



State of Idaho

DEPARTMENT OF WATER RESOURCES

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COPY

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

July 21, 2008

Michael D. Ferguson
PO Box 413
Rexburg, ID 83440

RE: Consent Order and Agreement; Notice of Violation Dated February 26, 2008

Dear Mr. Ferguson:

Please find enclosed a Consent Order and Agreement (Agreement) regarding the Notice of Violation dated February 26, 2008 that the Idaho Department of Water Resources (Department) sent to you. This Agreement is being sent to you following several emails and telephone conversations with your attorney, Rob Harris, between March 5 and July 3, 2008, and the compliance conference held between your attorney and myself on July 10, 2008. I believe the facts, terms, and conditions of the attached agreement are consistent with what was agreed to or negotiated in these telephone conversations.

Please carefully review and consider the terms and conditions of this proposed Agreement. If you continue to agree with the terms and conditions, please sign the document and return it directly to me as soon as possible. I will then execute the agreement on behalf of the Department and return a copy of the original with signatures to you. The agreed upon civil penalty is due to the Department within twenty-one (21) days of the execution of the agreement.

If you have any further concerns or questions about the proposed Agreement, please call me directly or submit written comments to me at the office listed on this letterhead. I look forward to your prompt reply and a final resolution of this matter. Thank you once again for your prompt cooperation in this matter.

Respectfully,

Tim Luke
Manager, Water Distribution Section

Cc Ernie Carlsen, Water District 110 Watermaster
Rob Harris, Holden, Kidwell, Hahn & Crapo, PLLC
John Homan, Idaho Deputy Attorney General
Don Parker and Kirk Jacobs, Jefferson Clark GWD

JUL 23 2008

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO
CONSENT ORDER AND AGREEMENT

In the matter of Notice of Violation dated February 26, 2008 issued to Michael D. Ferguson pursuant to Section 42-1701B, Idaho Code.

Findings of Fact

- 1) Michael D. Ferguson (Ferguson) is the owner of record for lands situated in the NE1/4 and SW1/4 of Section 25, Township 8 North (T8N), Range 33 East (R33E) and the NW1/4 of Section 30, T8N, R34E. Ferguson owns ground water rights 31-4117, 31-10405A, and 31-10405B that authorize irrigation of 338 acres in the NE1/4 and the SW1/4 of Section 25, T8N, R33E and the NW1/4 of Section 30, T8N, R34E.
- 2) On April 9, 2007, the watermaster of Water District No. 110 sent a notice to Ferguson advising that approximately 95 acres located within the area described in Finding 1 were irrigated in 2006 without valid water rights. The 95 acres were shown on a map attached to the notice. The notice advised Ferguson that a search of water rights on record at the Idaho Department of Water Resources (Department) found no water rights appurtenant to the lands in question. The watermaster advised Ferguson to cease and desist from further irrigation of the 95 acres until valid water rights were obtained for the land. Ferguson was further advised that a copy of the notice was forwarded to the Department for potential administrative enforcement action.
- 3) After receiving the watermaster's notice, Ferguson visited the watermaster and discussed possible solutions to the watermaster's notice. The visit revealed that system changes had occurred under the places of use for the water rights referenced in Finding 1 above since the time the rights were licensed and/or decreed in the Snake River Basin, but that the actual total number of acres irrigated in 2006 under the three rights was about 368 acres, or an enlargement of about 30 acres. Following that visit, Ferguson initiated efforts with the watermaster and Department representatives to file a water right transfer application to both correct the irrigated place of use under the rights and limit the total number of acres to the authorized 338 acres.
- 4) On May 11, 2007, Ferguson filed with the Department water right transfer application no. 73538 to correct the place of use under the three rights referenced in Finding 1 and limit the actual irrigated land to the maximum 338 acres authorized by the rights.
- 5) On August 28, 2007, the Department approved water right transfer application no. 73538 as described in Finding 4 above.
- 6) On November 21, 2007, the Department provided notice to Ferguson that it may issue a Notice of Violation for any unauthorized use found in 2006 and 2007 associated with the watermaster's letter from April 9, 2007.

- 7) On February 26, 2008, the Department sent Ferguson a Notice of Violation (NOV) concerning the unauthorized use of water on the 30 acres in 2006. The Department's notice also alleged that approximately 13 acres may have been irrigated in 2007 in excess of the 338 authorized acres. The NOV required Ferguson to provide restitution to replace the amount of water illegally diverted from the Eastern Snake Plain Aquifer in 2006 and 2007 by setting aside and curtailing diversion of ground water on a minimum of 43 acres during 2008, and pay a civil penalty of nine thousand dollars (\$9,000).
- 8) On or about March 5, 2008, Ferguson's attorney, Rob Harris, contacted the Department concerning Ferguson's NOV and to discuss the need for any compliance conference. On March 21, 2007, Mr. Harris corresponded with the Department via e-mail to explain that the Department's allegation about the 13 acres of unauthorized use in 2007 was not correct, that Mr. Ferguson had brought his water use in compliance in 2007 by filing the water right transfer one month after receiving the watermaster's notice, and by installing pivot stops on one of his pivots to limit the total irrigated acres to 338 acres. On March 21, 2008, the Department returned e-mail correspondence to Mr. Harris indicating that it would not pursue any further action regarding the potential unauthorized use of the 13 acres in 2007, but recommended that a compliance conference still be held regarding the unauthorized enlargement that occurred in 2006.
- 9) On July 10, 2008, a compliance conference was held between Ferguson's representative and attorney, Mr. Harris, and a Department representative, Tim Luke. At this conference, Mr. Harris explained that Ferguson would provide the restitution required by the NOV since Ferguson had purchased a separate farm in 2005 that was enrolled in the Federal Crop Reserve Program (CRP) and therefore not irrigated in 2005 through 2007. Ferguson also is not irrigating this ground in 2008 even though the CRP agreement expired at the end of 2007. The CRP land in question is covered by ground water right no. 31-4089, which authorizes irrigation of 98 acres in the NE1/4 of Section 29, T8N, R34E. During the conference Mr. Harris also emphasized the very prompt and diligent actions his client took in 2007 to bring his water use in compliance with his water rights. During the conference, Mr. Harris also provided evidence that Mr. Ferguson had not acquired the land and water rights described in Finding 1 above until November of 2003. However, review of aerial and satellite imagery during the conference confirmed that some of the irrigation system changes and water right enlargement had not occurred until 2004, or after Ferguson had purchased the land and appurtenant water rights.
- 10) Review of aerial and satellite imagery from 2006 and 2007 confirm that the 98 acres under right 31-4089 in the NE1/4 of Section 29, T8N, R34E was not irrigated in 2006 and 2007. Additionally, Mr. Harris provided a title deed to the Department confirming Ferguson's purchase of the land to which right no. 31-4089 is appurtenant in 2005.

It is hereby ordered and agreed that:

Terms of Agreement

- 1) Ferguson agrees to irrigate only those lands authorized as the place of use shown on approved Transfer No. 73538 for water rights 31-4117, 31-10405A, and 31-10405B in the NE1/4 and the SW1/4 of Section 25, T8N, R33E and the NW1/4 of Section 30, T8N, R34E.
- 2) Restitution for the unauthorized irrigation of 30 acres in 2006 will be considered accomplished by the concurrent set-aside during 2006 of 30 acres located in the NE1/4 of Section 29, T8N, R34E, and authorized by ground water right no. 31-4089.
- 3) Payment of an agreed civil penalty in the amount of five hundred dollars (\$500) is payable to the Idaho Department of Water Resources within twenty-one days (21) days of the execution of this agreement for the violation identified in the Notice of Violation dated February 26, 2008. The penalty amount compensates the Department for time and resources spent bringing this matter into compliance.
- 4) The Department suspends payment of eight thousand, five hundred dollars (\$8,500) civil penalty, which is the remaining maximum penalty authorized by law for an illegal diversion of approximately 30 acres less the amount identified in term 3 above. This penalty or any portion may be re-imposed for Ferguson's failure to fully comply with the terms of this agreement.
- 5) This agreement does not limit the Department or the Watermaster of Water District No. 110 to seek future compliance or regulation of said water use for other issues not directly related to the unauthorized use in 2006.

Dated this _____ day of _____, 2008

Tim Luke, Manager
Water Distribution Section
Idaho Department of Water Resources

CONSENT

Respondent acknowledges, in general, the facts set forth during the conference and accepts fully the terms and conditions of this Order. These terms shall become effective upon execution by the parties. Respondent waives any right to contest this Order and consents to the issue hereof.

Signed this _____ day of _____, 2008

Michael D. Ferguson