

LAW OFFICES OF

RACINE OLSON NYE BUDGE & BAILEY
CHARTERED

201 E. CENTER STREET
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

www.racinelaw.net

SENDER'S E-MAIL ADDRESS:

tjb@racinelaw.net

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
ERIC L. OLSEN
CONRAD J. AIKEN
RICHARD A. HEARN, M.D.
DAVID E. ALEXANDER
LANE V. ERICKSON
PATRICK N. GEORGE
SCOTT J. SMITH
STEPHEN J. MUHONEN
BRENT L. WHITING
JUSTIN R. ELLIS
JOSHUA D. JOHNSON
JOHANTHON S. BYINGTON
DAVE BAGLEY
CAROL TIPPJ VOLYN
THOMAS J. BUDGE
CANDICE M. MCHUGH
JONATHAN M. VOLYN
MARK A. SHAFFER

BOISE OFFICE

101 SOUTH CAPITOL
BOULEVARD, SUITE 208
BOISE, IDAHO 83702
TELEPHONE: (208) 393-0011
FACSIMILE: (208) 433-0167

IDAHO FALLS OFFICE

477 SHOUP AVENUE
SUITE 203A
IDAHO FALLS, ID 83402
TELEPHONE: (208) 528-6101
FACSIMILE: (208) 528-6109

COEUR D'ALENE OFFICE

250 NORTHWEST
BOULEVARD, SUITE 106A
COEUR D'ALENE, ID 83814
TELEPHONE: (208) 765-6888

ALL OFFICES TOLL FREE
(877) 232-6101

LOUIS F. RACINE (1917-2008)
WILLIAM D. OLSON, OF COUNSEL

August 13, 2009

Tim Luke
Idaho Department of Water Resources
Post Office Box 83720
Boise, Idaho 83720-0098

SENT VIA EMAIL
Tim.Luke@idwr.idaho.gov

Re: Notice of Violation – PEP, LLC

Dear Tim:

This firm has been retained by PEP, LLC ("PEP") concerning the Notice of Violation and Order to Cease and Desist you sent dated July 31, 2009, which PEP received Tuesday, August 4, 2009. We think this matter will resolve itself once you are brought current on the circumstances of the alleged violation, and therefore provide the following explanation.

PEP decided early this year that it would like to install a center pivot and bring new ground under irrigation using water rights appurtenant to nearby pivot corners. PEP identified 114 irrigated acres to transfer to the new pivot. Sixty of those acres have been in the CRP program and are appurtenant to property adjoining the new pivot. The other fifty-four acres are located two to three miles east of the new pivot and have been actively irrigated. Enclosed herewith is a map depicting the acres being dried up to provide water for the new pivot.

PEP hired Thompson Engineering to perform the requisite ESPA Model analyses and to prepare and file a transfer application with the IDWR. Thompson Engineering ran the ESPA Model, found that the proposed transfer will not injure other water rights, and prepared and filed a transfer application with the IDWR on May 14, 2009.

Upon confirming that the ESPA Model shows no injury to other water rights, many water users would have determined it was safe to accomplish the transfer. However, PEP elected to further protect itself by placing the water rights into the Water Supply Bank and renting the

rights back out of the Bank for use under the new pivot until the transfer is approved. PEP's Water Supply Bank applications were filed May 4, 2009.

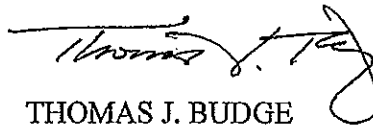
Since the subject water rights have been actually used or held in CRP, PEP reasonably expected no problem leasing them into the Water Supply Bank. Likewise, PEP reasonably expected no problem renting the rights back out from the Bank for use under the new pivot since the ESPA Model shows no injury to other rights. On that basis, PEP planted and made other preparations to irrigate under the new pivot this year.

It came as a great surprise to PEP to discover in late July that the IDWR had not accepted its Water Supply Bank or transfer applications. I understand the IDWR refused to accept the applications due to a concern that the rights had been forfeited for non-use. However, I believe that concern has now been put to rest. Blake Jordan of the IDWR's Eastern Region office inspected the property last week and was shown sound evidence that PEP has in fact been irrigating the corners and other ground (not including the CRP corners) from which water is being transferred to the new pivot. Blake was shown tracks from the "corner catcher" that was used to irrigate the corners, as well as the corner catcher itself which has been removed now that the corners are dried up. With confirmation that PEP's water rights have not been forfeited, I presume the Water Supply Bank applications can be processed and approved without delay.

In sum, PEP has irrigated no more acres than are authorized under its water rights. Nor did PEP attempt to circumvent the IDWR when it undertook to improve its operation by installing a new pivot. Rather, PEP hired a technical expert to run the ESPA Model and prepare and file appropriate applications with the IDWR. While the ESPA Model shows that the transfer will not injure other water rights, PEP assumed the expense of placing the water rights through the Water Supply Bank until the transfer is approved.

For these reasons, we do not think any fine is warranted, and ask that you withdraw the Notice of Violation, contingent upon PEP's water rights being accepted into the Water Supply Bank. Please advise whether this is acceptable. If not, PEP would like to schedule a compliance conference, and requests that its Water Supply Bank applications be promptly accepted and processed in the meantime.

Respectfully,



THOMAS J. BUDGE

cc: Ernie Carlson, Water District 120 Watermaster (via email)
John Homan, Idaho Deputy Attorney General (via email)
Tim Deeg, Aberdeen-American Falls Ground Water District (via email)
PEP, LLC (via email)

PEP, LLC

