

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATIONS )  
FOR PERMIT NOS. 75-07589 AND ) PROPOSED MEMORANDUM  
75-07590 IN THE NAME OF WILLIAMS ) DECISION AND ORDER  
LAKE WATER AND SEWER DISTRICT )  
\_\_\_\_\_ )

A hearing having been held regarding protests filed against applications for permit 75-07589 and 75-07590, the hearing officer as a representative of the Director of the Department of Water Resources, proposes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Water right application nos. 75-07589 and 75-07590 were filed with the Department for the purpose of supplying domestic water to homeowners within the Williams Lake Water and Sewer District (hereafter referred to as the district). Both applications describe the source of water sought to be diverted as Lake Creek. Lake Creek is tributary to the Salmon River. At the beginning of the hearing, however, the attorney for the applicant, Milt Slaven, stated the district wants to develop and divert two springs which are tributary to Lake Creek. The parties all stipulated the springs contribute water to Lake Creek.

2. The components of the water right applications are:

Application No. 75-07589

Source: Lake Creek (spring) Amount: 0.50 cfs  
Point of Diversion: SW $\frac{1}{4}$ SE $\frac{1}{4}$ , Sec.34, T20N, R21E  
(This point of diversion will be referred to as spring no. 1)  
Place of Use: S $\frac{1}{2}$ NE $\frac{1}{4}$ , Sec.3, T19N, R21E, and  
SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Sec. 34, T20N, R21E

Application No. 75-07590

Source: Lake Creek (spring) Amount: 0.50 cfs  
Point of Diversion: SE $\frac{1}{4}$ SE $\frac{1}{4}$ , Sec. 34, T20N, R21E  
(This Point of diversion will be referred to as spring no. 2)  
Place of Use: S $\frac{1}{2}$ NE $\frac{1}{4}$ , Sec. 3, T19N, R21E, and  
SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Sec. 34, T20N, R21E

The applications also describe several lots without a tract description and which are not clearly located.

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3. Williams Lake Water and Sewer District was formed to supply water to a subdivision and a resort which were built on the shores of Williams Lake. The water and sewer district now supplies water to approximately 58 homes and the Williams Lake Resort.

4. The district presently diverts water from Williams Lake through pumps located offshore approximately 90 feet. The diversion is authorized by permit to appropriate water no. 75-07052. Recent amendments to the Safe Drinking Water Act require that the district either install a costly filtration and treatment facility for the lake water, or find an alternate source of water. The district evaluated several alternatives, including treatment and drilling wells, and determined development of the springs (tributary to Lake Creek) is the cheapest alternative.

5. Traditionally, the district has diverted approximately 30 gpm. Applications 75-07589 and 75-07590 do not propose a cumulative flow of 1.0 cfs, but a total flow of only 0.50 cfs. Nevertheless, the applications seek approval for diversion of approximately 8 times more water than has traditionally been diverted by the district.

6. The applications were protested by Eva Miles, Albert Brown, Leslie May Shumate, and Martin Capps. Brown was represented at the hearing by C. Tom Arkoosh, attorney at law.

7. The protestants contend development of the springs proposed by the district will reduce the water supply available to them under prior rights. The protestants also object to excavation of the springs and possible compromise of the earth structure which impounds Williams Lake. Finally, Brown contests the legality of the operation of the district.

8. During the summer of 1992, the district excavated in the vicinity of the two springs. Before construction, spring #1 was only flowing 20 ~~gpm~~ but after some minor excavation, the flow increased to 35 ~~gpm~~ <sup>gpm</sup> <sub>gpm</sub>

9. The area around spring #2 was excavated with a backhoe until a vent for the spring was located. The flow increased from 35 gpm to 75 gpm.

10. The district alleges construction increased the flow from the springs, and alleges it should be entitled to divert the additional water developed with no injury to the prior right holders.

11. One of the district board members testified that when the flow of the spring was originally measured, there was a large boggy area from which all the water could not be captured. He was not able to estimate the flow of the spring water through the ground prior to excavation.

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12. Although the district alleged it has developed water, no facts were presented to counter probable hydrologic reality. The springs were probably always flowing the flow rate measured, but, until the excavation, the flow from the springs was diffuse, and not sufficiently concentrated to measure all of the flow.

13. According to Department records, the following is a summary of permits, licenses, decreed rights and claims listing Lake Creek or its tributaries below Williams Lake as a source of water:

| <u>Number</u> | <u>Priority<br/>Date</u> | <u>Name</u>   | <u>Amount</u> | <u>CFS</u>               |
|---------------|--------------------------|---------------|---------------|--------------------------|
| A75-10054     | 1898                     | Parish        | 0.020         | Domestic                 |
| 75-0093A      | 1898                     | McBride       | 2.666         | Irrigation               |
| 75-0093C      | 1898                     | Wrasper       | 0.034         | Irrigation               |
| 75-04467      | 1922                     | First Federal | 1.160         | Irrigation               |
| 75-04010      | 1922                     | Nelson        | 1.020         | Irrigation<br>& Domestic |
| 75-02149      | 1961                     | Capps         | 1.460         | Irrigation               |
| 75-07419      | 1985                     | Brown         | 0.440         | Irrigation               |
| 75-07427      | 1985                     | Brown         | 6.00          | Power                    |

14. The summary of water rights does not represent the actual diversion of water from the stream. Both Capps and Brown testified that only two diversions divert water from Lake Creek authorized by existing rights:

| <u>Number</u> | <u>Priority<br/>Date</u> | <u>Name</u> | <u>Diversion<br/>Ownership</u> | <u>CFS</u> | <u>Use</u> |
|---------------|--------------------------|-------------|--------------------------------|------------|------------|
| 75-0093A      | 1898                     | Brown       | Brown                          | 0.27       | Irrigation |
|               | 1898                     | Johnson     | Brown                          | 0.04       | Irrigation |
| 75-02149      | 1961                     | Capps       | Capps                          | 1.46       | Irrigation |
| 75-07419      | 1985                     | Brown       | Brown                          | 0.44       | Irrigation |
| 75-07427      | 1985                     | Brown       | Brown                          | 6.00       | Power      |

15. Other rights were claimed in the adjudication, but, according to Brown, many of the rights have not been diverted since the early 1980's.

16. Both Capps and Brown testified they have always received sufficient surface water to satisfy their irrigation demands, even in drought years.

17. Brown owns a hydropower facility located near the confluence of Lake Creek and the Salmon River. Brown stated flows have been insufficient to operate his hydropower plant at full capacity. His water right for the power facility, however, is subordinated to future uses of water other than hydropower. Brown's rights are subordinated to upstream domestic uses.

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18. The district has about \$40,000 to construct the project. The estimated cost of development of the springs and installation of necessary equipment is approximately \$30,000.

19. The district anticipates it will collect another \$30,000 to \$40,000 in taxes during the upcoming year. Brown argued the district does not conduct it's business properly, and, as a result, it is unable to legally collect the funds necessary for the project.

20. Although the application seeks to appropriate water for 100 homes, only 58 homes have been built. There has been no significant change in the number of homes within the Williams Lake Water and Sewer District in the last 20 years.

21. The homes served by district water are recreational homes and many of the lots are located on rather steep hillsides with very little vegetation.

22. Witnesses for the district stated the diversion works will be constructed so excess water diverted by the district but not used by the district will overflow back into Lake Creek.

#### CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, states, in part, as follows: The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under an existing water right, or (b) that the water itself is insufficient for the purposes for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein or (e) that it will conflict with the local public interest where the local public interest is defined as the affairs of the people directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

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2. Rule 4,4,2,1. of the Water Appropriation Rules and Regulations states the applicant shall bear the initial burden of coming forward with evidence of the evaluation of criteria (a) through (d) of Idaho Code § 42-203A.

3. Rule 4,4,4,2. of the Water Appropriation Rules and Regulations states that both the applicant and the protestant have the burden of coming forward with evidence regarding local public interest of which they are most cognizant.

4. The applicant bears the ultimate burden of proof regarding all issues.

5. By moratorium order dated May 15, 1992, the Director prohibited approval of new applications to appropriate water in the Salmon River drainage. Domestic uses were exempted from the moratorium prohibition.

6. Evidence presented by all the parties leads to a conclusion that there is sufficient water for appropriation. Other than a reduction in flow authorized by the hydropower right which is subordinated, all earlier right holders have been receiving their full entitlement.

7. Approval of this right will not reduce the quantity of water under an existing right that is not subordinated.

8. Approval of a permit and future license for domestic use related to 100 homes when only 58 homes have been built, and when the number of homes hasn't changed significantly in 20 years, would result in a speculative water right.

9. Proper limits and conditions can prevent speculation, however. The permit to appropriate water can be approved for 100 homes, but the development period should be shortened to two years, plus any lesser period granted as an extension of time for filing proof of beneficial use. Only homes built and served by district water lines before or during the development period may be recognized as legitimate places of use.

10. Public interest dictates that domestic users have a safe, uncontaminated source of domestic water. A subordinated hydropower right must yield water to a later-in-time domestic water right, particularly where the domestic units are existing, and the domestic appropriation is sought to comply with public health requirements.

11. In this case, the domestic homes are recreational property, built for the most part on steep terrain. The hearing officer is not convinced that the domestic use of water should include a right to irrigate one-half acre per lot at the expense of downstream rights, including hydropower. Any domestic approval

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will be limited to in house use only.

12. Lawns, garden and landscape can only be irrigated if a prior, consumptive right is acquired and transferred, or water is diverted pursuant to an established right from Williams Lake.

13. Combined diversion pursuant to rights 75-07589 and 75-07590 will be limited to 0.50 cfs.

14. Although the district might be operating improperly at times, it appears to have sufficient financial resources to construct the project. Furthermore, Brown has no standing before the Department to raise an impropriety internal to the district when he has no vested interest in the district. The approval of this permit, with sufficient conditions, is in the local public interest.

15. Use of water for in-house, culinary purposes will conserve the water of the state of Idaho.

#### ORDER

IT IS HEREBY ORDERED that applications to appropriate water nos. 75-07589 and 75-07590 are APPROVED subject to the following conditions:

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before March 1, 1995.

2. Subject to all prior rights except subordinated hydropower rights.

3. Permit holder shall commence the excavation or construction of diverting works within one year of the date this permit is issued and shall proceed diligently until the project is complete.

4. Use of water shall be limited to in-house use only.

5. The combined rate of diversion for rights 75-07589 and 75-07590 shall be limited to 0.50 cfs.

6. Only homes built and served by district water lines before or during the development period may be recognized as legitimate places of use.

7. A flow measurement port or other device as specified by the Department shall be installed by the right holder to provide for the installation of measuring equipment and the determination of the rate of diversion by the Department.

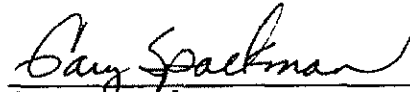
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8. The issuance of this right in no way grants any right-of-way or easement across the land of another.

9. Place of use is located within Williams Lake Subdivision.

10. Domestic use is for 100 homes.

Dated this 19<sup>th</sup> day of January, 1993



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Gary Spackman  
Hearing Officer

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20th day of January, 1993, I mailed a true and correct copy of the foregoing Proposed Memorandum Decision and Order and Order Issuing the Proposed Memorandum Decision and Order, postage prepaid, to the following:

Martin Capps

HC 61 Box 14  
Salmon, ID 83467

Williams Lake W & S

PO Box 518  
Salmon, ID 83467

Eva Miles

506 Courthouse Dr  
Salmon, ID 83467

Albert & Diane Brown

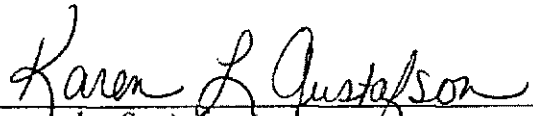
1207 Pembroke Lane  
Newport Beach, CA 92660

Leslie May Shumate

PO Box 352  
Salmon, ID 83467

C Tom Arkoosh

Roden and Arkoosh  
PO Box 2110  
Boise, ID 83701

  
Karen L. Gustafson  
Secretary/Records Manager

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