

36-7130

AGREEMENT

This Agreement, made and entered into this 22nd day of July, 1987, by and among THE IDAHO DEPARTMENT OF WATER RESOURCES, an executive agency of the State of Idaho (hereinafter "IDWR"); COLLEGE OF SOUTHERN IDAHO, a junior college district (hereinafter "CSI"); PROFESSIONAL INVESTORS LIFE INSURANCE COMPANY, a corporation with principal offices in Tulsa, Oklahoma (hereinafter "Professional"); J.D. McCOLLUM and JEAN McCOLLUM, husband and wife, of Twin Falls County, Idaho (hereinafter "McCollum"); SCHOOL DISTRICT 411, an instrumentality of the State of Idaho (hereinafter "411"); MICHAEL KESTLER, an individual of Twin Falls County, Idaho (hereinafter "Kestler"); GARY STONE, an individual of Twin Falls County, Idaho (hereinafter "Stone"); FIRST CHURCH OF THE NAZARENE (hereinafter "Nazarene"); HYDROTUBE OF IDAHO (hereinafter "Hydrotube"); ARNOLD ELSING and RONALD ELSING, individuals of Twin Falls County, Idaho (hereinafter "Elsing"); MAGIC GARDENS (hereinafter "M.G."); and the CITY OF TWIN FALLS, IDAHO (hereinafter "City");

Whereas, the Director of the Department of Water Resources will consider this Agreement as limiting for the purpose of implementing Idaho Code 42-1895(7) which authorizes the Director to suspend further development of existing water rights; and

Whereas, the parties hereto (except IDWR) are the holders of valid water permits and licenses issued by IDWR, or have filed applications which IDWR has not yet approved for the purpose of diverting and beneficially using hot water from a common hot water aquifer that underlies portions of Twin Falls and Jerome Counties in the vicinity of the City of Twin Falls, Idaho; and

Whereas, the parties hereto are desirous of entering into an agreement amongst themselves and IDWR setting forth their respective rights and obligations as to the hot water, for the purpose of resolving the interfaces between the parties, and securing the dismissal of the pending lawsuit; and

Whereas, the parties are concerned that the hot water be used for the heat resource and not as a substitute where cold water is adequate for a particular beneficial use and the parties are concerned about their rights to use the hot water in the future, and are agreeable to limit their rates of

*Copy from
micro-film
36-7130*

diversion under their respective rights to facilitate this Agreement conditioned upon protective action of IDWR; and

Whereas, because there is inadequate data necessary to determine whether or not the average annual recharge (hereinafter "AAR") of the aquifer has been reached which would allow conversion of the present Groundwater Management Area designation to a Critical Groundwater Area; and because it will take at least five years of data to make such a determination, the Director of IDWR is willing to declare a five (5) year moratorium pursuant to I.C. §42-1805(7) and Rule 7 of the Water Appropriation Rules and Regulations of the State of Idaho, and applications for permit will not be approved during the moratorium; and

Whereas, all the parties to this Agreement are parties to Twin Falls County Civil Case No. 37298 and agree that this Agreement may be treated as their consent to a stipulation for dismissal without prejudice of Twin Falls County Civil Case No. 37298, and incorporated in the order of dismissal thereof;

Now, therefore, in consideration of the mutual covenants and agreements herein contained and the dismissal of Civil Case No. 37298, and other good and valuable consideration, the parties hereto agree as follows:

1. The parties hereto agree that the primary use of all water diverted from the common hot water aquifer will be for the heat resource and agree that no diversions will be made as a substitute for uses not requiring hot water, except as provided in this Agreement. Additional secondary uses of the water are permitted in accordance with the water right of each party. All water diverted shall be used efficiently only for purposes authorized by the licenses, permits and applications hereinafter set out, and the parties agree to construct, operate and maintain their wells in accordance with existing state criteria and will do those things necessary to prevent surface and subsurface waste or contamination as required by Idaho law. The parties hereto also agree to, and hereby grant IDWR permission to inspect the wells at anytime and collect data as determined necessary by IDWR, and will submit data concerning flows, pressures, temperature, and other information as requested by IDWR at least quarterly. Charges incurred by IDWR in the collection and evaluation of the data requested (not to exceed a total of \$1,000.00 per year without the consent of the parties) shall be billed by IDWR to the parties to this Agreement in proportion to their actual diversions in accordance with this Agreement, and such billings shall be due within 30 days of mailing by IDWR, and if unpaid, shall be considered a lien against water right without further perfection or notice.

2. Professional is the holder of License No. 36-7130 for the diversion of 6 cfs of hot water from a well located in the NW 1/4 of the NW 1/4 of Section 29, Township 9 South, Range 17 East Boise Meridian, Jerome County, Idaho. Professional agrees that hereafter, during the continuance of this Agreement, they will divert no more than 4.5 cfs of water pursuant to said license and that the primary use of said water shall be for beneficial uses which utilize the heat resource of the water. Professional also agrees that diversions under Application No. 36-8094 for non-consumptive use for power generation (if Application No. 36-8094 be issued) shall be an additional use of the same 4.5 cfs, so that during the continuance of this Agreement, Professional shall divert no more than a total of 4.5 cfs under license.

3. CSI is the owner of Permit Nos. 47-7478 and 47-7606. CSI has submitted proof on 1.21 cfs under Permit No. 47-7478. Permit No. 47-7606 was granted an extension until 1/1/1990 for 7.76 cfs. The total potential diversion under the two permits is 8.97 cfs. CSI agrees that it will limit its development to a total of 6 cfs under both permits in consideration of reaching this agreement, and that the primary use of said water shall be for beneficial uses which utilize the heat resource of the water.

→ 4. McCollum is the owner of Permit Nos. 47-7758 and 47-7813 providing for the development of up to 25 cfs of water from the common hot water aquifer. McCollum currently diverts 6.6 cfs and herein agrees to limit total diversions under both permits from the common hot water aquifer to 8.1 cfs. McCollum agrees that the primary use of all current and future diversions shall be for beneficial uses which utilize the heat resource of the water in an efficient and reasonable manner, except for .5 cfs currently used for irrigation only, which use all parties agree may continue. If McCollum diverts more than 6.6 cfs from the common hot water aquifer, he agrees to reduce his use of hot water by the amount exceeding 6.6 cfs upon 90 days written notice if the other parties to this agreement can insure delivery in accordance with state law of high quality cold water in exchange therefor at no additional cost to McCollum.

5. 411 is the holder of Permit No. 47-7964 providing for the development of 1.11 cfs and has presently developed (.5 cfs) for heating purposes. In consideration for this Agreement, 411 agrees that their diversions from the common hot water aquifer shall be limited to .75 cfs for beneficial uses which utilize the heat resource of the water.

8.1 cfs
limit -
but only
6.25 cfs
Found
during
Lic exam.

6. Kestler is the holder of Permit No. 47-7492 providing for the development of .31 cfs. In consideration for this Agreement, Kestler agrees that his diversions from the common hot water aquifer shall be limited to .31 cfs for beneficial uses which utilize the heat resource of the water.

7. Stone is the holder of Permit No. 47-7714 providing for the development of 2 cfs. In consideration for this Agreement, Stone agrees that his diversions from the common hot water aquifer shall be limited to .5 cfs for beneficial uses which utilize the heat resource of the water.

8. Nazarene is the holder of Permit No. 47-7745 providing for the development of .70 cfs. In consideration for this Agreement, Nazarene agrees that its diversions from the common hot water aquifer shall be limited to .70 cfs for beneficial uses which utilize the heat resource of the water.

9. Hydrotube is the holder of Application No. 47-7872 providing for the development of .20 cfs. In consideration for this Agreement, Hydrotube agrees that its diversions from the common hot water aquifer shall be limited to .10 cfs for beneficial uses which utilize the heat resource of the water.

10. Elsing is the holder of Permit No. 47-7875 providing for the development of .30 cfs. In consideration for this Agreement, Elsing agrees that his diversions from the common hot water aquifer shall be limited to .15 cfs for beneficial uses which utilize the heat resource of the water.

11. M.G. is the holder of Application No. 47-7966 providing for the development of 1 cfs. In consideration for this Agreement, M.G. agrees that its diversions from the common hot water aquifer shall be limited to .5 cfs for beneficial uses which utilize the heat resource of the water.

12. City is the holder of Permit No. 47-7969 providing for the development of 1.92 cfs. While this Agreement is in no way intended to bind IDWR as to the status of the permit, City agrees that if its permit is not cancelled and remains in good standing, its diversions from the common hot water aquifer shall be limited to .95 cfs for beneficial uses which utilize the heat resource of the water.

13. Sun Ventures, LTD. is the holder of Application No. 36-8137 providing for the development of 48 cfs. The parties hereto (except IDWR and Professional) acknowledge that

Sun Ventures, LTD. is not a party hereto but agree to protest said application because the water would not be used for the heat resource and development of a filing of 48 cfs would decimate the common hot water resource.

14. The Director of IDWR agrees to issue an order declaring a moratorium of five years for processing new applications for permit to develop water from the common hot water aquifer in Twin Falls and Jerome Counties, Idaho, except the applications as herein provided in paragraphs 9 and 11. A copy of said order is attached hereto as Exhibit A, and made a part hereof as if set out at length herein. Said order also limits development by present permit holders who are parties to Civil Case No. 37298 and this Agreement (hereinafter "Stage One" development), to the amounts herein stated in paragraphs 2 through 12 above. The order also provides that parties to Civil Suit No. 37298 who will not execute this limitation Agreement shall be subject to the moratorium. The parties hereto agree that each shall be responsible for compliance with state law and the rules of IDWR prior to effecting a "Stage One" diversion pursuant to the rights listed in paragraphs 2 through 12 hereof. Statutory and permit requirements will be complied with relative to commencing construction and submission of proof of beneficial use for any development or diversion beyond that which presently exists to the maximum extent as provided for in paragraphs 2 through 12 of this Agreement. The pendency of the lawsuit to be dismissed pursuant hereto shall be considered as an adequate reason for granting equivalent extensions of time for development of the reduced amounts of water as set out in Paragraphs 2 through 12 hereof. IDWR also agrees to suspend the commencement of construction and proof of beneficial use requirements of any valid application or permit described in paragraphs 3 through 12 relative to the diversion and development increment herein agreed not to be developed and used (hereinafter "Stage Two" development). If at the end of five years, data indicates that AAR exceeds annual withdrawals (provided that the parties hereto reserve the right to contest such AAR determination administratively or judicially), IDWR agrees to allow "Stage Two" to begin and to allow development by the parties hereto to the extent of the excess water available over AAR, on the basis of an equal priority date which shall be the date of this Agreement, but junior to "Stage One" development. "Stage Two" development shall be on the basis of a proportionate ratio unless the parties hereto or their successors and assigns shall otherwise unanimously agree to a different method for the allocation of the available water, e.g. assume Hydrotube (Paragraph 9) has developed .10 cfs under "Stage One" and wishes to develop the remaining .10 cfs under their Permit No. 47-7872, and Stone (Paragraph 7) has developed .5 cfs under "Stage One" and wishes to develop the remaining 1.5 cfs under

Permit No. 47-7714, and and that no other parties to the Agreement wish to develop further and AAR exceeds withdrawals by 1 cfs at the end of the moratorium period and reasonable pumping levels are not a factor, development on the basis of a proportionate ratio with the priority date of this Agreement would mean Hydrotube could develop .0667 (0.1 cfs/1.5 cfs = 6.67% x 1 cfs = 0.667 cfs) and Stone would develop .9333 cfs under "Stage Two" and no applications filed after the date of this Agreement would develop. If AAR exceeded "Stage One" developments by 2.0 cfs, under the same example, .4 cfs would be available to applicants who file after the date of this Agreement; provided further that such rights entitled to participate in "Stage Two" development be then in good standing. 1.6

15. In the event that a court of competent jurisdiction abrogates the Director's order (Exhibit A) within the period of the moratorium or any extension thereof, this Agreement shall also terminate, unless the parties shall then specifically agree to an extension hereof.

16. The parties agree that the primary purpose of this Agreement is to protect the diversion rights of the parties hereto to the extent set out in paragraphs 2 - 12 and agree that it is not the purpose of this Agreement to protect the pressure of the water except as otherwise provided by state law. If at any time within the five years of the pendency of the order, or at the end of the five years of the order, IDWR evaluation of flow records indicate diversions exceed AAR, the parties hereto agree to reduce their diversions so that AAR is not thereafter exceeded (such reductions under the priority system of first in time is first in right so that the junior right holder shall be totally cut back before the second junior right holder is cut below the rate herein agreed to; the second junior right holder is totally cut back before the third junior right holder is cut below the rate herein agreed to, etc.) unless the parties hereto shall then otherwise unanimously agree (provided that the parties hereto reserve the right to contest such AAR determination administratively or judicially). If at the end of the five year period of the order, the flow records indicate diversions exceed AAR of the hot water aquifer, the parties will petition IDWR for a Critical Groundwater Area designation and will reduce diversions to the level of AAR on the basis of the priority system.

17. If IDWR does not or cannot make a determination of AAR at the end of five years based on the data, but flow pressures have not increased from their present level, the parties will seek a continuance of the moratorium.

18. Paragraphs 2 through 12 parties hereto agree that requests for extension of time extending the time for forfeiture for non-use filed pursuant to I.C. 42-222(2) shall not be protested during the term of this Agreement. Wells will be capped during times of non-use.

19. Any parties hereto may transfer their real property together with all water rights appurtenant thereto. However, if a party wishes to sell water rights which are subject of this Agreement but retain the real property, the other parties hereto shall have an option of first refusal to purchase any said water rights of any of the parties to this Agreement who may elect to sell. If two or more of the other parties elect to buy, and cannot otherwise agree on a proper allocation, they shall be entitled to purchase said water right being offered pro rata based on their then rights to divert from the aquifer in the amounts which are herein agreed. Any transfers proposed pursuant to this paragraph shall be subject to all applicable state laws.

20. The parties hereto agree that the amounts of the diversions as set out in paragraphs 2 through 12 are reasonable and each agrees not to protest, seek abandonment or forfeiture, or otherwise contest the amount of the agreed diversions of the other parties hereto during the term of this moratorium or any extension thereof, so long as the water is beneficially applied to use.

21. The parties hereto agree to support the efforts of IDWR to obtain funding from the Idaho Legislature so as to perform adequate and continuing hydrogeologic studies for the common hot water aquifer which is the subject of this Agreement.

MD → 22. The parties agree to the installation of measuring devices approved by IDWR which will provide an instantaneous readout and totalizing head so that the systems can be readily monitored and integrated volumetric measurements of pump out obtained over the period of the order.

23. The parties hereto agree that nothing herein contained shall prevent any party from seeking relief by injunction or otherwise, or an order requiring modification or closing of any well found to be in violation of the provisions of Idaho Code §§ 42-237a and 42-1601 et seq.

24. The parties hereto (except IDWR) herein consent to changes in the point of diversion and place of use of the City's right under Permit No. 47-7969 to utilize 411's facilities in common as set out in paragraph 5 hereof, provided that the priority for the City's Permit No. 47-7969 shall remain unchanged and the City shall use 411's discharges diverted pursuant to 47-7964 to the extent possible for heat

for a swimming pool and associated facilities, but in no event shall the City's use of hot water under 47-7969 in excess of 411's discharges exceed .95 c/f/s for the duration of this Agreement. City may make secondary use of 411's discharges during other than the pool season to keep the pool from freezing. City agrees that the use of water under 47-7969 shall only be made at such times as the swimming pool and associated facilities utilizing the heat resource are open for use.

25. This Agreement may be executed in counterparts for convenience of the parties, but shall be binding as though all had executed the same document.

26. The parties hereto bind their heirs, personal representatives, successors and assigns.

IN WITNESS WHEREOF, This Agreement has been executed on the day and year first above written.