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RECEIVED

JUN 20 2012

DEPT. OF WATER RESOURCES
SOUTHERN REGION

June 20, 2012

Hand Delivered

Allen Merritt
Idaho Department of Water Resources
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301

RE: *Petition for Reconsideration of Preliminary Transfer Approval (Transfer No. 76658)*
(Thomas M. O'Gara Family Trust)

Dear Mr. Merritt:

I am writing to request reconsideration of the Idaho Department of Water Resources' ("Department") June 6, 2012 *Preliminary Order* approving Transfer No. 76658, in the name of the Thomas M. O'Gara Family Trust ("O'Gara"). In that decision, the Department approved O'Gara's *Second Amended Transfer*, seeking to combine two Permissible Places of Use ("PPU") into one large PPU.

In approving O'Gara's transfer, the Department placed the following conditions on all ground water rights:

The right holder shall make full beneficial use of all surface water rights available to the right holder for irrigation of the lands authorized to be irrigated under this right. The right holder shall limit the diversion of ground water under this right to those times when the surface water supply is not available or the surface water supply is not reasonably sufficient to irrigate the place of use authorized under this right.

If the surface water rights appurtenant to the place of use is (sic) abandoned, forfeited, sold, transferred, leased or used on any other place of use, this right to divert ground water shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department if a transfer is not required.

Through these remarks, the Department attempts to convert O’Gara’s ground water rights into supplemental water rights. Since there is no basis in law or fact for these remarks, they should be removed from the ground water rights.

A water right is a property right. I.C. § 55-101. As such, it cannot be taken without due process of law and just compensation. *Moon v. North Idaho Farmers Association*, 140 Idaho 536 (2004). This *Preliminary Order* constitutes a taking of O’Gara’s valuable ground water rights by unilaterally converting them into supplemental rights. This is made clear through the second condition quoted above, which prohibits O’Gara from using his ground water if the surface water is removed from the appurtenant property. In such an instance, O’Gara would be required to seek authorization from the Department before using his ground water rights.

The law does not support this action. Indeed, I have been unable to find any basis for this unilateral conversion to a supplemental ground water right. The transfer memo does not provide any such authority or discussion.¹ I discussed these conditions with Department employees, including Jean Robertson who prepare the draft *Preliminary Order* for your review and signature, and no one can identify any legal basis for the unilateral conversion of a primary ground water right to a supplemental ground water right.

The Department is a creature of statute, and is bound thereby. *Henderson v. Eclipse Traffic Control Flagging, Inc.*, 147 Idaho 628, 632 (2009) (“Administrative agencies are ‘creature[s] of statute’ and, therefore, are ‘limited to the power and authority granted [them] by the Legislature’”). Idaho Code § 42-222 provides the authority for reviewing transfers and frames the Department’s authority. It provides:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter.

For at least the following reasons, none of these considerations warrant the unilateral conversation of a ground water right to a supplemental right:

¹ Even if the Transfer Memo did discuss the unilateral conversion of ground water right to supplemental rights it would be in error. Furthermore, the Transfer Memo is merely a guide and does not hold the force of law.

- There is no claim of injury as a result of O’Gara’s ground water diversions, which have occurred since as early as 1946. Furthermore, these rights were recently decreed in the SRBA as primary water rights. There was never any assertion that the rights should have been supplemental.
- Maintaining the primary nature of these ground water rights will not result in an enlargement. The rights were decreed as primary rights and O’Gara does not challenge the acreage limitations included on the *Preliminary Order*, which are consistent with the partial decrees.
- Maintaining the primary nature of the ground water rights is “consistent with the conservation of water resources.” Again, O’Gara does not challenge the acreage limitations and the transfer maintains the diversion rates that were recently decreed in the SRBA. Those diversion rates were based on the development of primary ground water rights.
- The local economy will not be harmed by maintaining the primary nature of these ground water rights. Indeed, O’Gara has farmed the property, and will continue to farm the property, with these primary ground water rights.

The only basis for the unilateral conversion that I have been informed of is that the unilateral conversion is in the public interest. According to a June 15, 2012 email from Pam Skaggs (copy attached), the following is the basis for the unilateral conversion:

I know that the general idea is to preserve ground water for domestic, municipal or other uses that require higher quality of water. In general, the Department of Water Resources believes it is good policy to require continued use of the surface water because:

- It conserves the ground water for other uses that require clean water.
- It minimizes the number of wells, which are potential conduits for ground water contaminants.
- It maintains the long-term economic viability of the surface water providers.
- Because the canals leak, it provides a continued supply of water to recharge our aquifers

These assertions, however, cannot support the drastic action of unilaterally converting a ground water right to a supplemental water right.

Idaho code defines “local public interest” as follows: “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource.” I.C. § 42-202B(3). As stated above, the O’Gara water rights were recently decreed in the SRBA. An SRBA decree is “conclusive” as to the nature and extent of the water right. I.C. §

42-1420. Based on these decrees, the ground water rights are not supplemental. None of the “people in the area directly affected” by this conclusion ever challenged the SRBA claims or recommendations. Likewise, no water users have challenged O’Gara’s transfer application.

Further, there is no claim that the continued diversion of O’Gara’s ground water rights as primary sources will deplete the ground water supply. That notwithstanding, these ground water rights, which have priority dates are early as June 15, 1946, are lawful and decreed appropriations. The rights have been diverted and will continue to be diverted.

There are no additional wells requested through this transfer.

The “long-term economic viability of the surfaced water providers” will not be impacted by O’Gara’s continued use of the ground water rights as primary sources. Indeed, O’Gara, or his predecessors in interest, have diverted and used this ground water since as early as 1946. There is no basis to assert that now, after over 50 years of ground water diversions, the “economic viability” of the surface water providers is a risk as a result of these diversions. For the same reason, the assertion that aquifer recharge from surface diversions must continue is without merit.

Unilaterally converting these ground water rights to supplemental water rights also depletes the value of O’Gara’s ground water rights. These rights were decreed as primary sources. Now, through the Department’s unilateral action, the rights are supplemental. Primary water rights have greater value and flexibility. Indeed, according to the Transfer Memo, at pages 27-29, any attempt to move the supplemental right will be faced with a presumption that the change will result in an enlargement of the supplemental right. O’Gara would be forced to rebut that presumption at a great cost of time and money – even though the rights were partially decreed without any such limitation.

According to Ms. Skaggs, “If the goal is to preserve a separate groundwater use, the rights should be maintained on separate or specific acres without surface water rights.” The demand that O’Gara redesign his entire irrigation system to segregate the surface and ground water supplies is not support by any law.

Finally, the unilateral conversion to of the rights to supplemental ground water rights is not consistent with the historical use of these rights – as reflected in the partial decrees. Indeed, much of this land was never irrigated with surface water prior to the installation of the current irrigation system. Further, some of the areas are still irrigated solely by ground water as they have not been connected to the irrigation system.

Neither the law nor the facts support the Department’s unilateral conversion of O’Gara ground water rights to supplemental rights. Accordingly, the conditions should be removed from each ground water right.

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Allen Merritt
June 20, 2012
Page 5

Yours truly,



Paul L. Arrington

PLA/jn

cc: Tom O'Gara
Erick Powell