

IDAHO DEPARTMENT OF WATER RESOURCES
Proof Report

8/7/2020

Water Permit 47-8080

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	LEO E RAY 4647D RIVER RD BUHL, ID 83316 (208) 837-6114
Current Owner	JUDITH K RAY 4647D RIVER RD BUHL, ID 83316 (208) 837-6114

Status: Relinquished

<u>Source</u>	<u>Tributary</u>
---------------	------------------

<u>Beneficial Use</u>	<u>From</u>	<u>To</u>	<u>Diversion Rate</u>	<u>Volume</u>
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Source and Point(s) of Diversion

Place Of Use

Conditions of Approval:

Comments:

Dates and Other Information

Water District Number: TBD
Mitigation Plan: False

Combined Use Limits

N/A

SubCase:

N/A

Water Supply Bank:

N/A

FELTON & FELTON
1020 Main Street
Post Office Box 589
Buhl, Idaho 83316-0589
Tel. No. (208) 543-4368
FAX No. (208) 543-4360
Attorneys for Rod Griffith, Howard Harder & Ted Harder
(GHI-DOC\3073STP.N18)pm

COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

* * * * *

APPLICATION FOR PERMIT NOS.	)	<u>STIPULATION FOR WITHDRAWAL</u>
47-08076 AND 47-08080	)	<u>OF APPLICATION NO. 47-08080</u>
IN THE NAME OF LEO E. and/or	)	<u>AND WITHDRAWAL OF OBJECTIONS</u>
JUDITH K. RAY	)	<u>TO APPLICATION NO. 47-08076</u>

* * * * *

The Applicants, LEO E. RAY and JUDITH K. RAY, and the Protestants, ROD GRIFFITH, HOWARD HARDER and TED HARDER, being desirous to compromise and adjust their positions in this matter now enter into the following:

IT IS HEREBY STIPULATED AND AGREED by the specified parties, through their respective counsel, as follows:

1. In consideration of the covenants here contained, the Applicants withdraw their Application No. 47-08080 for 50 cfs water from Deep Creek, tributary to the Snake River and agree not to refile the same or any part thereof.

STIPULATION FOR WITHDRAWAL OF APPLICATION NO. 47-08080 AND
WITHDRAWAL OF OBJECTIONS TO APPLICATION NO. 47-08076 - 1

2. In consideration of the covenants here contained, the Protestants, ROD GRIFFITH, HOWARD HARDER and TED HARDER, withdraw their Protest to the Applicants' Application for Permit No. 47-08076 for the diversion of certain seeps, tributary of Deep Creek, for use for fish propagation purposes.

3. The parties further stipulate and agree that Application for Permit No. 47-08076 shall not be increased or otherwise enlarged and the points of diversion and point of use shall remain the same as set forth in the original application.

WHEREFORE, the parties hereto request that the Department of Water Resources enter an Order consistent with the actions specified herein.

DATED This 29th day of January, 1998.

APPROVAL:

LLOYD J. and CURTIS R. WEBB, Attorneys

Leo E Ray
LEO E. RAY

By [Signature]
LLOYD J. WEBB
Attorneys for Applicants

APPROVAL:

FELTON & FELTON

Rod Griffith
ROD GRIFFITH

By [Signature]
MICHAEL HOYT FELTON (SR.)
Attorneys for Rod Griffith, Howard Harder,
and Ted Howard

Howard Harder
HOWARD HARDER

Ted Harder
TED HARDER

STIPULATION FOR WITHDRAWAL OF APPLICATION NO. 47-08080 AND
WITHDRAWAL OF OBJECTIONS TO APPLICATION NO. 47-08076 - 2

JAN 31 1997

FROM: Allen Merritt

DATE: January 31, 1997

TO: Application for Permit Files: 47-08076 & 47-08080
In the Name of: Leo Ray

SUBJECT: Pre-hearing Conference

On 1/30/97 I conducted a pre-hearing conference. Attending was Leo Ray and his attorney Lloyd Webb, protestant Rod Griffith and his attorney Mike Felton and protestant Fred Kippes. For the first several minutes Felton, Griffith & Kippes met in private conference then the conference was convened with all parties.

Prior to the conference Mr. Webb gave me a written motion to have a subpoena issued to Rod Griffith. At the conference Mike Felton submitted an executed stipulation for withdrawal of protest by Harder & Griffith & withdrawal of application 47-08080 by Ray.

During the conference Mr. Ray provided copies of the plans for the trimmed down project to those present and described that now only the seepage water at two locations would be used and then returned to a point at Deep Creek where Mr. Griffith would divert the return flow into his hatchery below just before it dumped into Deep Creek. (I told Griffith that if his diversion changed from Deep Creek to the Seepage return flow he would need to file a transfer)

It was explained that Mr. Griffith has bought out Terry White and that Harder had bought out Evan Cox. It seems everyone was satisfied except Mr. Kippes who was selling out to Griffith; negotiations were continuing between him and Griffith. It was indicated that Griffith had an option to buy which he was executing. (The purpose of the subpoena was to have him testify to this at a hearing)

Mr. Kippes indicated that if Griffith was satisfied with things after the sale was final he would withdraw his protest but wished to keep the protest incase the deal fell through. It was agreed that they could conclude their negotiations by March 1 so it was agreed to continue the conference until after March 1.

After the conference I asked Webb if we needed to proceed with the subpoena request and he said "no". I gave him back the original and kept a copy with withdrawn written on it.

I will forward my duplicate file for 47-08080 to the state office with the new documents since the state office has the original file. I will keep the duplicate file for 47-08076 until that matter is resolved. I do not have anything in my file showing Cox has formally withdrawn his protest.

ASSISTED BY: *None*

ROSTER OF ATTENDANCE

[illegible]

1 FELTON & FELTON
2 1020 Main Street
3 Post Office Box 589
4 Buhl, Idaho 83316-0589
5 Tel. No. (208) 543-4368
6 FAX No. (208) 543-4360
7 Attorneys for Rod Griffith, Howard Harder & Ted Harder
8 (GHI-DOC\3073STP.N18)pm
9

copy

10 BEFORE THE DEPARTMENT OF WATER RESOURCES
11 OF THE STATE OF IDAHO
12

13 * * * * *

14 APPLICATION FOR PERMIT NOS.) STIPULATION FOR WITHDRAWAL
15 47-08076 AND 47-08080) OF APPLICATION NO. 47-08080
16 IN THE NAME OF LEO E. and/or) AND WITHDRAWAL OF OBJECTIONS
17 JUDITH K. RAY) TO APPLICATION NO. 47-08076

18 * * * * *

19 The Applicants, LEO E. RAY and JUDITH K. RAY, and the Protestants, ROD
20 GRIFFITH, HOWARD HARDER and TED HARDER, being desirous to compromise and
21 adjust their positions in this matter now enter into the following:

22 IT IS HEREBY STIPULATED AND AGREED by the specified parties,
23 through their respective counsel, as follows:

24 1. In consideration of the covenants here contained, the Applicants
25 withdraw their Application No. 47-08080 for 50 cfs water from Deep Creek, tributary to the
26 Snake River and agree not to refile the same or any part thereof.

STIPULATION FOR WITHDRAWAL OF APPLICATION NO. 47-08080 AND
WITHDRAWAL OF OBJECTIONS TO APPLICATION NO. 47-08076 - 1

2. In consideration of the covenants here contained, the Protestants, ROD GRIFFITH, HOWARD HARDER and TED HARDER, withdraw their Protest to the Applicants' Application for Permit No. 47-08076 for the diversion of certain seeps, tributary of Deep Creek, for use for fish propagation purposes.

3. The parties further stipulate and agree that Application for Permit No. 47-08076 shall not be increased or otherwise enlarged and the points of diversion and point of use shall remain the same as set forth in the original application.

WHEREFORE, the parties hereto request that the Department of Water Resources enter an Order consistent with the actions specified herein.

DATED This 29th day of January, 1998.

APPROVAL:

Leo E Ray
LEO E. RAY

LLOYD J. and CURTIS R. WEBB, Attorneys

By [Signature]

LLOYD J. WEBB
Attorneys for Applicants

APPROVAL:

Rod Griffith
ROD GRIFFITH

FELTON & FELTON

By [Signature]

MICHAEL HOYT FELTON (SR.)
Attorneys for Rod Griffith, Howard Harder,
and Ted Howard

Howard Harder
HOWARD HARDER

Ted Harder
TED HARDER

STIPULATION FOR WITHDRAWAL OF APPLICATION NO. 47-08080 AND
WITHDRAWAL OF OBJECTIONS TO APPLICATION NO. 47-08076 - 2

LLOYD J. AND CURTIS R. WEBB
Attorneys at Law
155 2nd Avenue North
P.O. Box 1768
Twin Falls, ID 83303-1768
208/734-1616

Attorneys for:

Applicants

RECEIVED

JAN 30 1997

Department of Water Resources
Southern Region

Withdrawn
1/30/97 by Mr. Webb

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

* * * * *

APPLICATION FOR PERMIT NOS.	)	MOTION FOR ISSUANCE OF
47-08076 and 47-08080	)	SUBPOENA
IN THE NAME OF LEO E. and/or)	
JUDITH K. RAY)	

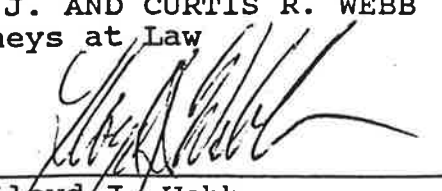
* * * * *

Consistent with the provision of IDAPA 37.01.01.525, the applicants, LEO E. RAY and JUDITH K. RAY, now request that the Department of Water Resources issue a subpoena compelling the attendance of Rod Griffith at the Pre-trial Hearing to be conducted in this matter on Thursday, January 30, 1997, at the hour of 1:00 p.m., then and there to give testimony on behalf of the applicants.

The contemplated testimony is limited in scope, and related only to the standing of the parties, an issue appropriately before the court at the Pre-trial conference.

DATED this 30th day of January, 1997

LLOYD J. AND CURTIS R. WEBB
Attorneys at Law

By 
Lloyd J. Webb
Attorney for Applicants

MOTION FOR ISSUANCE OF SUBPOENA 1

CERTIFICATE OF MAILING

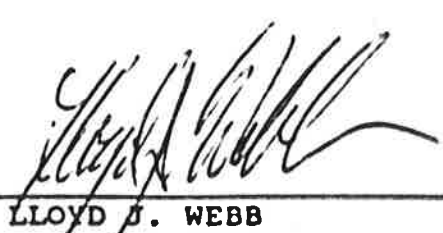
LLOYD J. WEBB, resident attorney, hereby certifies that on the 30th day of January, 1997, he served a true and correct copy of the within and foregoing MOTION FOR ISSUANCE OF SUBPOENA by depositing said copy in the United States Mails, postage prepaid, addressed to the following:

BOBBY FLEENOR
Hearing Officer
Department of Water Resources
222 Shoshone St. E.
Twin Falls, ID 83301

L. GLENN SAXTON
Chief, Water Allocation Bureau
Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720-9000

FRED KIPPES
3951 North 1100 East
Buhl, ID 83316

ROD GRIFFITH
4579 B River Road
Buhl, ID 83316



LLOYD J. WEBB

LLOYD J. AND CURTIS R. WEBB
ATTORNEYS AT LAW
188 SECOND AVENUE NORTH
P. O. BOX 1768
TWIN FALLS, ID 83303-1768
PHONE 208/734-1616

FELTON & FELTON
Attorneys at Law

Date Sent to S.O. JAN 31 1997

Attorneys at Law

Professional Center
1020 Main

Michael Hoyt Felton
Michael Morland Felton (Jr.)

Mailing Address:
Post Office Box 557
Burlingame, ID 83301-0557
(208) 543-4365 telephone
(208) 543-4360 telex

January 24, 1997

FAX TRANSMISSION TO (208) 736-3037

Allen Merritt, P.E.
Department of Water Resources
1341 Fillmore Street, Suite 200
Twin Falls ID 83301-3380

RECEIVED

JAN 24 1997

Department of Water Resources
Southern Region

Dear Allen:

RE: Applications No. 47-08076 & 08080 (Leo & Judith Ray)
Our File No. 3073

We are faxing herewith a copy of a stipulation that Lloyd Webb will be presenting to you, in fully executed form, before the pre-hearing conference scheduled for Thursday, January 30, 1997. If Lloyd gets this signed and delivered to you before January 30, 1997, do you see any need for my clients and me to attend the pre-hearing conference? Please advise.

Very truly yours,

Michael Hoyt Felton

MICHAEL HOYT FELTON (SR.)

MHF:pm
Enclosure

cc: Rod Griffith
Ted Harder
Howard Harder
Lloyd Webb, Esq.

1/24/97

I phoned Mr. Felton back & told him
if the agreement is executed that
it appears to me that they may not
need to come to conference.

1 FELTON & FELTON
2 1020 Main Street
3 Post Office Box 589
4 Buhl, Idaho 83316-0589
5 Tel. No. (208) 543-4368
6 FAX No. (208) 543-4360
7 Attorneys for Rod Griffith, Howard Harder & Ted Harder
8 (GHI-DOC\3073STP.N18)pm
9

10 BEFORE THE DEPARTMENT OF WATER RESOURCES
11 OF THE STATE OF IDAHO
12

13 * * * * *

14 APPLICATION FOR PERMIT NOS.	)	<u>STIPULATION FOR WITHDRAWAL</u>
15 47-08076 AND 47-08080	)	<u>OF APPLICATION NO. 47-08080</u>
16 IN THE NAME OF LEO E. and/or	)	<u>AND WITHDRAWAL OF OBJECTIONS</u>
17 JUDITH K. RAY	)	<u>TO APPLICATION NO. 47-08076</u>

18 * * * * *

19 The Applicants, LEO E. RAY and JUDITH K. RAY, and the Protestants, ROD
20 GRIFFITH, HOWARD HARDER and TED HARDER, being desirous to compromise and
21 adjust their positions in this matter now enter into the following:

22 IT IS HEREBY STIPULATED AND AGREED by the specified parties.
23 through their respective counsel, as follows:

24 1. In consideration of the covenants here contained, the Applicants
25 withdraw their Application No. 47-08080 for 50 cfs water from Deep Creek, tributary to the
26 Snake River and agree not to refile the same or any part thereof.

STIPULATION FOR WITHDRAWAL OF APPLICATION NO. 47-08080 AND
WITHDRAWAL OF OBJECTIONS TO APPLICATION NO. 47-08076 - 1

2. In consideration of the covenants here contained, the Protestants, ROD GRIFFITH, HOWARD HARDER and TED HARDER, withdraw their Protest to the Applicants' Application for Permit No. 47-08076 for the diversion of certain seeps tributary of Deep Creek, for use for fish propagation purposes.

3. The parties further stipulate and agree that Application for Permit No 47-08076 shall not be increased or otherwise enlarged and the points of diversion and point of use shall remain the same as set forth in the original application.

WHEREFORE, the parties hereto request that the Department of Water Resources enter an Order consistent with the actions specified herein.

DATED This _____ day of _____, 1996.

APPROVAL:

LLOYD J. and CURTIS R. WEBB, Attorneys

LEO E. RAY

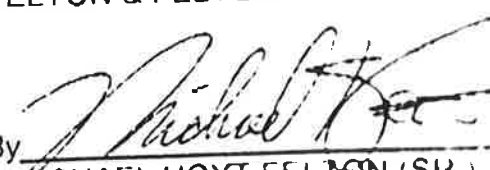
By _____
LLOYD J. WEBB
Attorneys for Applicants

APPROVAL:

FELTON & FELTON




ROD GRIFFITH

By 

MICHAEL HOYT FELTON (SR.)
Attorneys for Rod Griffith, Howard Harder
and Ted Howard



HOWARD HARDER



TED HARDER

STIPULATION FOR WITHDRAWAL OF APPLICATION NO. 47-08080 AND
WITHDRAWAL OF OBJECTIONS TO APPLICATION NO. 47-08076 - 2



State of Idaho

DEPARTMENT OF WATER RESOURCES

1341 Fillmore Street, Suite 200, Twin Falls, ID 83301-3380

Phone: (208) 736-3033 FAX: (208) 736-3037

PHILIP E. BATT
GOVERNOR

January 14, 1997

KARL J. DREHER
DIRECTOR

LLOYD J WEBB ESQ
155 2ND AVE NORTH
TWIN FALLS ID 83303

RE: Application for Permit Nos. 47-08076 & 47-08080 in
the name of Leo E. and/or Judith K. Ray

Dear Mr. Webb:

Thank you for your January 7, 1997 letter bringing to our
attention the name list error regarding the above
referenced matter. We have made the necessary
corrections to our mailing list.

We look forward to seeing you at the pre-hearing
conference scheduled for **Thursday, January 30, 1997 at
1:00 p.m.** to be held in our Twin Falls Office Conference
Room.

Please accept our apologies for any inconvenience this
omission may have caused you.

Very truly yours,

Allen D. Merritt, P.E.
Regional Manager

AM:MB

cc: Glen Saxton, IDWR-Boise

LLOYD J. AND CURTIS R. WEBB

LAWYERS

JAN 13 1997

LLOYD J. WEBB, CHARTERED*

CURTIS R. WEBB

*ALSO ADMITTED IN
UTAH AND ALASKA

Department of Water Resources

155 2ND AVENUE NORTH

P.O. BOX 1768

TWIN FALLS, ID 83303-1768

TELEPHONE 208/734-1616

FAX NO. 208/734-5769

January 7, 1997

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
ATTN: Allen Merritt
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720-9000

Re: Application for Permits Nos. 47-08076 & 47-08080
in the name of Leo E. and/or Judith K. Ray
Our File No. 4532-1

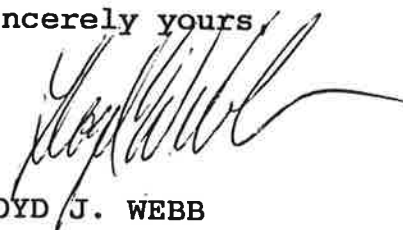
Dear Allen:

The Department continues to send notices and other information in the above matter to Lloyd Walker at my address (155 Second Avenue North, Twin Falls). Apparently, the Post Office delivers the material to Lloyd Walker at his address, so I don't see it.

Please have your people correct this situation. I, of course, represent Leo and Judith Ray, and the notices should come to me.

Fortunately, either my client or Mike Felton have forwarded the hearing information to me, and I expect to be present at the January 30, 1997 "pre-hearing conference".

Sincerely yours,



LLOYD J. WEBB

LJW:bc

cc: Department of Water Resources
222 Shoshone St. E.
Twin Falls, ID 83301

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATIONS)
FOR PERMIT NOS. 47-08076 & 47-08080)

NOTICE OF
PRE-HEARING CONFERENCE

LEO E. and/or JUDITH K. RAY,
Applicants)

SOURCE: Seep Tunnel,
Deep Creek
Tributary to Deep Creek,
Snake River

Evan Cox, Fred Kippes,
Protestants)

COUNTY: Twin Falls

On January 14, 1988 Leo E. and/or Judith K. Ray (applicants) filed Application for Permit No. 47-08076 and on January 22, 1998 applicants filed Application for Permit No. 47-08080 with the Department of Water Resources to appropriate the public waters of the State of Idaho. The Department received protests against the approval of said applications from Evan Cox, Shadow Springs, and the Idaho Department of Fish & Game. A Motion to Intervene was granted to Fred Kippes. Fish and Game subsequently withdrew its protest.

The Department has set the matter of protests for conference on Thursday, January 30, 1997 at 1:00 p.m. in the **Idaho Department of Water Resources Conference Room, 1341 Fillmore St - Suite 200; Twin Falls ID 83301-3380.**

The purpose of the conference is to formulate and simplify the issues, obtain admissions of fact and of documents which will avoid unnecessary proof, arrange for the exchange of proposed exhibits or prepared expert testimony prior to the hearing, limit the number of witnesses, consolidate the examination of witnesses, and advise the parties of the procedure which will be followed at any subsequent hearing.

The conference will be held in accordance with Chapter 2, Title 42, of the Idaho Code and the adopted Rules of Practice and Procedure of the Department of Water Resources.

The conference will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the conference, please advise the department within (10) days prior to the conference.

Dated this 30th day
of December, 1996


Allen D. Merritt, P.E.
Regional Manager

CERTIFICATE OF MAILING

I hereby certify that on the 30th day of December, 1996, a true and correct copy of the foregoing Notice of Pre-Hearing Conference was forwarded with all required charges prepared, by the method(s) indicated below, to the parties listed:

Mary Baldwin
Secretary

LEO E &/OR JUDITH K RAY
4647 D RIVER RD
BUHL ID 83316

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

Webb
LLOYD J WALKER ESQ
155 2ND AVE N
TWIN FALLS ID 83303

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

EVAN COX
1005 E 4100 N
BUHL ID 83316

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

TERRY WHITE
NW OF BUHL
BUHL ID 83316

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

ROD GRIFFITH
4579 B RIVER RD
BUHL ID 83316

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

TED HARDER
1022 E 4100 N
BUHL ID 83316L

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

FRED KIPPES
3951 N 1100 E
BUHL ID 83316

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

MICHAEL FELTON SR ESQ
PO BOX 589
BUHL ID 83316-0589

Hand delivered _____
U.S. Mail-Regular X
U.S. Mail-Certified _____
Fax _____

CONFERENCE AND HEARING PROCEDURE

APPLICATION FOR PERMIT ISSUES

Section 42-203A, Idaho Code, requires the department to consider the following issues in connection with an application for permit:

1. Will the proposed appropriation injure other water rights?
2. Is the water supply sufficient for the purpose for which it is sought to be appropriated?
3. Was the application made in good faith or for delay or speculative purposes?
4. Does the applicant have sufficient financial resources with which to complete the proposed project?
5. Is the proposed appropriation in the local public interest, which is defined as the affairs of the people in the area directly affected by the proposed use?
6. Is the proposed use contrary to conservation of water resources within the state of Idaho?

BURDEN OF PROOF

The applicant has the initial burden of proof for issues 1, 2, 3, 4, and 6 above and must provide evidence for the department to evaluate these criteria. The initial burden of proof on issue 5 above lies with both the applicant and protestant as to factors of which they are most knowledgeable and cognizant. The applicant has the ultimate burden of persuasion, however, for this issue.

PROCEDURE

The department generally conducts an informal conference with the parties to determine the issues and to try to settle a protested matter before a hearing is scheduled. If a hearing is held the department will issue a written decision based on the hearing record.

CONFERENCE

The purpose of a pre-hearing conference is to provide the opportunity for the parties and the department to familiarize themselves with a contested matter and to attempt to resolve the matter. At the conference, the department may also formulate and simplify the issues, identify documents to avoid unnecessary proof, exchange proposed exhibits or prepared testimony, limit witnesses, discuss settlement or make settlement offers, schedule hearings, establish procedure at hearing and address other matters that may expedite orderly conduct and disposition of the proceeding or its settlement. The department may issue a "pre-conference statement order" which requires response to the inquiries.

HEARING

The department will tape record the hearing. Copies of a hearing tape are available upon request and the payment of the cost of reproducing the tape. The hearing likely will be conducted by a hearing officer appointed by the Director rather than by the Director himself. If so, the hearing officer will prepare a recommended order for the Director's consideration. Parties can file exceptions to a recommended order, briefs in support of the exceptions or may request oral argument. Parties may seek judicial review of any final order issued by the Director. Parties may by written stipulation waive the right to a recommended order, particularly when a shortened decision process is desirable or necessary. Such a waiver does not eliminate any rights of the parties in connection with the final order of the Director and judicial review of the order.

EXHIBITS

A party who plans to offer an exhibit as part of the hearing record must provide a copy of the proposed exhibit to the parties and to the hearing officer. As part of the conference a date may be set by which exchange of exhibits and witness lists must occur.

EFFECT OF FAILURE TO APPEAR AT A CONFERENCE OR HEARING

Failure to appear at the time and place set for a conference or hearing by the applicant or protestant(s) may allow the department to dismiss without prejudice the protest(s) or the application. Any and all cost incurred by reason of such non-appearance may be assessed against such non-appearing party.

AMERICANS WITH DISABILITIES ACT

Any hearing scheduled will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the department within (10) days prior to the hearing.



IDAHO DEPARTMENT OF WATER RESOURCES
SOUTHERN REGION
222 SHOSHONE ST E
TWIN FALLS ID 83301
(208) 736-3033 FAX (208) 736-3037

PHILIP E BATT
GOVERNOR

KARL J DREHER
DIRECTOR

November 22, 1996

Leo E. & Judith K. Ray
4647 D River Rd
Buhl, ID 83316

RE: Protested Applications for Permit 47-08076 & 47-08080

Dear Mr. Ray:

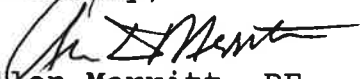
As you know the department has authorized an additional hearing into the matter of protested applications 47-08076 & 47-08080. Prior to any such hearing, I have been asked to arrange and conduct a pre-hearing conference. Since there are numerous parties involved and holiday season is upon us, this letter is an attempt initiate such a conference.

The purpose of the conference is to formulate and simplify the issues, obtain concessions of fact, identify documents to avoid unnecessary proof, arrange for the exchange of proposed exhibits and prepared testimony prior to the hearing and provide a copy to the hearing officer, identify and limit witnesses, discuss settlement offers, make settlement offers, schedule the hearing, establish procedure at the hearing and address other matters which may expedite the hearing or proceeding.

I request that you and those parties listed below contact me or leave message at my office within the next 10 days as to the times they may be available to meet in the month of December or early January so that I might send notice of the conference.

If you have questions, please feel free to contact our office.

Sincerely,


Allen Merritt, PE
Southern Region Manager

Parties: Lloyd J. Walker, 155 2nd Ave N, Twin Falls, 83303
Evan Cox, 1005 E 4100 N, Buhl, 83316
Terry White, NW of Buhl, Buhl, 83316
Rod Griffith, 4579 B River Rd, Buhl, 83316
Ted Harder, 1022 E 4100 N, Buhl, 83316
Fred Kippes, 3951 N 1100 E, Buhl, 83316
Michael Felton Sr., PO Box 589, Buhl, 83316-0589

CC: Glen Saxton, IDWR

47-08080

Webb



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

August 30, 1996

Lloyd J. Webb
155 2nd Avenue North
P.O. Box 1768
Twin Falls, ID 83303-1768

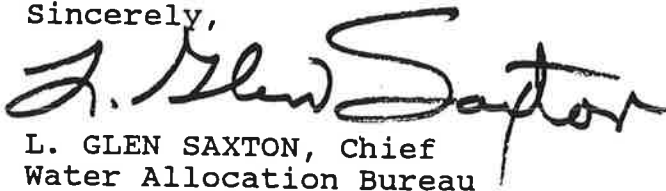
RE: APPLICATION FOR PERMIT NOS. 47-08076 AND 47-08080 IN THE
NAME OF LEO E. AND/OR JUDITH K. RAY

Dear Mr. Webb:

Enclosed is a copy of a response from Fred F. Kippes to the
Petition for Reconsideration of Recommended Order and Motion for
Additional Hearing which you submitted to the department on
August 16, 1996.

I am forwarding a copy of the response, since I can not
determine from the response itself that Mr. Kippes has served all
the parties of record as he is required to do by administrative
rule IDAPA 37.01.01302 (Rule of Procedure 302).

Sincerely,



L. GLEN SAXTON, Chief
Water Allocation Bureau

Encl: 1

c: IDWR - S. Region
Rod Griffith
Evan Cox
Ted Harder
Michael H. Felton
Fred Kippes

RECEIVED

SEP 01 1996

Department of Water Resources
Southern Region

47-08076
47-08080

RECEIVED

AUG 30 1996

August 28, 1996 Department of Water Resources

Department of Water Resources
State of Idaho
L. Glenn Saxton, Chief Officer
1301 N. Orchard Street
Statehouse Mail
Boise, ID 83720-9000

To Whom It May Concern:

Re: Petition for reconsideration of recommended order and motion for additional hearing. Permit #'s 47-08076 and 47-08080 submitted by LLOYD J. and Curtis Webb on behalf of Leo E. and/or Judith K. Ray.

Paragraph #1: I deny indicating that I would not resist an amended application by applicants.

Paragraph #2. Only common sense indicates that the downstream water users are going to suffer deteriorated water quality if these permits for water use would be granted.

Paragraph #4: Applicants' argument as to capacity of this water for fish propagation should not be a consideration. Damage to water quality should be the issue. To allow fish propagation waste to contaminate these upstream waters in the close proximity to Permit # 47-7458 would seem to put the Department of Water Resources of the State of Idaho in a precarious position.

Therefore consider this as a protest to Leo E. and/or Judith K. Ray's request for reconsideration re: Permit #'s 47-08076 and 47-08080

Respectfully submitted, August 23, 1996



Fred F. Kippes

FFK/bk

LLOYD J. AND CURTIS R. WEBB

LAWYERS

LLOYD J. WEBB, CHARTERED*

CURTIS R. WEBB

DARREN J. GUTHRIE

*ALSO ADMITTED IN
UTAH AND ALASKA

August 29, 1996

155 2ND AVENUE NORTH

P. O. BOX 1768

TWIN FALLS, ID 83303-1768

TELEPHONE 208/734-1616

FAX NO. 208/734-5789

RECEIVED

AUG 30 1996

BOBBY FLEENOR
Hearing Officer
Department of Water Resources
222 Shoshone St. E.
Twin Falls, ID 83301

Department of Water Resources
Southern Region

Re: Leo E. Ray and Judith K. Ray -- Application for Permit
Nos. 47-08076 and 47-08080 (Petition for
Reconsideration)
Our File No. 4532-1

Dear Mr. Fleenor:

As the enclosed request for extension discloses, I have been unable to prepare my statement of legal authorities as promised in support of Leo and Judith Ray's Petition for Reconsideration. I request that I be granted another week within which to accomplish that, which would mean that the legal authorities would be submitted to you on or before September 6, 1996.

If you have no problem with this request, please sign the document and advise me by returning a copy thereof. If there is a problem with this request, please give me a call.

Sincerely yours,



LLOYD J. WEBB

LJW:jg
Enc.

47-08076
47-08080

LLOYD J. AND CURTIS R. WEBB
Attorneys at Law
155 2nd Avenue North
P.O. Box 1768
Twin Falls, ID 83303-1768
208/734-1616

Attorneys for:

Applicants

RECEIVED

AUG 30 1996

Department of Water Resources
Southern Region

COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

* * * * *

APPLICATION FOR PERMIT NOS.)
47-08076 and 47-08080)
IN THE NAME OF LEO E. and/or)
JUDITH K. RAY)

REQUEST FOR EXTENSION OF
TIME WITHIN WHICH TO FILE
LEGAL STATEMENT

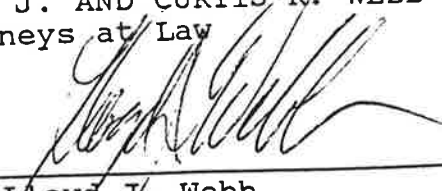
* * * * *

LEO E. RAY and JUDITH K. RAY, Applicants in the above matter, now request the Department that their counsel be given an extension of time within which to file a legal statement in support of Applicants' Petition for Reconsideration. Counsel had earlier advised the Department that he could have that legal statement to the Department by August 29, 1996. Because of his heavy workload, he has been unable to meet that deadline, but with the consent of the Department he will have it filed by September 6, 1996.

DATED this 29th day of August, 1996.

LLOYD J. AND CURTIS R. WEBB
Attorneys at Law

By


Lloyd J. Webb
Attorney for Applicants

REQUEST FOR EXTENSION OF TIME WITHIN
WHICH TO FILE LEGAL STATEMENT - 1

GRANT OF EXTENSION

At the request of the Applicants, and good cause appearing:

APPLICANTS ARE GRANTED to and including September 6, 1996, within which to file their statement of legal authorities in support of their Petition for Reconsideration.

DATED this _____ day of _____, 1996.

DEPARTMENT OF WATER RESOURCES
STATE OF IDAHO

LLOYD J. AND CURTIS R. WEBB
ATTORNEYS AT LAW
155 SECOND AVENUE NORTH
P. O. BOX 1768
TWIN FALLS, ID 83303-1768
PHONE 208/734-1616

REQUEST FOR EXTENSION OF TIME WITHIN
WHICH TO FILE LEGAL STATEMENT - 2

CERTIFICATE OF MAILING

LLOYD J. WEBB, resident attorney, hereby certifies that on the 29th day of August, 1996, he served a true and correct copy of the within and foregoing REQUEST FOR EXTENSION OF TIME WITHIN WHICH TO FILE LEGAL STATEMENT and (proposed) GRANT OF EXTENSION by depositing said copy in the United States Mails, postage prepaid, addressed to the following:

BOBBY FLEENOR
Hearing Officer
Department of Water Resources
222 Shoshone St. E.
Twin Falls, ID 83301

L. GLENN SAXTON
Chief, Water Allocation Bureau
Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720-9000

FRED KIPPES
3951 North 1100 East
Buhl, ID 83316

ROD GRIFFITH
4579 B River Road
Buhl, ID 83316



LLOYD J. WEBB

LLOYD J. AND CURTIS R. WEBB
Attorneys at Law
155 2nd Avenue North
P.O. Box 1768
Twin Falls, ID 83303-1768
208/734-1616

Attorneys for:

Applicants

RECEIVED

AUG 16 1996

Department of Water Resources
Southern Region

COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

* * * * *

APPLICATION FOR PERMIT NOS.	)	PETITION FOR RECONSIDERATION
47-08076 and 47-08080	)	OF RECOMMENDED ORDER AND
IN THE NAME OF LEO E. and/or	)	MOTION FOR ADDITIONAL HEARING
JUDITH K. RAY)	

* * * * *

The Applicants, LEO E. RAY and JUDITH K. RAY, now
Petition for Reconsideration of the Recommended Order of August
6, 1996, consistent with the provisions of 67-5243(3) Idaho
Code.

This Petition for Reconsideration is filed on account of
and for the reason that the Applicants believe that the
recommended Order is inappropriate given changes in the
Department's policies, the development of the Department of
Environmental Quality's Final Stage Waste Management Policy
regulations, and for further reasons specified in Applicants'
Brief in Support of the Petition for Reconsideration, which
Applicants propose to file within 14 days of the date of filing
of this Petition.

The Applicants further request Additional Hearing in
this matter for the reasons specified above, and for the
further reasons that follow:

PETITION FOR RECONSIDERATION OF RECOMMENDED ORDER AND
MOTION FOR ADDITIONAL HEARING - 1

47-08080

Original Forwarded to Fleenor 8/16/96

1. That the real party in interest as to the property and the facility which was the subject of the Kippes intervention (it should be noted that intervenor Kippes did not file a timely protest in this matter) has indicated that he would not resist the application as it is proposed to be amended by Applicants;

2. That recent studies and materials, referenced in the "Recommended Order", but rejected for consideration because proffered subsequent to the July 27, 1988 hearing, would be sufficient to convince the Department that no damage would result to downstream users and that the Application is well taken;

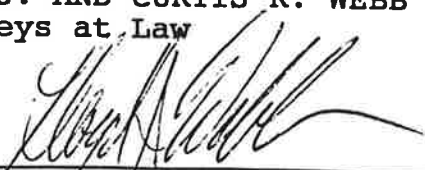
3. That Applicants are willing to drop the Deep Creek part of their filing and restrict their filing to the Seep Tunnel tributaries of Deep Creek;

4. That a study on the overall capacity of Deep Creek for fish installations is now available and would assist the Department in determining the sufficiency of the application.

This information was not available at the time of the 1988 hearing, but would be particularly significant in the disposition of the Application upon additional hearing.

RESPECTFULLY SUBMITTED this 15th day of August, 1996.

LLOYD J. AND CURTIS R. WEBB
Attorneys at Law


By: LLOYD J. WEBB
Attorney for Applicants

CERTIFICATE OF MAILING

LLOYD J. WEBB, resident attorney, hereby certifies that on the 15th day of August, 1996, he served a true and correct copy of the within and foregoing PETITION FOR RECONSIDERATION OF RECOMMENDED ORDER AND MOTION FOR ADDITIONAL HEARING by depositing said copy in the United States Mails, postage prepaid, addressed to the following:

BOBBY FLEENOR
Hearing Officer
Department of Water Resources
222 Shoshone St. E.
Twin Falls, ID 83301

L. GLENN SAXTON
Chief, Water Allocation Bureau
Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, ID 83720-9000

FRED KIPPES
3951 North 1100 East
Buhl, ID 83316


ROD GRIFFITH
4579 B River Road
Buhl, ID 83316

EVAN COX
1005 E. 4100 N.
Buhl, ID 83316

TERRY WHITE
NW of Buhl
Buhl, ID 83316

TED HARDER
1022 E. 4100 N.
Buhl, ID 83316

MICHAEL H. FELTON, ESQ.
Felton & Felton
1020 Main
Buhl, ID 83316



LLOYD J. WEBB

LLOYD J. AND CURTIS R. WEBB
ATTORNEYS AT LAW
185 SECOND AVENUE NORTH
P. O. BOX 1788
TWIN FALLS, ID 83303-1788
PHONE 208/734-1616



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

August 6, 1996

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

RE: In the matter of Application for Permit Nos. 47-08076 & 47-08080 in the name of Leo E. and/or Judith K. Ray

Dear Interested Party:

The accompanying order is a "**recommended order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order. 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 twenty-one (21) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

47-08076 Denied ✓
47-08080 Denied ✓

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, 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, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director 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 agency 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.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.

Sincerely,



L. GLEN SAXTON

Chief, Water Allocation Bureau

Enclosure

cc: IDWR - Region

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

IN THE MATTER OF APPLICATION FOR)
PERMIT NOS. 47-08076 AND 47-08080)
IN THE NAME OF LEO E. AND/OR)
JUDITH K. RAY)
_____)

RECOMMENDED ORDER

This matter came before the Idaho Department of Water Resources (department) in the form of protested applications for permit. When reviewing protested matters pending before the department in September 1995, department staff reviewed Application for Permit files 47-08076 and 47-08080 and determined that the department had conducted a hearing in the matter on June 21, 1988, but had not yet issued a decision and order. The delay in issuing the decision was directly related to a policy of the Division of Environmental Quality of the Idaho Department of Health and Welfare to not issue water quality certification for fish propagation facilities in the middle Snake River area until standards for discharge had been determined and established.

Upon contacting the parties in September 1995 to determine continuing interest in the applications, the applicant advised the department of his ongoing interest. Hence, the department has reviewed the water right files, the exhibits and the transcript of the hearing conducted in June 1988.

The transcript shows that Michael H. Felton (Felton), who represented the protestants, made a motion during the hearing seeking approval to call Don Chapman (Chapman) of Boise as an expert witness at a later date to testify in the matter, since Chapman was not present at the hearing. The department advised that it would take the motion under consideration.

The motion to allow Chapman to testify is denied, since Felton had ample opportunity to notify his witnesses before the hearing was held and since Felton offered no explanation why Chapman did not attend the hearing held on June 21, 1988.

Based on review of the record in this matter, the department recommends the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On January 14, 1988, Leo E. and/or Judith K. Ray (applicant) filed Application for Permit No. 47-08076 with the department proposing the year-round diversion of 12 cubic feet per second (cfs) of water from two (2) points of diversion from a seep tunnel tributary of Deep Creek to be used year-round for fish

propagation purposes. The proposed point of diversion is located within the SE1/4NW1/4SE1/4 Section 8, T10S, R14E, B.M. Twin Falls County, Idaho. The source actually consists of two (2) seep tunnels locally known as Cox Seep Tunnel and as an Unnamed Seep Tunnel.

2. On January 22, 1988, the applicant also filed Application for Permit No. 47-08080 with the department proposing the year-round diversion of 50 cfs of water from Deep Creek tributary to the Snake River to be used year-round for fish propagation purposes. The proposed point of diversion is located within the SE1/4NW1/4SE1/4 Section 8, T10S, R14E, B.M. Twin Falls County, Idaho. (Note: the "1/4" designations will be omitted from subsequent legal descriptions in this order).

3. Approval of the applications was subsequently protested by Evan Cox, Shadow Springs c/o Terry White and the Idaho Department of Fish and Game (Fish and Game). Fred Kippes (Kippes) was later granted intervention into the matter. Fish and Game subsequently withdrew its protest.

4. On June 21, 1988, the department conducted a hearing in the matter. The applicant was present and was represented by Lloyd J. Webb. Protestants Shadow Springs and Evan Cox were present and were represented by Michael H. Felton. Intervenor Fred Kippes was present and represented himself.

5. Issues which must be evaluated by the director of the department, whether an application is protested or not, are described in Section 42-203A(5), Idaho Code, and include the following:

- a. Whether an application will reduce the quantity of water under existing water rights.
- b. Whether the water supply itself is sufficient for the purposes intended.
- c. Whether an application is made in good faith and not for delay or speculative purposes.
- d. Whether an applicant has sufficient financial resources with which to complete the project.
- e. Whether the application conflicts with the local public interest.
- f. Whether the application is contrary to the conservation of water resources within Idaho.

6. Exhibits offered and accepted as a part of the record include the following:

- a. Applicant's Exhibit 1 - Photograph depicting Cox Seep Tunnel water source.

- b. Applicant's Exhibit 2 - Photograph depicting Unnamed Seep Tunnel water source.
- c. Applicant's Exhibit 3 - Photograph showing Deep Creek and the proposed hatchery site.
- d. Applicant's Exhibit 4 - Photograph showing Deep Creek.
- e. Applicant's Exhibit 5 - Photograph showing Deep Creek.
- f. Applicant's Exhibit 6 - Letter report dated April 11, 1988 to Leo Ray from Robert G. Piper.
- g. Protestant's Exhibit A - Curriculum Vitae (4 pages).
- h. Protestant's Exhibit B - June 20, 1988 Times News Article.
- i. Protestant's Exhibit C - List of Water Rights.

7. At the hearing, the department officially noticed certain information including water right records in department files and the previous decision of the department issued on September 18, 1979 in connection with Application for Permit No. 47-07507.

8. In the proposed fish propagation facility, the applicant intends to hatch eggs, grow fish, process fish and to produce about 150,000 to 200,000 pounds of fish annually. The applicant's proposed facility is upstream from the intervenor and the protestants.

9. The applicant's proposed facility is approximately 0.25 miles upstream from the fish propagation facility being constructed in 1988 by intervenor Kippes. The applicant's point of effluent discharge from either the Seep Tunnel or Deep Creek, however, could be as close as 150 feet upstream from the diversion intake of Kippes. Although there was conflicting testimony in the record, the elevation difference between the applicant's proposed point of effluent discharge in relation to the Kippes intake could vary in height from almost no elevation difference to several feet.

10. The point of diversion of protestant Shadow Springs (Terry White) is approximately 1.5 miles downstream from the applicant's proposed facility. The point of diversion of protestant Evan Cox is approximately 1.75 miles downstream from the applicant's proposed facility.

11. The water right of intervenor Kippes is represented by Permit No. 47-07458 which provides as follows:

Priority:	February 28, 1978
Source:	Deep Creek tributary to Snake River
Rate of div:	40 cfs
Pts of div:	NWNWNE Section 17, T10S, R14E, B.M.

SWSWNE Section 8, T10S, R14E, B.M.
Use: Fish propagation
Place of use: SWNE, SWSE Section 8, NWNE Section 17, both in
T10S, R14E, B.M.
Season of use: Year-round
Comment: - Proof of beneficial use of water was filed
with the department on August 31, 1988.

12. The water right of protestant Evan Cox is represented by License No. 47-07459 which provides as follows:

Priority: March 1, 1978
Source: Deep Creek tributary to Snake River
Rate of div: 20.97 cfs
Pts of div: NESW Section 32, T9S, R14E, B.M.
Use: Fish Propagation
Place of use: NESW Section 32, T9S, R14E, B.M.
Season of use: Year-round
Comment: - Facility volume is 48,000 cubic feet.

13. The water right of protestant Terry White is represented by Permit No. 47-07460 which provides as follows:

Priority: April 2, 1978
Source: Deep Creek tributary to Snake River
Rate of div: 40 cfs
Pts of div: Lot 4 (NWNW) Section 5, T10S, R14E, B.M.
Use: Fish Propagation
Place of use: Same as pt of div.
Season of use: Year-round
Comment: - Proof of beneficial use was filed with the
department on November 15, 1988.
- On September 25, 1991, Terry White assigned
the permit to Rodney J. Griffith and Carla J.
Griffith DBA Boswell Trout Farms.

14. The flow in Deep Creek at the applicant's point of diversion varies from about 30 cfs to about 200 cfs depending upon the time of year.

15. The main water quality parameters which influence fish culture and fish production are oxygen level, water temperature, settleable solids, and pathogens.

16. The applicant's expert witness, Robert Piper, prepared written comments (Applicant's Exhibit 6) assuming that the nearest fish propagation facility was located 1.75 miles downstream from the applicant's point of effluent discharge.

With respect to oxygen content, the applicant states:

Substantial aeration of the water is provided by numerous (sic) riffle areas in Deep Creek which has a drop of approximately 90 feet in the 1.75 miles to the

nearest downstream hatchery.

With respect to metabolic wastes, the applicant states:

It is unfeasible that ammonia contained in the proposed hatchery effluent will be detectable 1.75 below the discharge point.

17. The peak demand period for water for fish production in existing facilities diverting from Deep Creek and tributaries is during the February to April period when the stream flow of Deep Creek drops to about 30 cfs. The amount of water in Deep Creek substantially increases when water for irrigation is provided to adjacent lands by the Twin Falls Canal Company.

18. Annual fish production and/or facility holdings of the protestants and the intervenor are approximately as follows:

Terry White:	150,000 pounds of fish
Evan Cox:	100,000 pounds
Fred Kippes:	100,000 pounds (proposed in 1988)

19. The applicant has submitted schematic plans of the proposed fish propagation facility and has suggested general means by which the effect of an upstream fish hatchery on a downstream fish hatchery may be reduced.

20. The hearing record does not show that the applicant has applied to the Division of Environmental Quality of the Idaho Department of Health and Welfare for water quality certification in connection with the proposed project or to the Environmental Protection Agency for an NPDES permit for the effluent discharge.

21. Subsequent to the hearing, on July 27, 1988, the protestants offered to supplement the hearing record with an article entitled "Effects of Water Reuse on Rainbow Trout in Hatcheries" by Jack D. Larmoyeux and Robert G. Piper. The department rejected the offer of the protestants and has not considered the article in reaching the decision in this Recommended Order.

CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

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, 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 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. IDAPA Rule 37.03.08045.01.a.iii (Water Appropriation Rule 45.01.a.iii) provides as follows:

45. EVALUATION CRITERIA (Rule 45).

01. Criteria for Evaluating all Applications to Appropriate Water. The director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount or approved with conditions.

a. Criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. A proposed use will be determined to reduce the quantity of water under an existing water right (i.e. injure another water right) if:

iii. The quality of the water available to the holder of an existing water right is made unusable for the purposes of the existing user's right, and the water cannot be restored to usable quality without unreasonable effort or expense.

3. IDAPA Rules 37.03.08045.01.c.ii and 37.03.08045.01.c.iii (Water Appropriation Rules 45.01.c.ii and 45.01.c.iii) provide in part as follows:

45. EVALUATION CRITERIA (Rule 45).

01. Criteria for Evaluating all Applications to Appropriate Water. The director will use the following criteria in evaluating whether an application to appropriate unappropriated water or trust water should be approved, denied, approved for a smaller amount or approved with conditions.

c. Criteria for determining whether the application is made in good faith. The criteria requiring that the director evaluate whether an application is made in good faith or whether it is made for delay or speculative purposes requires an analysis of the intentions of the applicant with respect to the filing and diligent pursuit of the application requirements. ... An application will

be found to have been made in good faith if:

ii. The applicant is in the process of obtaining other permits needed to construct and operate the project; and

iii. There are no obvious impediments that prevent the successful completion of the project.

4. IDAPA Rule 37.03.08040.04.c. (Water Appropriation Rule 40.04.c) provides as follows:

40. PROCESSING APPLICATIONS FOR PERMIT AND REPROCESSING PERMITS (Rule 40).

04. Burden of Proof.

c. The applicant has the ultimate burden of persuasion for the criteria of Section 42-203A, Idaho Code, and the protestant has the ultimate burden of persuasion for the criteria of Section 42-203C, Idaho Code.

5. The Piper report (Applicant's Exhibit 6) was prepared assuming that the nearest fish propagation facility was located 1.75 miles downstream from the applicant's proposed facility rather than immediately below (0.25 miles) the proposed facility. The report also was prepared without regard to any specific level of water flow, is not site-specific to the applications, water sources, existing fish propagation uses and existing conditions on Deep Creek.

6. The plans of the proposed fish propagation facility submitted by the applicant are not definite enough to specifically reflect its impacts and implications on downstream fish propagation facilities. The record shows, however, that the proposed facility would injure the fish propagation operations of intervenor Kippes which is 0.25 miles or less downstream from the applicant's proposed facility due to increased nutrients, decreased oxygen and an increase in metabolic wastes such as ammonia in the water.

7. The applicant suggested ways which could reduce the effect of a proposed facility upon a downstream facility but did not specifically commit to construct and maintain such facilities or to implement specific operation measures.

8. The applications will reduce the quantity of water under existing water rights.

9. The applicant has sufficient financial resources with which to complete the project.

ANALYSIS

Applicant's Exhibit No. 6. prepared by the applicant's expert witness provides information based on the nearest fish propagation facility being located 1.75 miles downstream from the applicant's

proposed facility. In reality, the nearest fish propagation facility is that of intervenor Kippes, said facility being located 0.25 miles or less downstream from the applicant. Hence Applicant's Exhibit No. 6. is of limited value and is not persuasive in this matter.

The applicant objected to the offering by the protestants of post-hearing information in the form of an article titled "Effects of Water Reuse on Rainbow Trout in Hatcheries" by Jack D. Larmoyeux and Robert G. Piper but then offers for consideration a post-hearing report titled "Deep Creek Fish Farm Effluent Effects" dated December 1993. Subsequent to the hearing, the applicant also submitted more detail relative to plans of the proposed fish propagation facility and a draft of a report titled "Idaho Waste Management Guidelines for Aquaculture Operations." None of this post-hearing information is proper to consider in connection with the pending applications, since the information is ex-parte and the hearing record was not kept open for the submittal of such reports to be made a part of the record.

The applications and the record which has been created in this contested matter must be evaluated as the record was created and not with post-hearing ex-parte information.

The applicant has not met the required burden of proof relative to the applications.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Permit Nos. 47-08076 and 47-08080 in the name of Leo E. and/or Judith K. Ray are DENIED.

Signed this 6th day of August, 1996.


BOBBY D. FLEENOR
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of August, 1996, I mailed a true and correct copy, postage prepaid, of the foregoing **RECOMMENDED ORDER** to the following:

Leo E. & Judith K. Ray
4647 D River Rd.
Buhl, ID 83316

Terry White
NW of Buhl
Buhl, ID 83316

Michael H. Felton, Esq.
FELTON & FELTON
1020 Main
Buhl, ID 83316


Rod Griffith
4579 B River Rd.
Buhl, ID 83316

Lloyd J. Webb, Esq.
155 2nd Ave. N
Twin Falls, ID 83303

Ted Harder
1022 E 4100 N
Buhl, ID 83316

Evan Cox
1005 E 4100 N
Buhl, ID 83316

Fred Kippes
3951 N 1100 E
Buhl, ID 83316


JULIE L. YARBROUGH
Senior Secretary



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

March 25, 1996

Leo Ray
4647 D River Rd
Buhl, ID 83316

RE: Status of Applications 47-08076 & 47-08080

Dear Mr. Ray:

As you know, Glen Saxton forwarded the above referenced files to our office shortly after he spoke with you about the matter. Our office was to schedule a supplemental hearing into the protested matter as needed. I found that the hearing tapes were not included in the files. I assume the lack of tapes prevented Glen from issuing a decision. I was able to locate and copy the hearing transcription for Mr. Webb. I informed Glen and he requested the files be returned to the state office so that he can review the extensive hearing transcript. Once he reviews the complete file he will either draft a decision or direct me to schedule a supplemental hearing.

Sincerely

A handwritten signature in cursive script, appearing to read 'Allen Merritt'.

Allen Merritt, PE
Southern Region Manager

47-08080



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

October 18, 1995

RECEIVED

OCT 20 1995

Department of Water Resources
Southern Region

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

Evan Cox
Rural Route 3
Buhl, ID 83316

RE: PROTESTED APPLICATION FOR PERMIT NOS. 47-08076 AND 47-08080

Dear Mr. Cox:

Department files show that you are a protestant to the above referenced applications for permit which were filed in January 1988 by Leo Ray (applicant). The files also show that the department conducted a water right hearing in the matter in November 1988, but has not issued a final decision.

On September 19, 1995, I contacted the applicant to determine his continuing interest in the applications. He indicated he wanted to pursue the applications and also indicated that subsequent to the hearing, land ownership of the protestants has changed as follows:

- Fred Kippes sold his farm to Rod Griffith.
- Terry White sold his farm to Rod Griffith.
- Evan Cox sold his farm to Ted Harder, who has leased the land to Rod Griffith.

Please advise the department within thirty (30) days if the land ownership changes described above are not correct or if you wish to continue your protest. Your failure to timely respond will indicate that you do not wish to continue your protest.

The department will consider that Rod Griffith and Ted Harder are the successors-in-interest to the original protestants and will treat them as protestants, unless they withdraw their protests and so notify the department in writing.

If you have questions, please feel free to contact the department.

Sincerely,

L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR - S. Region
Leo Ray

47-08076-47-08080



State of Idaho

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Department of Water Resources
Southern Region

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

Fred Kippes
Route 2
3951 N. 1100 E.
Buhl, ID 83316

RE: PROTESTED APPLICATION FOR PERMIT NOS. 47-08076 AND 47-08080

Dear Mr. Kippes:

Department files show that you are a protestant to the above referenced applications for permit which were filed in January 1988 by Leo Ray (applicant). The files also show that the department conducted a water right hearing in the matter in November 1988, but has not issued a final decision.

On September 19, 1995, I contacted the applicant to determine his continuing interest in the applications. He indicated he wanted to pursue the applications and also indicated that subsequent to the hearing, land ownership of the protestants has changed as follows:

- Fred Kippes sold his farm to Rod Griffith.
- Terry White sold his farm to Rod Griffith.
- Evan Cox sold his farm to Ted Harder, who has leased the land to Rod Griffith.

Please advise the department within thirty (30) days if the land ownership changes described above are not correct or if you wish to continue your protest. Your failure to timely respond will indicate that you do not wish to continue your protest.

The department will consider that Rod Griffith and Ted Harder are the successors-in-interest to the original protestants and will treat them as protestants, unless they withdraw their protests and so notify the department in writing.

If you have questions, please feel free to contact the department.

Sincerely,

L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR - S. Region
Leo Ray

47-08076



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

October 18, 1995

RECEIVED

OCT 20 1995

Department of Water Resources
Southern Region

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

Shadow Spring
c/o Terry White
P.O. Box 267
Buhl, ID 83316

RE: PROTESTED APPLICATION FOR PERMIT NOS. 47-08076 AND 47-08080

Dear Mr. White:

Department files show that you are a protestant to the above referenced applications for permit which were filed in January 1988 by Leo Ray (applicant). The files also show that the department conducted a water right hearing in the matter in November 1988, but has not issued a final decision.

On September 19, 1995, I contacted the applicant to determine his continuing interest in the applications. He indicated he wanted to pursue the applications and also indicated that subsequent to the hearing, land ownership of the protestants has changed as follows:

- Fred Kippes sold his farm to Rod Griffith.
- Terry White sold his farm to Rod Griffith.
- Evan Cox sold his farm to Ted Harder, who has leased the land to Rod Griffith.

Please advise the department within thirty (30) days if the land ownership changes described above are not correct or if you wish to continue your protest. Your failure to timely respond will indicate that you do not wish to continue your protest.

The department will consider that Rod Griffith and Ted Harder are the successors-in-interest to the original protestants and will treat them as protestants, unless they withdraw their protests and so notify the department in writing.

If you have questions, please feel free to contact the department.

Sincerely,

L. Glen Saxton

L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR - S. Region
Leo Ray

47-08080



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

September 19, 1995

RECEIVED

SEP 21 1995

Leo E. Ray
Rt 3, Box 234
Buhl, ID 83316

Department of Water Resources
Southern Region

RE: PROTESTED APPLICATION FOR PERMIT NOS. 47-08076 AND 47-08080

Dear Mr. Ray:

The department of Water Resources (IDWR) is currently reviewing protested applications for permit which are pending before IDWR. Our files show that you have filed the above referenced applications which provide as follows:

Ident. no:	47-08076
Date of filing:	January 14, 1988
Source of water:	Seep Tunnel trib. to Deep Creek
Rate of div:	12 cubic feet per second (cfs)
Use:	Fish propagation

Ident. no:	47-08080
Date of filing:	January 22, 1988
Source of water:	Deep Creek trib. to Snake River
Rate of div:	50 cfs
Use:	Fish propagation

47-08080

Since the applications were subsequently protested, on June 21, 1988, the department conducted a hearing in the matter and on November 17, 1988, scheduled a viewing of the proposed project sites. The water right files do not indicate any further action or continuing activity associated with the pending applications. The remarks on both applications indicate that purchase of the Robert Baker property proposed as the place of use was contingent upon approval of the applications.

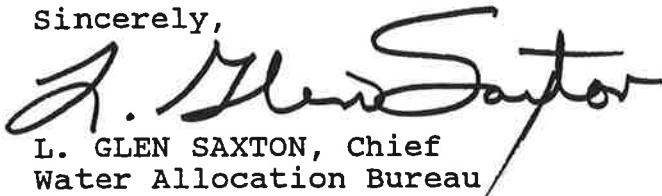
Since substantial time has passed subsequent to the filing of the applications and the hearing, it appears that one of two potential actions needs to occur in connection with the applications as follows:

1. If you are no longer actively pursuing the development proposed in the applications, please complete and return the enclosed relinquishment form. IDWR will then remove the applications from its records.

2. If you are actively pursuing the proposed development, you need to specifically advise IDWR in writing of your continued interest within thirty (30) days of the date of this letter. In addition, please specifically provide information to the department relative to your contingent purchase of the Robert Baker property.

If you do not timely respond to this letter, IDWR will reject the applications pursuant to Section 42-203A(5), Idaho Code, as being filed for speculative purposes. If you do timely respond and provide the required information, IDWR will further consider the applications, as appropriate. Feel free to contact this office or our Southern Regional Office in Twin Falls if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Glen Saxton". The signature is fluid and cursive, with the first name "L." and last name "Saxton" clearly distinguishable.

L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR - S. Region

Encl: 2