

29-2548

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS FOR PERMITS NOS.
13-7427 IN THE NAME OF VON N. SIMONSON; 13-7451
IN THE NAME OF RICHARD OR ILA HOLSTEN; 13-7458
IN THE NAME OF DWAIN K. CHRISTENSEN; 29-7505
IN THE NAME OF M & M CENTRAL DAIRY; 29-7636
AND 29-7637 IN THE NAME OF DON C. RIGBY;
29-7618 IN THE NAME OF GOLDEN GRAIN FARMS;
29-7608 IN THE NAME OF TERRY RINDLISBAKER

PROPOSED
MEMORANDUM
DECISION AND
ORDER

This matter having been heard by a hearing officer appointed by the Director of the Department of Water Resources, the following findings of fact, conclusions and order are proposed:

FINDINGS OF FACT

1. The following applications were filed with the Department of Water Resources and protested by the listed parties:

<u>Right No.</u>	<u>Applicant</u>	<u>Priority</u>	<u>Flows Sought</u>	<u>Protestant</u>
13-7427	Von N. Simonson	01/04/1985	2.4 cfs	Last Chance Canal Company Warren P. Lloyd Keith Lloyd George C. Kimball Utah Power & Light (intervenor)

RECEIVED
JAN 21 1992

<u>Right No.</u>	<u>Applicant</u>	<u>Priority</u>	<u>Flows Sought</u>	<u>Protestant</u>
13-7451	Richard & Ila Holsten	02/25/1988	7.0 cfs	Keith Lloyd George C. Kimball Warren Lloyd Utah Power & Light (intervenor)
13-7458	Dwain K. Christensen	11/29/1988	5.0 cfs	Warren Lloyd (protestant) Keith Lloyd, Last Chance Canal Co., Utah Power & Light (intervenor)
29-7505	M & M Central Dairy	08/01/1979	6.4 cfs	Warren Lloyd Kim Welch Everett Smith Keith Lloyd Gem Valley Farm
29-7636	Don C. Rigby	04/13/1982	1.6 cfs	Everett Smith Warren Lloyd Keith Lloyd
29-7637	Don D. Rigby	04/13/1982	17.04 cfs	Warren Lloyd Keith Lloyd Everett Smith
29-7608	Terry Rindlisbaker	08/21/1981	8.0 cfs	Keith Lloyd Eldon Corbridge
29-7618	Golden Grain Farms	10/14/1981	1.36 cfs	Warren Lloyd

2. A hearing regarding the protested water right applications was held on January 17, 18 and 31, 1991, in Soda Springs, Idaho. All of the applicants and protestants, except Eldon Corbridge, appeared at the hearing. Don C. Rigby and Terry Rindlisbaker were represented by A. Bruce Larsen, attorney at law. Dwain Christensen and Von Simonson were represented by Thomas Holmes, attorney at law. Protestants Warren Lloyd, Keith

FILMED
JAN 21 1992

Lloyd, George Kimball, Everett Smith, Kim Welch and Gem Valley Farm were represented by Ray Rigby, attorney at law. Last Chance Canal Company was represented by Randall Budge, attorney at law. Utah Power & Light was represented by Jody Williams, attorney at law. Mike Holsten and Mark Holsten, sons of Richard and Ila Holsten appeared as the agents for their parents and as partners in M & M Central Dairy. Finally, Golden Grain Farms was represented by Monte Yost.

3. At the outset of the hearing, Rindlisbaker discovered that the point of diversion proposed by his application was misplaced approximately six miles. He determined that his application would have to be amended, and that subsequent protests could be filed. A hearing regarding the Rindlisbaker application was deferred until the appropriate amendment is filed.

4. Monte Yost represented to the hearing officer that Golden Grain Farms had no desire to pursue development as proposed in application no. 29-7618.

5. Holstens testified that they have no present intention or financial ability to construct the system proposed by applications nos. 29-7505 and 13-7451. The lands proposed as a place of use are currently enrolled in the Conservation Reserve Program (CRP), and will be idle for another 7-8 years.

RECEIVED
JAN 21 1992

6. Don C. Rigby established that there is very little drawdown at his existing well. There has been little reduction in static water level since he began pumping.

7. Don Rigby established that he has sufficient finances to construct the project.

8. There are very few wells in close proximity to the wells proposed to be drilled by Mr. Rigby. A well owned by Golden Grain Farms (Yost) is the nearest well and is located approximately one-half mile away.

9. Monte Yost testified that Golden Grain had been unable to operate end guns for three circular pivot systems because of low well water levels in a well located near Mr. Rigby's proposed wells. The hearing officer finds, however, that the Golden Grain well is not deep enough to allow for the necessary drawdown. Mr. Yost testified that the well is 120 feet deep and the pump bowls are located at a depth of 112 feet. The Golden Grain pump would not pump air if the well were deepened and the bowls set sufficiently deep in the well to draw down the well depth, causing greater flow from the surrounding aquifer.

10. Don Rigby established that he would pursue completion of the proposed wells if his applications are approved.

11. Von Simonson established that he has the financial ability to construct his proposed project, and that he intends to pursue its completion if his application is approved.

RECEIVED
JAN 21 1992

12. Dwain Christensen established that he has the financial ability to construct his proposed project and that he intends to pursue completion of the project if his application is approved.

13. USGS data for four observation wells, labeled as applicant's exhibit's nos. B, D, E and F, were offered by the attorney for Von Simonson and Dwain Christensen. The records span the years of 1980 through 1990.

14. The data generally shows that static water levels increased from 1980 through 1988, but declined during 1989 and 1990 to approximately the same static water levels recorded in 1980.

15. Water levels in two of the observation wells, the Von Simonson well (exhibit B) and the Paul Christensen well (exhibit F), only draw down approximately one foot while being pumped. These small drawdowns indicate a very permeable water bearing strata.

16. The extent of local well interference depends on the rate of withdrawal permeability and the water storage capacity of the water bearing strata. No evidence was submitted to establish storage capacity of the aquifer material.

17. The other two observation wells, the Marvin Smith well (exhibit D), and the Everett Smith well (exhibit E), both draw down water surface levels approximately 20-25 feet while pumping.

REPROFILMED
JAN 21 1992

18. A main artery of the Last Chance Canal Company, the West Extension, cuts across the Gem Valley in a westerly direction. It is depicted on Protestant's Exhibit #1.

19. The ground water contours in the area show a ground water divide located approximately along and beneath this canal. The ground water divide is a high point in the ground water level from which some of the ground water flows toward the Bear River, and some of the ground water flows toward the Portneuf River.

20. The close correlation of the ground water divide and the West Extension is more than mere coincidence. Testimony established that significant water loss occurs in the West Extension and helps establish the approximate location of the hydrologic divide.

21. Data from exhibits B and F were retabulated in applicant's exhibits I and J. Exhibits I and J show higher water levels during the pumping season than in the fall. These higher water levels are caused by both seepage from the West Extension Canal and annual recharge during the non-irrigation season.

22. The wells proposed by Simonson and Christensen are located in close proximity to the observation wells identified by exhibit B and exhibit F, and probably would exhibit similar characteristics, including a small drawdown.

23. The wells proposed by Simonson and Christensen are located within a mile of the hydrologic divide on the Portneuf

RECEIVED
JAN 21 1992

side. The application filed by Rigby is located approximately six miles north of the ground water divide.

24. The Department ceased approving applications for permit proposing diversion of ground water in approximately 1980 at the time the Bancroft-Lund Adjudication was commenced. Some additional diversions pursuant to existing permits may have been developed after 1980, but in the last decade, the total annual volume of water withdrawn from the aquifer has not changed significantly.

25. The data submitted by the applicants does not reveal the effect of development prior to 1980 when pumping may have lowered ground water levels.

26. Chad Neibaur of Gem Valley Farms testified that static well water levels have declined approximately fifteen feet in wells owned by Warren Lloyd, Keith Lloyd and Gem Valley Farms since the wells were drilled. The measured wells are associated with water rights having dates of priority in the 1950's and 1960's.

27. Recharge contributed by the West Extension and other irrigation raises the static ground water levels during the irrigation season. This artificial recharge probably does not raise water levels to traditional levels because of greater withdrawals from ground water and also because of expansion and more efficient use by the Last Chance Canal as discussed in the next finding.

MICROFILMED
JAN 21 1992

28. Last Chance Canal Company has attempted to save losses in its canal system, particularly in the West Extension that bisects the Gem Valley. Many of the farmers have converted from gravity to sprinkler irrigation, and the canal company has expanded its irrigated acreage by 3000 acres. The saving of ditch losses, the conversion to sprinkler, and the expansion of additional irrigated acreage resulting from water savings has reduced the amount of water percolating into the ground water aquifer.

29. Protestant's Exhibits #3 and #3A attempt to show a decline in the discharge from Black Canyon Springs by comparing 1956-58 data and 1979-81 data. The accuracy of the information used to plot the graph is suspect because reconstruction of the Grace power plant reduced hydraulic (flow) capacity of the power plant which changed the release pattern into Black Canyon between these two periods of time. Since the amount of water bypassing the Grace power plant diversion is used to determine declines in spring flow, the exhibit is viewed as unreliable information, and will not be considered by the hearing officer.

30. George C. Kimball owns a trout rearing facility in Black Canyon, which relies on spring flows to supply water for the hatchery and raceways. He owns three water rights, 13-7029, 13-7115 and 13-7219. All of these water rights have been licensed. The total diversion authorized by these licenses is 6.08 cfs. Mr. Kimball has also filed application no. 13-7444,

RECEIVED
JAN 21 1992

which is currently pending before the Department of Water Resources.

31. License no. 13-7219 was conditioned to limit the use of water under the right to policies set forth in the State of Idaho Water Plan, including policy no. 32F.

32. Policy 32F is the predecessor of the current policy 5G which states:

It is the policy of Idaho that water necessary to process aquaculture products be included as a component of DCMI as provided in policy 5C. The minimum flows established by the Murphy Gauging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

Aquaculture can expand when and where water supplies are available and where such uses do not conflict with other beneficial uses. It is recognized, however, that future management and development of the Snake River Plain Aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

33. The intent of the condition was to notify Kimball that his water right may be subject to depletion by ground water developments located hydrologically upstream. The condition refers only to the Snake River Plain Aquifer, however. Furthermore, the condition does not subject Kimball's rights to depletion by upstream development, but states that different diversion facilities may have to be constructed.

34. Utah Power & Light owns multiple water rights downstream from Black Canyon. It also owns the Grace Power Plant which

RECEIVED
JAN 21 1992

diverts water above Black Canyon, and which discharges water back to the Bear River below Black Canyon.

35. The diversion works for the Gentile Valley Canal Company are located between the diversion and the return to the river at the Grace Power Plant. Utah Power & Light is obligated to supply water to the Gentile Valley Canal Company because the Gentile Valley right is earlier in time than the Grace Power Plant right.

36. Withdrawals of water from the ground water hydraulically upstream from Black Canyon Springs causes a reduction in the spring flows. This reduction results from a decrease in the hydraulic gradient which pushes ground water to the springs. Furthermore, according to the testimony of Jack Barnett, an expert witness retained by the protestants, withdrawal of ground water from the Portneuf side of the hydrologic ground water divide will also reduce the flow of Black Canyon Springs because the withdrawal shifts the hydrologic divide away from the location of the withdrawal, but also lowers the elevation of the hydrologic divide, reducing the gradient on the Bear River side, and as a result, reducing the flow of the springs.

37. On some occasions, George Kimball has observed flows from his springs of less than 6.08 cfs. Kimball has observed reductions in spring flow resulting from ground water withdrawals north of Black Canyon.

38. Ground water withdrawals north of Black Canyon deplete flow for springs which discharge into Black Canyon. A depletion

MICROFILMED
JAN 21 1992

of spring flows reduces the amount of water available to Gentile Valley Irrigation Company. If insufficient water flows from Black Canyon Springs to satisfy the Gentile Valley rights, Utah Power & Light must bypass water down Black Canyon. The bypassed water cannot be diverted to its Grace power plant for power generation.

39. A reduction in Black Canyon springs flow results in a reduction of water flowing in the Bear River.

40. Protestants Warren Lloyd, Keith Lloyd, Everett Smith, Kim Welch, and Gem Valley Farms all own various water rights summarized in Protestant's Exhibit #5 and located on Protestant's Exhibit #1. All of these wells are located within 1-2 miles of the ground water divide shown on Protestant's Exhibit #1.

41. Jack Barnett testified that more water is entering the Gem Valley near Alexander, than is being withdrawn. Even if all of the existing appropriators are diverting at their maximum allowable annual volume, water is available for appropriation.

42. Some of the protestants' wells are located in the center of Gem Valley where the water bearing strata is deeper, and water appears to be plentiful. There is sufficient water for these wells, although some wells may need to be deepened.

43. Of particular concern, however, are some wells located near the west foothills of the Gem Valley. In developing and improving these wells, the applicants have penetrated the entire water bearing strata, and have drilled into "blue clay." There

MICROFILMED
JAN 21 1992

is no other water available for appropriation if they drill any deeper.

44. Other wells, such as those owned by Everett Smith, exhibit very little drawdown when water is being drawn from the upper water bearing strata. When well water levels drop below the upper aquifer, however, drawdowns increase, and a deeper "soda water," which is less desirable for irrigation use, is pumped.

45. Wells which cannot intercept a deeper water bearing strata or which intercept water with a chemistry less desirable for irrigation will hereafter be referred to as "problem wells."

46. The developments proposed by Simonson, Christensen, Holsten, and M & M Central Dairy, are located almost directly upstream hydrologically from the problem wells or are located in direct proximity to the problem wells. Development of additional wells will lower the hydraulic gradient and may reduce the flow of water to the water bearing strata which is tapped by the problem wells.

47. Wells located directly east and hydraulically upstream from the problem wells intercept ground water that would have flowed into the limited water bearing strata from which the problem wells divert. As a result of upstream water diversion, water is sometimes not of sufficient depth in the problem wells for full diversion of the authorized flow rate.

RECEIVED
JAN 21 1992

48. Ground water north of the ground water divide may be tributary to the Portneuf River, although the relationship is unclear.

49. The wells proposed by Rigby are much more remote than the other wells, located some 8-10 miles northeast of the problem wells. Application no. 29-7635 proposes the diversion of 17.04 cfs of water, however, and this large withdrawal of water may have some effect on surrounding wells, springs, and surface flows.

50. Black Canyon is an important recreational resource. The springs which flow from Black Canyon into the Bear River maintain a popular fishery, and also contribute to the riparian habitat along the riverbed.

CONCLUSIONS OF LAW

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

The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. 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 purposes 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 does not have sufficient financial resources with which to complete the work involved therein or (e) that it will conflict with the local public interest where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the State of Idaho; the director of the department of water resources may reject such application, refuse issuance of a permit therefor, or may partially

RECEIVED
JAN 21 1992

approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. Rule 4,4,2,1. of the Water Appropriation Rules and Regulations states that the applicant shall bear the initial burden of coming forward with evidence of the evaluation of criteria (a) through (d) of Idaho Code § 42-203A.

3. Rule 4,4,2,2. of the Water Appropriation Rules and Regulations states that both the applicant and the protestant have the burden of coming forward with evidence regarding local public interest of which they are each most cognizant.

4. The local public interest criterion of Idaho Code § 42-203A(5) is defined by Rule 5,1,5. of the Water Appropriation Rules and Regulations to include, but not to be limited to:

The effect the project will have on the economy of the local area affected by the proposed use as determined by the employment opportunities, both long and short term, revenue changes to various sectors of the economy, short and long term, and the stability of revenue and employment gains;

The effect the project will have on recreation, fish and wildlife resources in the local public area affected by the proposed use;

Compliance with applicable air, water, hazardous substance standards, and compliance with planning and zoning ordinances of local or state government jurisdictions.

5. Rule 4,4,3. of the Water Appropriation Rules and Regulations states that the applicant has the ultimate burden of persuasion for all of the criteria of Section 42-203A, Idaho Code.

6. Agents for M & M Central Dairy and for Richard and Ila Holsten did not satisfy their burden of proof. The fact that the

RECEIVED
JAN 21 1992

land is now enrolled in the Conservation Reserve Program, and that there is no present intent to develop as requested by the applications makes them speculative in nature. Applications nos. 29-7505 in the name of M & M Central Dairy and 13-7451 in the name of Richard and Ila Holsten should be rejected.

7. The testimony of Monte Yost of Golden Grain Farms, constitutes a withdrawal of application for permit no. 29-7618.

8. Applicants Don Rigby, Von Simonson, and Dwain Christensen established that there is ground water available for appropriation in the Gem Valley.

9. The protestants established, however, at least with respect to water rights located in and around the north extension of the Last Chance Canal Company, that these diversions directly affect flows in the Bear River, and may also affect problem wells owned by Warren Lloyd, Keith Lloyd and Gem Valley Farms on the west side of the valley. Direct reductions in flow to Black Canyon Springs, and a lowering of the water in the problem wells causes injury for which no mitigation by the applicants has been proposed.

10. Applicants Von Simonson and Dwain Christensen did not satisfy their ultimate burden of persuasion that the development proposed by their applications would not reduce the quantity of water under existing water rights.

11. The applications by Don C. Rigby are remote enough in location, that they will not have significant affect upon the

RECEIVED
JAN 21 1992

Bear River water rights, Black Canyon Springs, or the problem wells. The large amount of water proposed for diversion may injure other water users, however, particularly nearby well operators.

12. The applications filed by Don C. Rigby can be approved, but Mr. Rigby must pay the cost of monitoring several nearby wells during and after his development is complete.

ORDER

IT IS HEREBY ORDERED that applications for permit no. 29-07505 in the name of M & M Central Dairy, 13-7427 in the name of Von N. Simonson, application no. 13-7451 in the name of Richard and Ila Holsten, and application no. 13-7458 in the name of Dwain K. Christensen are REJECTED and issuance of a permit is REFUSED, without prejudice. If the applicants can propose a plan to compensate other waterusers for injury that will be caused by the proposed development, the Department will consider new applications.

IT IS FURTHER ORDERED that application for permit no. 29-7618 in the name of Golden Grain Farms is considered WITHDRAWN.

IT IS FURTHER ORDERED that applications for permit nos. 29-7636 and 29-7637 in the name of Don C. Rigby are APPROVED subject to the following conditions:

1. The approved irrigated acreage must be developed in two incremental year stages. Not more than 240 acres may be

RECEIVED
JAN 21 1992

developed during a particular stage. The Department will consider an application for extension of time for any development not complete within five (5) years.

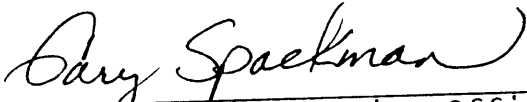
2. The owner of water rights nos. 29-7636 and 29-7637 must pay the cost of monitoring nearby wells during each staged development, as determined by the Department of Water Resources. The purpose of monitoring is to discover the effect of development on these wells. The owner of the rights must submit a monitoring plan acceptable to the Department prior to commencing construction.

3. The owner of water rights nos. 29-7636 and 29-7637 bears the risk of future Departmental regulation of the new wells, and possible shut down if the interference is found to exist.

4. Regulation of water right nos. 29-7636 and 29-7637 may be necessary to protect earlier in time ground water users, or surface water users in the Portneuf River.

5. Proof of beneficial use must be submitted on or before July 1, 1996.

Dated this 8th day of May, 1991.


GARY SPACKMAN, Hearing Officer
Department of Water Resources

RECEIVED
JAN 21 1992