



State of Idaho

DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way • Boise, Idaho 83705-5082

Phone: (208) 334-2190 • Fax: (208) 334-2348 • Web Site: www.idwr.idaho.gov

May 14, 2012

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

Far Marel LLC
Viel Gluck LLP
Ben Fatto Limited Partnership
Cardon Haitt Investments LLC
SMT Investors Limited Partnership
1223 S Clearview Ave Ste 103
Mesa AZ 85209

Eric J Orr
1355 S 10th E
Mountain Home ID 83647

RE: Complaint—Aquifer Level Decrease/Use of Ground Water

Dear Parties:

Recently, the Idaho Department of Water Resources (Department) received a complaint regarding the use of ground water for irrigation on parcels located at Twp.02S, Rge 05E, Section 11, SE and NE quarters. Our records show that ground water right no. 61-12112 is applicable to the property, and your investment group is the property owner. The complaint alleges that aquifer levels continue to decline injuring a near-by domestic well and that ground water is being improperly utilized at your location.

Critical Ground Water Area

The irrigated lands and wells are located in the designated Cinder Cone Critical Ground Water Area (1981). A "*critical ground water area*" is defined as any ground water basin or designated part hereof, not having sufficient ground water to provide a reasonably safe supply of irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal...., ref. Idaho Code §42-233a. Unfortunately after 30 years of restricted ground water development, aquifer levels generally continue to decline.

On-site Investigation

On April 13, 2012, Department staff met on-site with Mr. Orr. Pump and well data was compiled from the locations along with irrigation system, acreage, and management practices information. Utilizing the data/information, staff made theoretical calculations and estimated that your typical water use appeared to be within the flow and volume parameters of water right no. 61-12112. However, staff found that flow meters were either inoperable or missing on the wells as required on the water right conditions of approval, see attached.

Page 2.

Water Right No. 61-12112

Excavated Small Ponds

It was noted during the field investigation there were several small excavated ponds on the property. A water right is not required if the water stored is diffused surface water or field waste water for reuse. Diffused surface water is water on the land surface resulting from precipitation and snowmelt prior to entering a natural water course. However if the ponds are storing water from a natural water course, a water right is required. The ponds should be filled in if they are no longer of use.

Illegal Diversion/Use of Water

Idaho Code §42-351 in part states:

(1) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right. (2) It is unlawful for any person to divert or use water in substantial violation of any provision of this title or any rule, permit, condition of approval or order issued or promulgated pursuant to this title that is related to the diversion or use of water. (3) Upon investigation of available information, the Director of the Department of Water Resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B.....

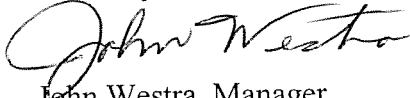
Given water right no. 61-12112 conditions of approval and the complaint, the following actions are required by the Department:

*-Install operable instantaneous flow rate and total volume meters on both wells on or before **July 1, 2012**. The Department shall be notified by written notice the meters have been installed. A listing of Department approved flow meters is attached.*

*-Monthly readings of both wells flow rates (cfs) and total volume (acre-feet) shall be recorded. The records/data will be made available to the Department upon request. Bear in mind the total instantaneous diversion rate from both wells should not exceed **2.78 cfs**, nor a total combined annual volume of **992.0 acre feet**.*

Should you have further questions, please contact me at the Western Regional Office, phone 334-2190. I appreciate Mr. Orr's cooperation in working with my field staff.

Sincerely,



John Westra, Manager.

Enclosure: proof no. 61-12112, critical map, IC 42-233a, 42-351, 42-1701B, flow meter list.
Cc: J. Scheff

Idaho Department of Water Resources
List of approved full profile Electromagnetic Flow meters *
March 2012

Manufacturer	Model	Type	Manufacturer Installation recommendations*
Siemens	Mag 5100 W	Full profile Electro-Magnetic	5 upstream and 3 downstream diameters
Seametrics	AG 2000	Full profile Electro-Magnetic	2 upstream and 1 downstream diameters
McCrometer	Ultra Mag	Full profile Electro-Magnetic	5 upstream and 2 downstream diameters
Badger	M2000	Full profile Electro-Magnetic	5 upstream and 2 downstream diameters
Khrone	Enviromag 2000	Full profile Electro-Magnetic	5 upstream and 2 downstream diameters
Rosemount	8705	Full profile Electro-Magnetic	5 upstream and 2 downstream diameters
Burkert	8054/8055	Full profile Electro-Magnetic	3 upstream and 2 downstream diameters

The above list of flow meter manufacturers performed at or above IDWR minimum acceptable standards for accuracy when installed in piping distances that met or exceeded minimum straight run piping requirements specified by IDWR. These approved flow meters were subject to testing (http://www.idwr.idaho.gov/WaterManagement/WaterMeasurement/DOCs/Vendor%20Notice%20for%20USULabtesting_Final.docx) requirements outlined by IDWR and conducted by staff from Utah State's NIST traceable lab in Logan Utah during the spring of 2011. Water users looking for guidance on what meters to install should use this list as a reference and or starting point when researching which meter best fits your application.

*Installation requirements may vary from manufacturer to manufacturer, please be aware that IDWR staff and or consultants in the field conducting flow meter calibration work assume no responsibility for improperly installed flow meters. Check with the manufacture of the meter for specific information related to straight piping requirements.

The approved list may change as more and more manufacturers subject their meters for testing. Manufacturers may also have other meters in the future that will be required to be tested at USU for accuracy prior to inclusion on this approved list.

IDWR was not provided testing results from individual flow meters tested by USU. Only a pass/fail statement was issued to IDWR after testing was completed.

This list may change at future dates based on additional meters meeting IDWR testing requirements

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 61-12112

WATER RIGHT NUMBER: 61-12112

<u>Owner Type</u>	<u>Name and Address</u>
Original Owner	WESTERN IDAHO PRODUCTION CREDIT ASSN
	, ID
Original Owner	HAYWOOD P HONEYCUTT JR PO BOX 451 MOUNTAIN HOME, ID 83647 (208)587-3978
Previous Owner	EMERSON INVESTMENTS LLC 1223 S CLEARVIEW AVE STE 103 MESA, AZ 85209
Current Owner	FAR MAREL LLC 1223 S CLEARVIEW AVE STE 103 MESA, AZ 85209 480-222-5800
Current Owner	VIEL GLUCK LLP 1223 S CLEARVIEW AVE STE 103 MESA, AZ 85209 480-222-5800
Current Owner	BEN FATTO LIMITED PARTNERSHIP 1223 S CLEARVIEW AVE STE 103 MESA, AZ 85209
Current Owner	CARDON HIATT INVESTMENTS, LLC 1223 S CLEARVIEW AVE STE 103 MESA, AZ 85209
Current Owner	SMT INVESTORS LIMITED PARTNERSHIP 1223 S CLEARVIEW AVE STE 103 MESA, AZ 85209

Priority Date: 04/20/1979

Basis: Decreed

Status: Active

<u>Source</u>	<u>Tributary</u>
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GROUND WATER

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	04/01 to 10/31	2.780 CFS	
	<u>Total Diversion:</u>	2.780 CFS	

Location of Point(s) of Diversion

GROUND WATER	NE1/4SE1/4	Sec. 11, Twp 02S, Rge 05E, B.M.
ELMORE County		
GROUND WATER	NE1/4NE1/4	Sec. 11, Twp 02S, Rge 05E, B.M.
ELMORE County		

IDAHO DEPARTMENT OF WATER RESOURCES
Water Right Report 61-12112

Place of Use

IRRIGATION

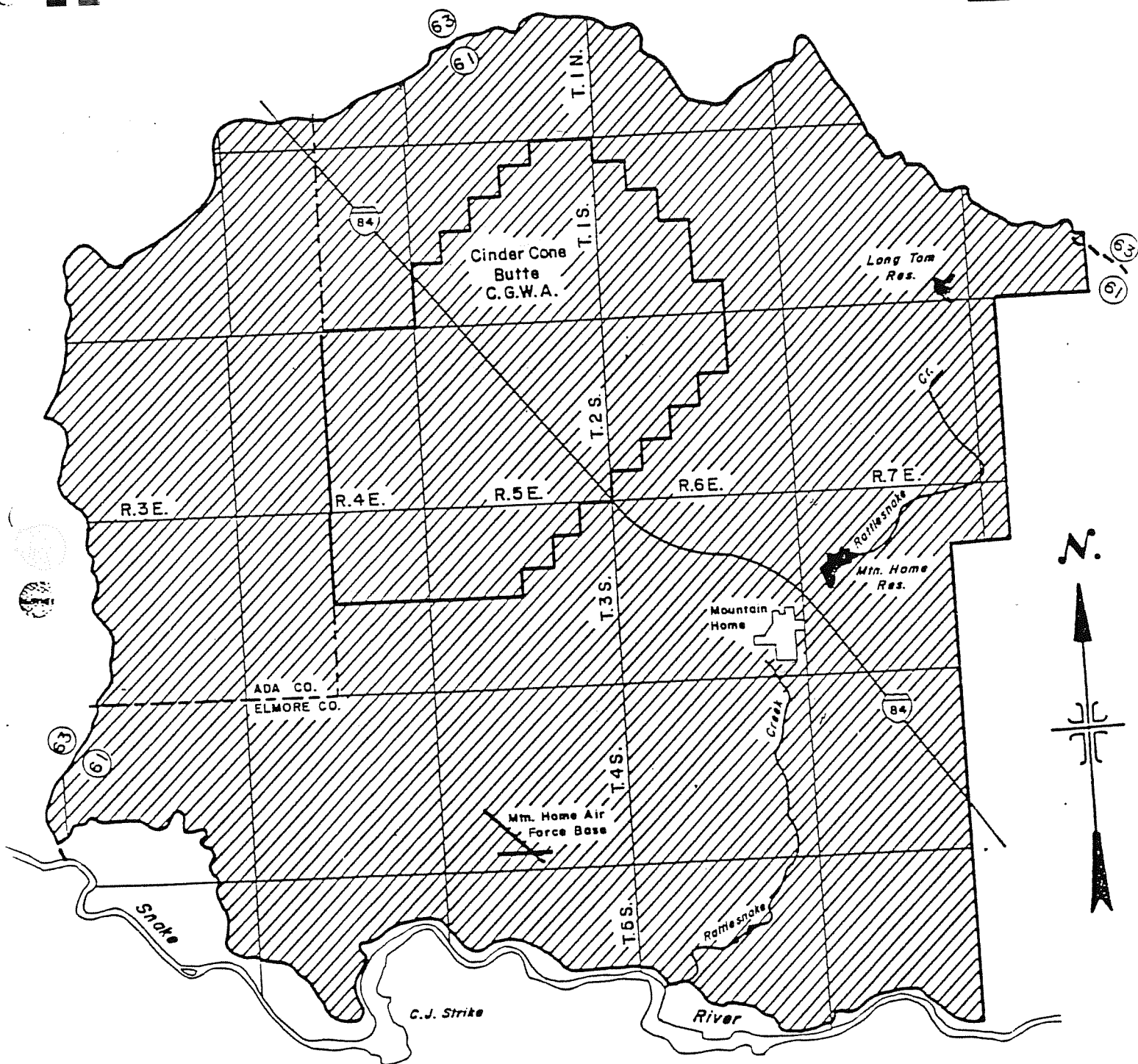
Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
02S	05E	11	40.0	38.0	40.0	40.0									40.0	40.0	40.0	40.0	318.0

Total Acres: 318

Conditions of Approval:

1. X27 This right is limited to the irrigation of 248 acres within the place of use described above in a single irrigation season.
2. X61 The period of use for the irrigation described in this approval may be extended to a beginning date of 3/15 and an ending date of 11/15 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before 4/1 and after 10/31 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date of this approval.
3. Prior to diversion of water under this right, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.
4. The total instantaneous diversion of water from all points of diversion under this right shall not exceed 2.78 cfs, nor total combined annual volume of 992.0 af.
5. T19 Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

Remarks:

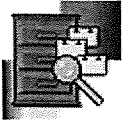


LEGEND

 Groundwater Area

 Hydrologic Basin No.

MOUNTAIN HOME GROUNDWATER MANAGEMENT AREA
(Designated Nov. 9, 1982)



Idaho Statutes

TITLE 42

IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 17

DEPARTMENT OF WATER RESOURCES -- WATER RESOURCE BOARD

42-1701B. ENFORCEMENT PROCEDURE -- NOTICE -- CONSENT ORDER -- CIVIL ACTION. (1) Authority to commence actions. The director of the department of water resources is authorized and may commence and pursue enforcement actions to remedy the designated violations set out in title 42, Idaho Code.

(2) Notice. When the director commences an administrative enforcement action the notice of violation shall be served upon the alleged violator in person or by certified mail. The notice of violation shall identify the alleged violation and shall specify each provision of the designated chapter, rule, permit, condition of approval or order which has been violated. The notice of violation shall state the remedy, including any demand to cease and desist, restoration and mitigation measures, and the amount of any civil penalty the director seeks for redress of the violation. Factors the director may consider in seeking the appropriate remedy include the impact of the violation and whether the violation was willful, a repeat violation for which the violator had been given a prior written warning, or the violator has otherwise refused to comply with the department's lawful directives. The notice of violation shall inform the person to whom it is directed of an opportunity to confer with the director or the director's designee in a compliance conference concerning the alleged violation.

(3) Response. A written response may be required within fourteen (14) days of the receipt of the notice of violation by the person to whom it is directed. If a recipient of a notice of violation contacts the department within fourteen (14) days of the receipt of the notice, the recipient shall be entitled to a compliance conference. The conference shall be held within twenty-one (21) days of the receipt of the notice unless a later date is agreed upon between the parties. If a compliance conference is not requested, the director may proceed with a civil enforcement action as provided in this section.

(4) Compliance conference and consent order. The compliance conference shall provide an opportunity for the recipient of a notice of violation to explain the circumstance of the alleged violation and, where appropriate, to present a proposal for remedying the damage caused by the violation and assuring future compliance. If the recipient and the director agree on a plan to remedy damage caused by the alleged violation and to assure future compliance, they may enter into a consent order formalizing their agreement. The consent order may include a provision providing for payment of any agreed civil penalty. The consent order shall be effective immediately upon signing by both parties and shall preclude a civil enforcement action for the same alleged violation. If a party does not comply with the terms of the consent order, the director may seek and obtain in any appropriate district court, specific performance of the consent order and other relief as authorized by law. If the parties cannot

agree to a consent order within fifty-six (56) days after the receipt of the notice of violation, or if the recipient does not request a compliance conference, the director may commence and prosecute a civil enforcement action in the district court in accordance with this section.

(5) Civil enforcement actions.

(a) The director may initiate a civil enforcement action through the attorney general as provided in this section. Civil enforcement actions shall be commenced and prosecuted in the district court in and for the county in which the alleged violation occurred, and may be brought against any person who is alleged to have substantially violated any provision of title 42, Idaho Code, or any rule promulgated pursuant to that title. The action may be brought to compel compliance with provisions of title 42, Idaho Code, or rules promulgated pursuant to that title. The director shall not be required to prosecute an administrative enforcement action before initiating a civil enforcement action.

(b) Nothing in this section shall preclude employees of the department designated by the director from issuing Idaho uniform citations or written administrative orders directing persons to cease and desist as authorized by law.

(c) If the person who is the subject of the notice of violation fails to cease and desist the activity or activities constituting the alleged violation within the time limits set in the notice of violation, the director may seek, by and through the attorney general, injunctive relief in the district court pending the outcome of the administrative enforcement action.

(d) In an action brought against a person for diverting water without having obtained a valid water right to do so, the director need not allege or prove that irreparable injury to the state or to other water users will occur should the preliminary injunction not be issued or that the remedy at law is inadequate, and the preliminary injunction or permanent injunction shall issue without those allegations and without that proof.

(6) Penalties.

(a) Any person determined in a judicial civil enforcement action to have substantially violated any designated provision of title 42, Idaho Code, or any rule promulgated pursuant to that title, shall be liable for a civil penalty not to exceed ten thousand dollars (\$10,000) per violation or one hundred fifty dollars (\$150) per day for a continuing violation, whichever is greater; except that persons determined to be in violation of section 42-351, Idaho Code, shall be liable for a civil penalty not to exceed:

(i) For nonirrigation uses, fifty dollars (\$50.00) per one-tenth (0.1) cubic feet per second of water or part thereof diverted per calendar day, or fifty dollars (\$50.00) per two tenths (0.2) of an acre foot of water or part thereof diverted to storage, up to a maximum penalty of fifty thousand dollars (\$50,000) per year for water illegally used or diverted;

(ii) For irrigation uses, three hundred dollars (\$300) annually for each acre irrigated, in whole or in part, by the illegal use or diversion.

(b) Civil penalties shall not be assessed for violations that have occurred more than twelve (12) months prior to the issuance of the notice of violation. The court shall determine the amount of the penalty based upon the willfulness of the violation, the economic value obtained by the violator and the damage to public resources and

other water right holders. A method of recovery of the penalty shall be a civil enforcement action in and for the county where the violation occurred.

(c) All civil penalties collected under this section shall be paid into the water right[s] enforcement account established pursuant to section 42-1778, Idaho Code.

(d) Parties to an administrative enforcement action may agree to a civil penalty as provided in this subsection.

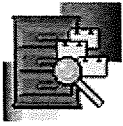
(7) No action taken pursuant to this section shall relieve any person from any civil liability and damages that may exist for injury or damage resulting to others.

(8) Upon request of the director, it shall be the duty of the attorney general to institute and prosecute civil enforcement actions pursuant to this section.

History:

[42-1701B, added 1998, ch. 173, sec. 8, p. 607; am. 2003, ch. 165, sec. 2, p. 468.]

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Idaho Statutes

TITLE 42

IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 2

APPROPRIATION OF WATER -- PERMITS, CERTIFICATES, AND LICENSES -- SURVEY

42-233a "CRITICAL GROUND WATER AREA" DEFINED -- PUBLIC HEARINGS -- PUBLICATION OF NOTICE -- GRANTING OR DENIAL OF APPLICATION -- APPEAL. "Critical ground water area" is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

Upon the designation of a "critical ground water area" it shall be the duty of the director of the department of water resources to conduct a public hearing in the area concerned to apprise the public of such designation and the reasons therefor. Notice of the hearing shall be published in two (2) consecutive weekly issues of a newspaper of general circulation in the area immediately prior to the date set for hearing.

In the event an area has been designated as a "critical ground water area" and the director of the department of water resources desires to remove such designation or modify the boundaries thereof, he shall likewise conduct a public hearing following similar publication of notice prior to taking such action.

When a "critical ground water area" is designated by the director of the department of water resources, or at any time thereafter during the existence of the designation, the director may approve a ground water management plan for the area. The ground water management plan shall provide for managing the effects of ground water withdrawals on the aquifer from which withdrawals are made and on any other hydraulically connected sources of water.

In the event an application for permit is made with respect to an area that has not been designated as a critical ground water area the director of the department of water resources shall forthwith issue a permit in accordance with the provisions of section 42-203A and section 42-204, Idaho Code, provided said application otherwise meets the requirements of such sections; and further provided that if the applicant proposes to appropriate water from a ground water basin or basins in an amount which exceeds ten thousand (10,000) acre-feet per year either from a single or a combination of diversion points, and the director determines that the withdrawal of such amount will substantially and adversely affect existing pumping levels of appropriators pumping from such basin or basins, or will substantially and adversely affect the amount of water available for withdrawal from such basin or basins under existing water rights, the director may require that the applicant undertake such recharge of the ground water basin or basins as will offset that withdrawal adversely affecting existing pumping levels or water rights.

In the event an application for permit is made in an area which has

been designated as a critical ground water area, if the director of the department of water resources from the investigation made by him on said application as herein provided, or from the investigation made by him in determining the area to be critical, or from other information that has come officially to his attention, has reason to believe that there is insufficient water available subject to appropriation at the location of the proposed well described in the application, the director of the department of water resources may forthwith deny said application; provided, however, that if ground water at such location is available in a lesser amount than that applied for the director of the department of water resources may issue a permit for the use of such water to the extent that such water is available for such appropriation.

The director may require all water right holders within a critical ground water area to report withdrawals of ground water and other necessary information for the purpose of assisting him in determining available ground water supplies and their usage.

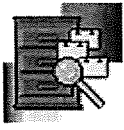
The director, upon determination that the ground water supply is insufficient to meet the demands of water rights within all or portions of a critical ground water area, shall order those water right holders on a time priority basis, within the area determined by the director, to cease or reduce withdrawal of water until such time as the director determines there is sufficient ground water. Such order shall be given only before September 1 and shall be effective for the growing season during the year following the date the order is given.

Any applicant dissatisfied with the decision of the director of the department of water resources may appeal to the district court in the manner provided for in section 42-237e, Idaho Code.

History:

[42-233a, added 1951, ch. 200, sec. 9, as added by 1953, ch. 182, sec. 5, p. 277; am. 1963, ch. 216, sec. 2, p. 623; am. 1967, ch. 187, sec. 1, p. 616; am. 1978, ch. 366, sec. 2, p. 956; am. 1995, ch. 286, sec. 1, p. 949; am. 2000, ch. 85, sec. 5, p. 185.]

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Idaho Statutes

TITLE 42 IRRIGATION AND DRAINAGE -- WATER RIGHTS AND RECLAMATION

CHAPTER 3 APPROPRIATION OF WATER -- CANCELATION OF PERMITS

42-351. ILLEGAL DIVERSION OR USE OF WATER -- ENFORCEMENT PROCEDURE -- INJUNCTIVE RELIEF. (1) It is unlawful for any person to divert or use water from a natural watercourse or from a ground water source without having obtained a valid water right to do so, or to divert or use water not in conformance with a valid water right.

(2) It is unlawful for any person to divert or use water in substantial violation of any provision of this title, or any rule, permit, condition of approval or order issued or promulgated pursuant to this title that is related to the diversion or use of water.

(3) Upon investigation of available information, the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.

(4) Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.

History:

[42-351, added 1986, ch. 313, sec. 8, p. 774; am. 1988, ch. 83, sec. 3, p. 145; am. 1994, ch. 450, sec. 5, p. 1438; am. 1998, ch. 173, sec. 4, p. 602; am. 2003, ch. 165, sec. 1, p. 467.]

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