

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

IN THE MATTER OF APPLICATIONS FOR	)	
PERMIT TO APPROPRIATE WATER NOS.	)	ORDER DENYING
15-7273, 15-7274, AND 15-7275 IN THE	)	PETITION FOR
NAME OF M. J. DAVIS MEMORIAL	)	RECONSIDERATION
LIMITED PARTNERSHIP	)	

On December 16, 2005, M.J. Davis Memorial Limited Partnership ("MJ Davis") filed three applications for permit to appropriate water with the Idaho Department of Water Resources ("IDWR"). IDWR determined the applications were not complete, and returned them to MJ Davis. On January 4, 2006, MJ Davis refilled the applications with IDWR.

IDWR assigned water right numbers 15-7273, 15-7274, and 15-7275 to the applications. IDWR published notice of the applications. The applications were protested by Samaria Water and Irrigation Company ("Samaria Irrigation"), Dee's, Inc., the Samaria Recreation and Cemetery Districts, and several residents of the City of Samaria.

On November 14, 2006, IDWR conducted a hearing regarding the protests.

On May 3, 2007, IDWR issued a preliminary order approving application to appropriate water no. 15-7275, and denying applications to appropriate water nos. 15-7273 and 15-7274.

On May 16, 2007, MJ Davis timely filed a Petition for Reconsideration.

Appropriation from Private, Artificial Channels

The hearing officer denied applications nos. 15-7273 and 15-7274 because the applications "locate as proposed points of diversion a Samaria Irrigation delivery canal channel location" and "IDWR cannot approve a point of diversion from an existing canal." MJ Davis argues that the hearing officer should have conditionally approved the applications and allowed a period of time to obtain "access to the water source." The argument also implies that, at some point during duration of the permit development period, the permits would be amended to identify the Samaria Irrigation points of diversion from Rose Bud Creek and Dry Pine Creek as the permitted points of diversion.

Idaho Code § 42-101 states that "waters of the state, when flowing in their natural channels . . . are the property of the state" and that the "right to use the waters of the state for useful or beneficial purposes is recognized and confirmed."

In the case of *Rabido v. Furey*, 33 Idaho 56, 190 P. 73 (1920), Furey argued that the court should recognize a beneficial use water right perfected by diversion from an artificial channel constructed by Rabidos. In refusing to recognize the water right, the Idaho Supreme Court stated:

Whether or not appellant obtained any right to the water by his attempted appropriation depends upon whether the water was subject to appropriation at the place and in the manner in which he attempted to appropriate it. The [statutory language] indicates that water is subject to appropriation only when flowing in its natural channel and that it must be appropriated therefrom.

The specific question upon which we pass in this case is whether the water in question, which respondents caused to flow down the canyon and into the ditch which they had constructed, and from which appellant diverted it, was flowing in its natural channel and was diverted therefrom by appellant. In view of the evidence . . . we answer this question in the negative. . . . It is perfectly clear that the ditch out of which appellant diverted the water was not its natural channel.

MJ Davis was responsible for identifying a point of diversion in its applications on Dry Pine Creek and on Rose Bud Creek. The Department cannot authorize a point of diversion from the delivery canals of Samaria Irrigation.

Futile Call

Conclusions of Law nos. 12 and 13 stated the following regarding a possible futile call by Samaria Irrigation:

12. The hearing officer will not address the issue of futile call. The testimony established that water is available, at times, in the upper reaches of Thomas Davis Creek and would not reach the headgates of Samaria Irrigation. Nonetheless, the determination of a futile call is fact dependent. Futile call is determined during the administration of water rights not at the time of determining whether there is water available for appropriation.

13. There is not yet a water district created for administration of water from Thomas Davis Creek. As a result, a watermaster cannot regulate water based on principles of futile call. In this approval, the availability of water will be determined based on the actual surface water flow that is available or not available at the points of diversion. If Samaria Irrigation District cannot divert water at its point of diversion, then MJ Davis can divert the water, to the extent it can be beneficially used.

Both Conclusion no. 5 and Conclusion no. 12 use the plural phrase “points of diversion.” Use of the plural phrase “points of diversion” in Conclusion no. 5 reflects some uncertainty by the hearing officer whether Samaria Irrigation has a single point of diversion or more than one point of diversion from Thomas Davis Creek. The phrase “points of diversion” refers to Samaria

Irrigation's point or points of diversion from Thomas Davis Creek. In the conditions requiring Samaria Irrigation to install a measuring device and provide access, the requirement applies to all Samaria Irrigation points of diversion from Thomas Davis Creek.

In the order, the hearing officer wrote, as a condition of approval:

The water right holder may only divert water from Thomas Davis Creek when: (a) the flow of Thomas Davis Creek exceeds the flow rate claimed in Samaria Irrigation amended claim no. 15-4066 at Samaria Water and Irrigation Company's point of diversion; or (b) at any time Samaria Water and Irrigation Company is not diverting its full flow rate under amended claim no. 15-4066 and excess water is flowing past Samaria Water and Irrigation Company's point of diversion; or (c) **at any time Samaria Water and Irrigation Company cannot divert water at its point of diversion and the water right holder can divert and beneficially use the water in Thomas Davis Creek.** (Emphasis added).

The authorization for diversion by MJ Davis when "Samaria Water and Irrigation Company cannot divert water at its point of diversion and the water right holder can divert and beneficially use the water in Thomas Davis Creek" was a condition that addressed the issue of injury and sufficiency of the water supply. The phrase "point of diversion" refers to Samaria Irrigation points of diversion from Thomas Davis Creek. The condition was not intended to define how a futile call would be administered. The record did not contain sufficient facts for the hearing officer to determine in the preliminary order the locations where Samaria Irrigation could not beneficially use water. The hearing officer will not define in the preliminary order what constitutes a futile call. The preliminary order does not prevent MJ Davis from seeking a determination of a futile call in the future, however.

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by M.J. Davis Memorial Limited Partnership is **Denied**.

DATED this 6th day of June, 2007.



GARY SPACKMAN
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of June, 2007, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Order Denying Petition for Reconsideration and Explanatory Information sheet

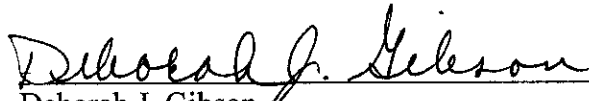
M J DAVIS MEM LTD PARTNERSHIP
C/O RANDALL C BUDGE
RACINE OLSON
PO BOX 1391
POCATELLO ID 83204-1391

SAMARIA WATER & IRRIGATION CO
C/O ROGER D LING
LING ROBINSON & WALKER
PO BOX 396
RUPERT ID 83350-0396

MICHAEL W OLSEN
DEE'S INCORPORATED
777 EAST 2100 SOUTH
SALT LAKE CITY UT 84106

SAMARIA RESIDENTS REC &
CEMETERY DISTRICTS
C/O JOHN EVANS
5071 S 4600 W
MALAD ID 83252

IDWR - EASTERN REGION
900 N SKYLINE DR STE A
IDAHO FALLS ID 83402-6105


Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau