

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

IN THE MATTER OF APPLICATION)
FOR EXCHANGE IN THE NAME OF)
DKJ FARMS LLC.)

PRELIMINARY ORDER

On February 22, 2007, DKJ Farms LLC ("applicant") filed with the Department of Water Resources ("IDWR") an application for exchange ("the application" or "the exchange") of water to be leased from the Fremont-Madison Irrigation District ("District") with the waters from Moody Creek.

IDWR published notice of the proposed application on March 15 and March 22, 2007 in the Standard Journal.

IDWR received timely protests against the approval of said application from the following individuals:

- a) George M. Brown ("Brown") on March 26, 2007, who has a domestic use from Moody Creek under decree 22-10005.
- b) R. Scott Wood ("SWood") on March 29, 2007, who waters stock from Moody Creek under SRBA claim 22-13686.
- c) Trent Wood ("TWood") on March 30, 2007, who has four domestic uses downstream of the applicant's diversion on Moody Creek.

IDWR received a late protest on from the Friends of Moody Creek ("Friends") on April 5, 2007. IDWR considered the late protest as a petition to intervene and Friends were allowed to intervene in this matter as a full party to this contested case. Friends are represented by Thomas Budge, attorney.

By letter dated April 10, 2007, IDWR acknowledged receipt of the protests. IDWR set the matter for hearing on June 5, 2007 in Rexburg, Idaho.

On June 1, 2007, prior to the date of the scheduled hearing, the applicant entered into a "Settlement Agreement" with Friends and filed a withdrawal of protest with IDWR. The Settlement Agreement provided that:

- 1. Friends would withdraw their protest of the Exchange for the 2007 irrigation season upon the terms and conditions of the agreement. In the event that IDWR grants the Exchange for multiple irrigation seasons, the applicant agreed that Friends be entitled to renew its protest of the Exchange of the 2008 irrigation season and subsequent irrigation seasons, which if protested would terminate the Exchange such that DKJ Farms would be required to re-apply for another exchange of water if desired.

2. The applicant agreed that the Exchange water would only be used on grain crops and that it would not be diverted from Moody Creek after July 15.
3. Friends and the applicant agreed to explore long-term solutions to preserve Moody Creek flows, which may include the transfer of Moody Creek water utilized by DKJ Farms to a ground water source. If such a transfer were achieved the applicant agreed to pay additional pumping costs that may be incurred as a result of such a transfer.

On June 5, 2007, IDWR conducted a hearing in this matter. The applicant appeared by and through its attorney, Jerry Rigby. SWood, TWood and Brown appeared but were not represented by counsel.

At the hearing, the hearing officer took official notice of the exchange file, water right records including SRBA claims and recommendations, stream flow records, water delivery records and past decisions of IDWR that may bear on this application.

The applicant offered 7 exhibits into the record. All protestants stipulated to the admission of these exhibits. The applicant's exhibits considered by the hearing officer are listed as follows:

Applicant's Exhibits	Description
1	USGS Moody Creek Hydrograph
2	Moody Creek Monitoring Report 2003
3	Powerpoint presentation on "Normal" Hydrologic Regime of Moody Creek
4	SRBA Recommendations for 22-594, 22-4195, 22-13479 and 22-265E
5	Topographic Map of area
6	Consent Agreement dated 5/18/07 between IDWR and Jeppesens
7	Moody Creek Stream Inventory Report 2005 & 2006

At the hearing, Brown offered 3 exhibits into the record. The applicant stipulated to the admission of these exhibits. The protestant's exhibits considered by the hearing officer are listed as follows:

Protestant's Exhibits	Description
A	Show Cause Order 10/28/2002
B	Spackman letter to Jeppesen 9/8/2006
C	Groen letter to Brown 2/13/2007

After reviewing the official file and the evidence submitted at the hearing, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On February 22, 2007, the applicant filed with IDWR an application for exchange of 300 acre-feet of Fremont-Madison Irrigation District storage water with the waters of Moody Creek. The applicant proposes delivery of the Henrys Fork water stored in Island Park Reservoir into the "Cross-Cut Canal" and discharge of the storage water through the Cross-Cut Canal into the Teton River in exchange for diversion of natural flow water from Moody Creek, a tributary of the Teton River. The confluence of the Cross Cut Canal and the Teton River is located upstream from the confluence of Moody Creek and the Teton River.
2. The applicant proposes to divert water from Moody Creek at an existing point of diversion located in the NESENW¹ of Section 21, T5N, R41E. The applicant proposes to irrigate lands within Sections 16, 20 and 21, T5N, R41E with the water diverted from Moody Creek. These lands are included within the permissible place of use defined below.*
3. Fremont-Madison Irrigation District historically makes available unallocated or excess storage to water users within their district through the Fremont-Madison Irrigation District rental pool. The applicant's land is within the district. The district may have water available for the applicant to rent for the purpose of the proposed exchange during certain years including the 2007 irrigation season.
4. The district's storage right is described as follows:

License Water Right no.	21-2156
Source:	Henrys Fork
Priority Date	March 14, 1935
Purpose of Use:	Storage for Irrigation Storage for Domestic Irrigation from Storage Domestic from Storage
Total Amount:	114,000 acre feet
Point of Diversion:	Island Park Reservoir
Place of Use:	Within the Fremont-Madison Irrigation District service area
5. The applicant's recommended water rights are described as follows:

¹ Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Madison County.

Recommended Water Right no. **22-265E**
 Basis: Decree
 Source: Moody Creek
 Priority Date March 15, 1879
 Purpose of Use: Irrigation
 Amount: 8.0 cfs from 4/1 to 6/20
 4.0 cfs from 6/20 to 10/31
 Point of Diversion: NESENW Section 21, T5N, R41E
 Place of Use: 200 acres within a 547.7 acre permissible place of use.*

Recommended Water Right no. **22-4195**
 Basis: Beneficial Use
 Source: Moody Creek
 Priority Date May 1, 1969
 Purpose of Use: Irrigation
 Amount: 3.85 cfs from 4/1 to 10/31
 Point of Diversion: NESENW Section 21, T5N, R41E
 Place of Use: 192.7 acres within a 547.7 acre permissible place of use.*

Recommended Water Right no. **22-13479**
 Basis: Beneficial Use
 Source: Moody Creek
 Priority Date May 1, 1980
 Purpose of Use: Irrigation
 Amount: 3.10 cfs from 4/1 to 10/31
 542.5 acre-feet per annum
 Point of Diversion: NESENW Section 21, T5N, R41E
 Place of Use: 155 acres within a 547.7 acre permissible place of use.*

6. Recommendations 22-265E, 22-4195 and 22-13479 are limited to a combined diversion rate of 11.85 cfs for the irrigation of a combined total of 547.7 acres within the permissible place of use* being the DKJ farm identified as:

Township	Range	Section	Tract	Acres	Tract	Acres	Tract	Acres	Tract	Acres
05N	41E	16	SESW	31						
		20	NENE	40	NWNE	40	SWNE	40	SENE	40
			SWNW	40	SENE	40				
			NESW	40	NWSW	36				
			NESE	40	NWSE	40				
		21	NENW	23	NWNW	39	SWNW	36	SENE	2.7
			NWSW	20						

7. The applicant has control of two ground water rights numbered 22-7683 and 22-13671 that overlap a portion of the permissible place of use* described above. These rights overlap 73.4 acres identified as:

Township	Range	Section	Tract	Acres	Tract	Acres
05N	41E	20	NESE	38	NWSE	27
		21	NWSW	8.4		

8. The applicant owns shares in the Woodmansee Johnson Canal Company that represent an entitlement to water under the Woodmansee Johnson Canal Company water rights. Historically, the applicant leased the Woodmansee Johnson water from a shareholder or the company. The applicant has now purchased the shares of stock. The water delivered to the applicant pursuant to these shares is included in the right recommended in the SRBA to the Woodmansee Johnson Canal Co. as follows:

Recommended Water Right no. **22-594**
 Basis: Decree
 Source: Moody Creek
 Priority Date: March 15, 1881
 Purpose of Use: Irrigation
 Amount: 6.4 cfs from 4/1 to 10/31
 Point of Diversion: NESENW Section 21, T5N, R41E (Jeppesen Pump)
 NESESE Section 11, T6N, R40E
 Place of Use: Within the area served by the Woodmansee Johnson Canal Co. which includes the 547.7 acre permissible place of use described above.*

9. The SRBA recommendation for right no. 22-594 limits the diversion of this right at the applicant's pumps to 2.0 cfs. The recommendation has numerous limitations when combined with other water rights but the limitations do not include the rights listed above belonging to the applicant.

10. The applicant testified that water delivered under the Woodmansee Johnson Canal Co. shares can only be used on grain crops. This condition of use is not reflected in the recommendation of right no. 22-594.

11. The applicant testified that if the watermaster of Water District 01 would deliver the Woodmansee Johnson Canal Company's right 22-594 as recommended this exchange would not be necessary.

12. The applicant testified its total pumping rate for this exchange is limited to 4.0 cfs when combined with all its other rights being diverted out of the same point of diversion from Moody Creek.

13. Testimony by SWood indicates that when the applicant's irrigation diversion was 4.0 cfs or less there was no problem with the creek. The hearing officer understood from this testimony there was no adverse impact on existing water rights and the creek was not dry.

14. The evidence provided indicates that Moody Creek has dried up in years past due to drought and/or diversion for irrigation in July, August and September. It is not clear from the record at what rate the applicant was diverting when the creek was observed to have dried up.

15. A viable fishery once existed on Moody Creek. The fishery has been negatively impacted by drought and man-caused changes to the environment which include:

- a) diversion of water from the creek for irrigation, stockwater and domestic purposes.
- b) creation of fish barriers in the creek.
- c) elimination or degradation of riparian areas along the creek including the destabilization of the stream bank, caused by livestock grazing, farming practices and other man controlled modifications to the environment.

16. No in-stream minimum flow water right exists on Moody Creek to assure fish passage or protect other stream values. If one were to be established it would likely be junior to existing water rights on the creek. If one were to be established and maintained it would likely require the subordination of rights through some sort of cooperative effort. It is inappropriate for this hearing office to establish a de-facto in-stream minimum flow.

17. Any conclusion of law later determined to be a finding of fact is hereby incorporated as a finding of fact in this order.

CONCLUSIONS OF LAW

1. This Preliminary Order is issued pursuant to Idaho Code sections 67-5243 and 67-5245.

2. Idaho Code § 42-240 states, in pertinent part:

The director shall examine all the evidence and available information and shall approve the exchange in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the exchange does not constitute an enlargement in use of the original right or rights, the exchange is consistent with the conservation of water resources within the state of Idaho, the exchange is in the local public interest as defined in section 42-202B, Idaho Code, and the exchange 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. Unless otherwise provided in a written agreement between the applicant and other right holders, the director shall condition approval of an exchange so that the exchange will not be operative during times when water is not available to satisfy the exchange, and that during these times the right to use water automatically reverts to the place of use authorized under the water rights. A copy of the approved application for exchange shall be provided to the applicant and the watermaster, and the applicant shall be authorized upon receipt

thereof to make the exchange in accordance with the conditions set forth by the director. Should an approved exchange thereafter be discontinued the applicant or the applicant's successor in interest must so notify the director and the district watermaster.

3. The applicant bears the burden of proof for all of the factors listed in Idaho Code § 42-240.
4. Approval and completion of the proposed exchange will not injure other water rights if certain limitations and conditions are applied.
5. Approval and completion of the proposed exchange will not enlarge the use of the rights sought to be leased for exchange.
6. The Exchange proposed by the applicant is in the local public interest if certain limitations and conditions are applied. IDWR should condition the approval to provide that Moody Creek will not be dewatered when the exchange is occurring.
7. Approval and completion of the proposed exchange will be consistent with conservation of water resources within the State of Idaho.
8. Approval of the proposed exchange will support the agricultural base of the local area and does not negatively affect the watershed from which water is being exchanged if certain limitations and conditions are applied.
9. This application for exchange should be approved with conditions and limitations.

ORDER

IT IS HEREBY ORDERED that the application for exchange filed in the name of DKJ Farms LLC is **APPROVED** subject to the conditions and limitations listed below. All references to DKJ Farms LLC in the conditions also include successors to DKJ Farms LLC.

1. This approval is conditioned upon DKJ Farms LLC leasing storage water from the Fremont-Madison Irrigation District to exchange for water diverted from Moody Creek at the DKJ Farms LLC point of diversion. Storage water leased from the Fremont-Madison Irrigation District shall be delivered into the Teton River via the "Cross Cut Canal". During times when the leased water is delivered into the Teton River, DKJ Farms LLC may divert water from Moody Creek consistent with these limitations and conditions.
2. This approval is subject to the terms of the settlement agreement dated June 1, 2007 between DKJ Farms LLC and Friends, specifically, paragraph no. 2 of that agreement which requires that DKJ Farms LLC only divert water from Moody Creek for

use on grain crops and that all diversions of water from Moody Creek shall cease on or before July 15th of each year.

3. Pursuant to this exchange approval DKJ Farms LLC shall only irrigate grain crops **not** watered by ground water rights nos. 22-7683 and 22-13671 and by lands watered by Moody Creek under right 22-265E. For the 2007 irrigation season the exchange may be used on the lands listed below totaling 267.3 acres:

Township	Range	Section	Tract	Acres	Tract	Acres	Tract	Acres	Tract	Acres
05N	41E	20	NENE	40	NWNE	40	SWNE	33	SENE	40
			NESE	2						
		21	NENW	23	NWNW	39	SWNW	36	SENW	2.7
			NWSW	11.6						

4. The watermaster of Water District 01 shall regulate the simultaneous delivery of storage water and diversion from Moody Creek authorized by this exchange.

5. DKJ Farms LLC shall install and maintain measuring devices, control works or monitoring equipment deemed necessary to assure compliance with this approval. The watermaster may rely on periodic inspections, reports by the applicant or others to determine that conditions of this approval are being met.

6. Diversion of water authorized by this approved exchange shall be junior to all valid water rights on Moody Creek that are represented by license, court decree, or claim.

7. DKJ Farms LLC shall not divert water from Moody Creek under this exchange approval anytime the flow of Moody Creek ceases to flow continuously from the applicant's point of diversion to the point of diversion for the Woodmansee Johnson Canal located in the NESESE Section 11, T6N, R40E. Nothing in this approval is intended to impede or limit DKJ Farms LLC's ability to call on and divert water in priority under water right 22-265 when this exchange is not occurring, regardless whether this diversion would dewater or cause Moody Creek to cease to flow.

8. DKJ Farms LLC shall limit the diversion from Moody Creek to 4.00 cfs when combined with all other water rights at those times when the exchange is in effect. This condition is not intended to limit the DKJ Farms LLC's diversion rate under 22-265 during those times when this exchange is not occurring.

9. For the 2007 irrigation season, this approval is limited to the lesser amount of 140 acre-feet or the storage volume actually leased from the Fremont-Madison Irrigation District for the exchange.

10. The approval to exchange water authorized herein shall continue from year to year provided the DKJ Farms LLC complies with all the conditions provided herein. If

the recommendation for the Woodmansee Johnson Canal Co. water right 22-594 is decreed to include the DJK Farm LLC property as an authorized place of use, then this approval authorizing the exchange of water shall be null and void.

11. Failure of the DKJ Farms LLC to comply with the conditions of this exchange is cause for the Director to rescind approval of the exchange.

Dated this 18th day of June 2007.

A handwritten signature in black ink, appearing to read "Allen D. Merritt", is written over a horizontal line.

Allen D. Merritt, PE
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of June, 2007, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid, and properly addressed to the following:

Document(s) Served: Preliminary Order, and Explanatory Information Sheet to accompany a Preliminary Order when a hearing has been held.

GEORGE BROWN MD
1439 CAMBRIDGE DR
IDAHO FALLS ID 83401

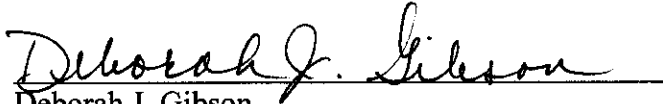
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TRENT WOOD
PO BOX 174
REXBURG ID 83440

JERRY RIGBY
RIGBY THATCHER ANDRUS RIGBY
& MOELLER CHARTERED
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DKJ FARMS LLC
665 CENTENNIAL LOOP
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THOMAS J BUDGE
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