4, 1998, the hearing officer for the Idaho Department of Water Resources (the "Department") issued a Recommended Order in connection with the above captioned matter. On September 25, 1998, Magic West, Inc. ("Magic West" or "petitioner") filed exceptions to the Recommended Order. On October 9, 1998, intervenor Robert K. Hall filed a response to the exceptions of Magic West. On October 23, 1998, intervenor Edward T. Potucek filed a response to the exceptions of Magic West. The Director of the Department has reviewed the exceptions and responses and responds as follows:

1. **The Department has the statutory authority to amend the Water Right License for Water Right No. 61-07189 in accordance with § 67-5254(1), Idaho Code.** In response to exceptions filed by Magic West, intervenor Edward T. Potucek contends that the Department has no authority to amend the license for Water Right No. 61-07189. Similarly, in his objection to exceptions filed by Magic West, intervenor Robert K. Hall renews his motion to dismiss Magic West's Petition for Adjustment and Clarification of Existing Order/License. Under Idaho Code § 67-5201, " 'License' means the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of authorization required by law, but does not include a license required solely for revenue purposes." Idaho Code § 67-5254(1) grants the authority to the Department to amend such a license when "the agency first gives notice and an opportunity for an appropriate contested case" Because the Department has complied with this statute, the Department will amend the license for Water Right No. 61-07189 as ordered herein. Also, an additional element is included in this final order denying intervenor Hall's renewed motion for dismissal.

2. **The Department initially required Magic West to install and maintain a device to measure groundwater diversions, and Magic West could have used such measurements to document the extent of beneficial use under its permit to appropriate water.** In its exceptions, Magic West contends that use of data and information subsequent to the period for development authorized by Permit to Appropriate Water No. 61-07189, or the alternative use of a theoretical calculation of maximum groundwater diversions based on pump capacity, is reasonable for determining the extent of beneficial use under the permit because "there were no actual measurements made or required during the development period." However, when the Department approved the permit to appropriate water on August 29, 1974, a condition of approval was that "A measuring device . . . be

permanently installed and maintained as part of the diverting works.” Although the Department removed the requirement for a measuring device by order dated August 28, 1978, Magic West was not relieved of its burden to offer sufficient proof of the extent of beneficial use prior to the Department licensing the water right, a burden that Magic West could have met by installing an adequate device to measure actual diversions and water use.

3. The Department is not required or obligated to use the input-output formula proposed by Magic West or the data and information provided by Magic West regarding water use that occurred after the development period to estimate water use during the development period. Magic West contends that the diversion volume recommended by the Hearing Officer “is not a Reasonable Determination of Actual Beneficial Use under the Input-Output Formula.” At issue is not whether the determination of the Hearing Officer resulted from reasonable and complete use of the input-output formula proposed by Magic West, but whether the determination of the Hearing Officer is appropriate given the lack of measurements of diversions and use during the period for development authorized by the permit to appropriate water. Magic West contends that based on the Department’s Final Order for Transfer No. 4985, in the name of Mark T. Gates, “all available data should be included in making relevant calculations.” While the Department procedurally erred by failing to contact the representative identified by Magic West to accompany the Department during the beneficial use field examination, in determining whether to amend Water Right License No. 61-07189 the Department should only consider data and information concerning beneficial use during the permit development period that could have been provided by Magic West’s designated representative had that representative been notified of the Department’s beneficial use field examination. Data and information for time periods subsequent to the permit development period should only be considered if it is conclusively shown that groundwater diversions and beneficial use subsequent to the development period were the same as groundwater diversions and beneficial use during the development period. Magic West has not provided measured data or information derived during the period authorized for development by the permit to appropriate water for five of the six variables in the input-output formula proposed by Magic West to determine the seventh variable, the volume of groundwater diverted and beneficially used during the development period. Magic West has also not conclusively shown that groundwater diversions and beneficial use subsequent to the development period were essentially the same as groundwater diversions and beneficial use during the development period.
4. Records of waste water pumped from Magic West’s plant to Magic West’s waste water farm do not corroborate the testimony of witnesses for Magic West that Magic West’s plant operations and associated beneficial use of water were the same during and following the time period authorized for development by the permit to appropriate water. Consequently, the

calculation of annual volume of groundwater beneficially used during the development period proposed by Magic West is not supported by adequate evidence. During the hearing held on December 15, 1997, the plant manager for Magic West, Mr. Jack C. Anderson, testified describing the operations at the plant since 1985. Tr. at 120, Ln. 1-17.¹ Mr. Anderson testified that from 1985 through 1997, the plant generally processed potatoes year-round, six to seven days per week, 24 hours per day, for 21 days. Following this 21-day time period, Magic West's plant was taken out of service 8 to 12 hours for clean up. Mr. Anderson testified that the cycle of 21 days of 24-hour operations followed by 8 to 12 hours for clean up was continuously repeated year-round, excluding holidays. Mr. Doug Ogden, who was the plant manager from August of 1974 through June of 1979, testified that "We run [the plant] the same way [as described by Mr. Anderson for the time period 1985 through 1997]." Tr. at 193, Ln. 19. Mr. Ogden testified that "There were some weeks we could only run [the plant] five [days]" Tr. at 195, Ln. 5-7. But that the amount of raw potatoes processed at the plant each year of operations beginning in 1974 through 1979 was about the same as the amount processed in 1997. Tr. at 196, Ln. 16-17. Mr. Ogden further testified that the amount of waste water sent to Magic West's waste water farm during each year beginning in 1974 through 1979 was "awfully close" to the amount of waste water sent to the farm in 1997. Tr. at 198, Ln. 4-7. Finally, Mr. William S. Schow, vice president for Magic West from 1975 through 1997, testified that the plant was always operated 24 hours per day, 7 days per week, year-round. He testified that it was therefore reasonable to determine water use during the years 1974 through 1979 using more recent information because plant operations were similar. Tr. at 222 and 233, Ln. 8-23.

No testimony was offered to refute the testimony described in the preceding paragraph. However, recorded measurements of the volume of waste water discharged from the Magic West plant to Magic West's waste water farm do not corroborate the testimony of Magic West's witnesses. During Magic West's fiscal year ending October 31, 1978, records of waste water discharge submitted by Magic West to the Idaho Division of Environmental Quality show that a total of 44,136,800 million gallons waste water were discharged to the waste water farm during 217 days (Petitioner's Exhibit 1A). For Magic West's fiscal year ending October 31, 1997, records of waste water discharge show that more than 103,749,200 million gallons of waste water were discharged to the waste water farm during more than 313 days (Petitioner's Exhibit 1A). Because the number of days during which waste water was discharged to the waste water farm must be directly related to the number of days during which the plant was in operation, Magic West's plant was operated approximately 50 percent more days in fiscal year 1997 than in fiscal year 1978. As a result, approximately 250 percent more waste water

¹ Unofficial transcript of hearing held on December 15, 1997, provided by Mr. Norman Semanko on behalf of Petitioner, Magic West

502

was discharged to the waste water farm in fiscal year 1997 than was discharged in fiscal year 1978. The primary difference between the days of plant operation in 1978 and 1997 occurred because in fiscal year 1978, the plant operated only about 15 days in January, less than 10 days in March, no days in August, and less than 10 days in September. Although records of waste water discharged for 1978 may not be representative of plant operations for all years of the 1974 to 1979 period authorized for development by the permit to appropriate water, 1978 was the only fiscal year during the development period for which complete records of waste water discharged to the waste water farm and use of water supplied by the City of Glenns Ferry were provided. Based on the significant differences in plant operations indicated during Magic West's fiscal years 1978 and 1997, Magic West has not shown that groundwater diversions and beneficial use subsequent to the period authorized for development by the permit to appropriate water were the same as groundwater diversions and beneficial use during the development period. Therefore, it is not reasonable to determine groundwater use during the 1974 through 1979 development period using information derived during various years subsequent to the development period.

5. **The information available to the Department does not support the use of data for waste water discharged to the City of Glenns Ferry sewer system during one year of the period authorized for development by the permit to appropriate water together with waste water discharged to the waste water farm during other years of the development period to estimate water use during the development period.** Petitioner's Exhibit 1 includes a copy of recorded measurements of waste water from the Magic West plant discharged to the City of Glenns Ferry sewer system for calendar year 1975. In its exceptions, Magic West contends that the Hearing Officer should have included the amount of waste water discharged to the Glenns Ferry sewer system in addition to the amount of waste water discharged to the waste water farm in his determination of the amount of water used at the plant during the time period authorized by the permit to appropriate water. However, no records for the amount of waste water discharged to the waste water farm were provided for calendar year 1975, and no records for the amount of waste water discharged to the Glenns Ferry sewer system were provided for the years corresponding to records of discharge to the waste water farm. In its exceptions, Magic West describes that more waste water was discharged to the Glenns Ferry sewer system during the development period than in later years because of odor problems associated with waste water discharged to the waste water farm, which have since been corrected. Since Magic West has not conclusively shown that the amount of waste water discharged to the Glenns Ferry sewer system in 1975 was similar to the amounts of waste water discharged to the sewer system during other years of the development period, it is possible that a relatively small volume of waste water was discharged to the waste water farm in 1975 or that a relatively small volume of waste water was discharged to the Glenns Ferry sewer system in 1978 when records of waste water discharged to the waste water farm were provided.

Therefore, it is not appropriate to add the volume of waste water discharged to the Glenns Ferry sewer system in 1975 to the volume of waste water discharged to the waste water farm in 1978 in estimating the amount of water used at the plant during the development period.

6. **The alternate calculation proposed by Magic West to estimate beneficial use during the development period is not supported by adequate evidence.** In its exceptions, Magic West contends that "There is no dispute that the plant has always been operated 24-hours per day, using 3 8-hour shifts per day. Tr. at 120 (Anderson), 195 (Ogden), 222 (Schow). It was also undisputed that the flow of the plant was constant while it was in operation. Tr. at 28, 231-32." Therefore, as an alternate calculation to the use of Magic West's proposed input-output formula, Magic West proposes to multiply 0.67 cfs (which is equivalent to a flow rate of 433,000 gallons per day) by the number of days the plant was operated during 1978 (217 days) and by the conversion factor 1.9835, which is the volume of water in acre-feet that results from a constant flow rate of 1 cfs for 24 hours. However, the records of waste water discharged to the waste water farm during fiscal year 1978 show that the plant was not operated at a constant flow rate for 24 hours each day the plant was in operation. At maximum operations, during June of 1978, the records of waste water discharged to Magic West's waste water farm show that Magic West's plant was operated 28 days for an average of 22.8 hours per day and discharged an average of 235,064 gallons of waste water per day to the waste water farm. At minimum operations, during September of 1978, the records of waste water discharged show that Magic West's plant was operated 8 days for an average of 17.5 hours per day and discharged an average of 156,687 gallons of waste water per day to the waste water farm. These records are not consistent with Magic West's contention the flow rate of water through the plant was constant each day the plant was in operation.
7. **The limitation on the volume of ground water diverted annually should not be removed from the Water Right License for Water Right No. 61-07189.** Section 42-219, Idaho Code, provides that a license issued by the Department shall state the "quantity of water which may be used" among other parameters. In licensing Water Right No. 61-07189, the Department specified an annual volume limitation together with a rate of diversion limitation to limit the quantity of water that can be used under the water right to the quantity of water that was beneficially used during the time period authorized for development under the permit to appropriate water. Because the records of waste water discharged from Magic West's plant to Magic West's waste water farm show that the plant was not operated using a constant flow rate 24 hours per day, 365 days per year, the diversion rate alone is not sufficient to limit the quantity of water that can be used to the amount beneficially used during the development period authorized by the permit to appropriate. Hence, the diversion volume should not be removed from the license as suggested by Magic West.

8. The requirement for reporting ground water diversions every three months is necessary to verify that use of water by Magic West under Water Right License No. 61-07189 does not exceed the authorized volume of water that can be diverted and beneficially used on an annual basis. Magic West contends that the requirement for reporting ground water diversions every three months is either inappropriate or unnecessary. However, the records of plant operations submitted by Magic West and the testimony of witnesses for Magic West show that Magic West has consistently violated the limitation on annual volume of ground water that can be diverted under Water Right License No. 61-07189 as originally issued or as amended herein. Therefore, this Final Order includes a cease and desist order directing Magic West to comply with the amended water right license forthwith as provided under § 42-350, Idaho Code. To ensure Magic West complies with the cease and desist order, Magic West is required to measure all ground water diversions and report the volume of ground water diverted to the Department every three months as described herein.

Based upon his understanding of the law and the facts in this matter, the Director makes the following Findings of Fact, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. On October 27, 1990, the Department issued Water Right License No. 61-07189 (the "license") in the name of Magic West, Inc. as follows:

Source:	Groundwater
Priority:	July 10, 1974
Use:	Industrial
Rate of diversion:	0.67 cubic feet per second ("cfs")
Volume:	12.9 acre feet per year ("afa")
Season of use:	August 15 of each year to July 1 of the following year
Point of diversion:	SW1/4SE1/4 Section 29, T5S, R10E, B.M.
Place of use:	SW1/4SW1/4 Section 29, T5S, R10E, B.M.

2. On May 5, 1997, Magic West submitted a Petition for Adjustment and Clarification of Existing Order/License ("petition") to the Department. The petition represented that Magic West had beneficially used a larger volume of water under the permit to appropriate water, issued on August 29, 1974, than the 12.9 afa subsequently provided on the license that was issued on October 27, 1990. In the petition, Magic West contends that because a larger volume of water was beneficially used during the time period authorized by the permit, and prior to the beneficial use examination conducted by the Department on August 4, 1987, the volume limitation set forth in License No. 61-07189 should be clarified or amended to reflect the higher volume of water beneficially used during the permit period. Alternatively, Magic West contends that the volume limitation should be removed from the license.

3. On October 22, 1997, the Department issued an Order Designating Contested Case; Appointing Hearing Officer; and Scheduling Hearing. The order provided that a hearing was appropriate "to provide Magic West the opportunity to establish through plant production records, or other similar evidence, the extent of beneficial use that existed under right no. 61-07189 prior to the submission of proof of beneficial use on June 13, 1979."

4. On December 15, 1997, the Department conducted a hearing in the matter. Magic West was represented by Norman M. Semanko. Intervenor Robert K. Hall was present and was represented by Perce Hall. Intervenor Edward T. Potucek was present and was represented by Daniel V. Steenson.

5. At the hearing held on December 15, 1997, intervenor Edward T. Potucek filed a Motion in Limine and to Strike: Re. Introduction of Certain Evidence to Establish Diversion Volume, which motion the hearing officer took under advisement.

6. Exhibits premarked, offered, or accepted as a part of the record include the following:

- a. Petitioner's Exhibit 1 - Report on Annual Diversion Volume for License No. 61-07189 During Authorized Development Period 1974-1979
- b. Petitioner's Exhibit 1A - Water Discharge Records from DEQ in connection with Magic West's plant
- c. Petitioner's Exhibit 2 - Water Use Measurements 1996-1997 (Oct. 20 to Oct. 18)
- d. Petitioner's Exhibit 3 - Water Usage Chart - Well Water - 1996 and 1997
- e. Petitioner's Exhibit 4 - Water Usage Chart - City Water - 1996 and 1997
- f. Petitioner's Exhibit 5 - Magic West Water Usage Chart - Discharge/Waste Water Pumped to Farm
- g. Petitioner's Exhibits 6 thru 12 - NOT OFFERED
- h. Petitioner's Exhibit 13 - Magic West Farm Water Report 04/06/87 through 04/30/87
- i. Petitioner's Exhibit 14 - Magic West Farm Water Report 04/30/87 through 05/31/87
- j. Petitioner's Exhibit 15 - Magic West Farm Water Report 06/01/87 through 06/30/87
- k. Intervenor's Exhibits A thru D - NOT OFFERED

- l. Intervenor's Exhibit E - Letter to Magic West, Inc. from Kay Walker dated August 9, 1979
- m. Intervenor's Exhibit F - NOT OFFERED
- n. Intervenor's Exhibit G - Letter to Magic West, Inc. from Steve Lester dated July 23, 1987
- o. Intervenor's Exhibits H thru Q - NOT OFFERED
- p. Intervenor's Exhibit R - Memorandum to Gary Spackman from Steve Lester dated May 2, 1997
- q. Intervenor's Exhibit S - NOT OFFERED
- r. Intervenor's Exhibit T - Sale Agreement dated September 11, 1959
- s. Intervenor's Exhibit U - Map of Glenns Ferry area showing total depth of selected wells
- t. Intervenor's Exhibit V - Conservation Plan Map - Soils, Photo No. 3EE 102, April 1975

7. During the hearing, the hearing officer took official notice of all water right records in the Department's files.

- 8. Issues identified by the parties for post-hearing briefing included the following:
 - a. the Department's authority to issue an amended license
 - b. the Motion in Limine and Motion to Strike certain evidence
 - c. injury to intervenor Potucek
 - d. the extent of beneficial use of water by Magic West during the period authorized to appropriate water

9. The license examination information submitted to the Department by Magic West on April 21, 1987, advised the Department that Jack Anderson was the company's designated representative who was to accompany the Department's field examiner during the license examination conducted to determine the extent of beneficial use made of water under Permit to Appropriate Water No. 61-07189. The Department procedurally erred by not specifically contacting Mr. Anderson to schedule his participation in the field examination. Instead, Mr. Doug Mason, the maintenance superintendent at the Magic West facilities in Glenns Ferry,

accompanied the Department's field examiner during the license examination conducted on August 4, 1987.

10. Magic West contends that its potato processing operations at its plant in Glenns Ferry have not significantly changed from the late 1970s to the present time. Consequently, Magic West claims that water use data collected at its plant during 1996 and 1997 generally represent water use at its plant in the late 1970s during the development period authorized by the permit to appropriate water. To estimate the amount of water diverted from its well prior to June 13, 1979, Magic West relies upon records of waste water discharged from its plant to its waste water farm, records of water discharged to the sewer system of the City of Glenns Ferry, records of water provided by the City of Glenns Ferry to the plant, records of water trucked to a sludge pond, and processing records for consumptive uses and losses.

11. Magic West used an input-output relationship to estimate the amount of groundwater diverted from its well during the years 1975 through 1979, since Magic West did not actually measure the amount of groundwater diverted until October 1996. Using this relationship, the amount of groundwater diverted from Magic West's well added to the amount of water provided to Magic West's processing plant by the City of Glenns Ferry is estimated to approximately equal the discharge of wastewater from the plant to Magic West's farm, plus discharge to the Glenns Ferry sewer system, plus water trucked to a sludge pond, plus the net processing consumption and losses in the plant, reduced by the water contained in the incoming potatoes.

12. Magic West's records indicate the amount of water provided to the plant by the City of Glenns Ferry during Magic West's fiscal year 1978 (November 1, 1977 through October 31, 1978) was 25.49 million gallons per year. (See petitioner's Exhibit 1).

13. Magic West's records of the discharge of waste water to its waste water farm include complete records for only one year during the time period authorized by the permit to appropriate water: Magic West's fiscal year 1978. The records show that for fiscal year 1978, there were 44.1368 million gallons of waste water discharged from the plant to Magic West's farm over 217 days in the 12 month time period of the fiscal year. (see petitioner's Exhibit 1A).

14. The records submitted by Magic West do not include corresponding data for fiscal year 1978 documenting discharge to the city sewer system, water trucked to the sludge pond, or the net consumption and losses in Magic West's processing plant.

15. Magic West's records show the amount of water discharged to the City of Glenns Ferry sewer system during calendar year 1975 only, and Magic West bases its estimate of net losses and consumption during plant processing on data for one (1) week in March 1997.

16. The 1997 data showing waste water discharged from the processing plant to the waste water farm indicate that the plant operated 352 days and discharged approximately 112 7974 million gallons of waste water to the farm

17. Based on comparing the number of days waste water was discharged from Magic West's processing plant to its waste water farm, and the corresponding amounts of waste water discharged, Magic West's use of water in 1997 was clearly larger than its water use during the time period authorized to appropriate water in the late 1970s. Therefore, Magic West's water use in 1997 is not representative of Magic West's water use during the time period authorized by the permit to appropriate water.

18. Magic West has consistently exceeded the limitation on annual volume of ground water that can be diverted under Water Right License No. 61-07189 as originally issued or as amended herein.

19. Intervenor Potucek alleges that he would incur injury if the Department amends the license increasing the annual volume of water diverted under the license from the 12.9 afa now provided by the license.

20. Magic West has filed Claim No. A61-02248B in the Snake River Basin Adjudication claiming the use of 0.40 cfs of groundwater from the same point of diversion as for Water Right No. 61-07189 for industrial use in connection with its potato processing plant in Glens Ferry. This water right was previously licensed by the Department and has also been claimed by a different party in the Snake River Basin Adjudication.

21. As issued, License No. 61-02248 provides the following:

Source:	Groundwater
Priority:	April 3, 1939
Rate of diversion:	0.40 cfs
Point of diversion:	Lot 3, Section 32, T5S, R10E, B.M.
Uses:	Domestic and bathing, irrigation of 3 acres
Place of use:	Same as point of diversion.

Remarks:	Use of low temperature geothermal water under this license was the subject of a Local Ground Water Board Ruling in April 1960. The board held that the authorized rate of diversion be reduced to 0.08 cfs. After October 1, 1960, the order of the board became permanent.
----------	---

CONCLUSIONS OF LAW

1. The Department has the statutory authority to amend the Water Right License for Water Right No. 61-07189 in accordance with § 67-5254(1), Idaho Code.
2. Magic West's use of water in 1997 was clearly larger than its water use during the 1970s, both in duration and the amount of water diverted and is not representative of Magic West's use of water in the late 1970s during the time period authorized by the permit to appropriate water.
3. The Department issued Water Right License No. 61-07189 based on information provided by Magic West during the beneficial use field examination conducted on August 4, 1987. Although the license was issued based on data provided by Magic West, the Department erred procedurally by failing to involve Magic West's designated representative in the field examination and subsequent requests for information.
4. The records submitted by Magic West during the hearing on December 15, 1997, show that Magic West used more water under Permit to Appropriate Water No. 61-07189 than reported to the Department in 1987 during the beneficial use field examination.
5. The data submitted by Magic West showing water discharged to the City of Glenns Ferry sewer system and the net amount of water lost during plant operations should not be considered in determining the amount of water actually diverted under the permit to appropriate water because the information available in the record is not sufficient to relate these data to actual plant operations and use of water during the time period authorized to appropriate water under the permit. With respect to the data showing discharge to the City of Glenns Ferry sewer system during 1975, the record does not show that a similar discharge was made to the sewer system during fiscal year 1978, the only year during the appropriation period authorized by the permit for which complete data are available documenting the amount of waste water discharged by Magic West to its waste water farm and the volume of water supplied by the City of Glenns Ferry. Similarly, the record does not establish that the net processing consumption and losses at the plant during 1997 are comparable to those during fiscal year 1978.
6. The Motion in Limine and to Strike: Re. Introduction of Certain Evidence to Establish Diversion Volume, filed by intervenor Edward Potucek, should be denied. Approval would have precluded the hearing that the Department authorized in its order dated October 22, 1997, designating a contested case.
7. The injury alleged by intervenor Potucek has no bearing on the extent of beneficial use of water made by Magic West during the period to appropriate water authorized by the permit. The present proceeding is to determine the volume of water authorized for diversion under License No. 61-07189. If Potucek, or one or more other groundwater users, can demonstrate injury because of groundwater diversions by Magic West, the Department's "Rules for Conjunctive Management of Surface and Groundwater Resources" provide procedures for the

holder of a senior water right for groundwater to call for delivery of water against the holder of a junior water right for groundwater causing injury to the senior water right.

8. The parameters for Water Right License No. 61-07189 should be based upon the extent of diversion and beneficial use made of water within the time period authorized for appropriation of water under the permit and prior to submittal of proof of beneficial use, i.e. within the time period of August 29, 1974 to June 13, 1979.

9. The Department should issue an amended license based on the amount of water diverted and applied to beneficial use within the time period beginning August 29, 1974 and ending June 13, 1979.

10. The amended license should limit annual diversions of groundwater to a volume of 58 afa instead of 12.9 afa. The volume of 58 afa is calculated using fiscal year 1978 data for the volume of water discharged from Magic West's processing plant to its waste water farm and the volume of water provided by the City of Glenns Ferry to the processing plant. The volume of waste water discharged to Magic West's farm is taken to be the volume of water used at the processing plant without additions for water discharged to the City of Glenns Ferry sewer system, water trucked to the sludge pond, or the net amount of water consumed and lost during processing, because actual data for these additions during the period of appropriation authorized by the permit do not exist in the record. Therefore, the volume of groundwater diverted from Magic West's well in fiscal year 1978 is calculated to be the volume of waste water discharged from the processing plant in fiscal year 1978 less the volume of water supplied by the City of Glenns Ferry in fiscal year 1978 as follows:

$$\frac{44.1368 \text{ million gallons used in 1978 less } 25.49 \text{ million gallons from Glenns Ferry}}{0.325850 \text{ million gallons per acre-foot}}$$

$$= 58 \text{ acre-feet (rounded up)}$$

11. Magic West should not be authorized to divert more water than 58 afa under terms of Amended Water Right License No. 61-07189.

12. The records of plant operations submitted by Magic West and the testimony of witnesses for Magic West show that Magic West has consistently violated the limitation on annual volume of ground water that can be diverted under Water Right License No. 61-07189 as originally issued or as amended herein. Therefore, Magic West should be ordered to cease and desist forthwith from diverting larger volumes of ground water than authorized by Amended Water Right License No. 61-07189. The hearing held on this matter by the Department on December 15, 1997, satisfies the substantive due process requirements of § 42-350, Idaho Code, for issuance of a cease and desist order.

13. To ensure Magic West complies with the cease and desist order, Magic West should be required to measure all ground water diversions and report the volume of ground water diverted under Amended Water Right License No. 61-07189 during four, consecutive, three

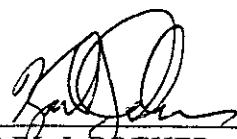
month periods annually to the Department until such time as the Department determines annual reporting is sufficient to ensure compliance with the provisions of Amended Water Right License No. 61-07189

ORDER

IT IS THEREFORE, hereby ORDERED as follows:

1. The renewed motion for dismissal filed by intervenor Hall is **DENIED**.
2. The Motion in Limine and to Strike: Re. Introduction of Certain Evidence to Establish Diversion Volume, filed by intervenor Potucek, which motion the hearing officer took under advisement, is **DENIED**.
3. Water Right License No. 61-07189 issued by the Department on October 27, 1990, is amended to change the authorized diversion volume from 12.9 afa to 58 afa. All other terms and conditions of License No. 61-07189 are included in Amended License No. 61-07189 without change. The Amended License No. 61-07189 replaces the original license issued on October 27, 1990.
4. Upon receiving this order, Magic West shall cease and desist forthwith from diverting amounts of groundwater under Amended Water Right License No. 61-07189 that exceed the annual volume authorized by the amended license.
5. In addition to maintaining an approved totalizing measuring device on its point of diversion, Magic West shall report the volume of groundwater diverted and used to the Department every three (3) months beginning June 1, 1999 for the three-month period beginning on February 1, 1999, and ending April 30, 1999. Magic West shall continue to report the volume of groundwater diverted and used pursuant to Amended Water Right License No. 61-07189, and any other water right authorizing use of the same point of diversion, within thirty (30) days following each three-month period thereafter until such time as the Department determines that annual reporting is sufficient to ensure compliance with Amended Water Right License No. 61-07189.

Signed this 22nd day of January, 1999.



KARL J. DREHER
Director

CERTIFICATE OF MAILING

I DO HEREBY CERTIFY that on this 22nd day of January, 1999, the above and foregoing document was served upon the following, via certified mail, by placing a copy of the same in the United State Mail, postage prepaid and properly addressed to the following:

MAGIC WEST INC
PO BOX 475
RUPERT ID 83350

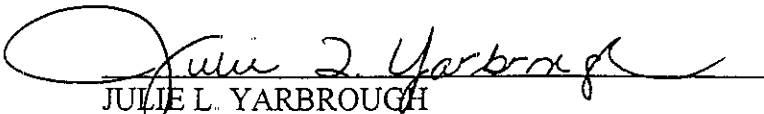
PERCE HALL ESQ
340 E 2ND N
MOUNTAIN HOME ID 83647

EDWARD T POTUCEK
ROSEVEAR RD
PO BOX 537
GLENN'S FERRY ID 83623

NORMAN SEMANKO
ROSHOLT ROBERTSON TUCKER
PO BOX 1906
TWIN FALLS ID 83303-1906

DANIEL V STEENSON
RINGERT CLARK CHARTERED
PO BOX 2773
BOISE ID 83701-2773

ROBERT K HALL
RT 1 BOX 103
GLENN'S FERRY ID 83623


JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau