



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

July 17, 2001

Kent Foster
HOLDEN, KIDWELL, HAHN & CRAPO
330 Shoup Ave, 3rd Floor
Idaho Falls, ID 83402

RE: PETITION TO CHANGE APPROVAL OF TRANSFER NO. 5120 IN THE NAME
OF TIMOTHY P. DEEG

Dear Mr. Foster:

I have reviewed your letter to Phil Rassier dated July 2, 2001, and the PETITION FOR MODIFICATION OF FINAL ORDER AND TO DIVERT WATER ("petition") which you submitted to the department on behalf of Timothy P. Deeg ("Deeg").

Norm Young's letter dated June 8, 2001, suggests that when Deeg, Norm and Phil Rassier met on February 9, 2001, the intent was to seek modification of the conditions on the final order for Transfer No. 5120 to prevent loss of the water right through non-use. More specifically, it appears that Deeg may have wanted a change to Condition of Approval no. 5 so the rate of diversion in the amount of 1.82 cubic feet per second ("cfs") associated with water right no. 41-07034 would not be lost through non-use, if Deeg terminated his leasehold interest in the water right. The petition, however, appears to go further than to preserve diversion entitlements under rights 41-07030 or 41-07034 should Deeg's leasehold interests in the rights terminate or expire.

Department files show that transfer No. 4268 ("**T4268**"), involving water right no. 41-07030, was approved on March 21, 1995 authorizing a change in point of diversion and place of use of 1.4 cfs of ground water. The transfer allowed the water to be diverted from Deeg's well located 12 miles north and 3 miles west of the licensed point of diversion. The approval did not have conditions that limited the rate of diversion of right 41-07030 when considered together with other water rights diverted from the same well.

Department files also show that transfer No. 5120 ("**T5120**"), involving water right no. 41-07034, was approved on May 15, 1998 authorizing a change in point of diversion and place of use of 1.82 cfs of ground water. The transfer allowed the water to be diverted from Deeg's well located 10 miles north and 2 miles west of the licensed place of use.

Your petition appears to seek the following:

1. A change to Finding of Fact 11 in T5120 to provide that Deeg can increase the output of his well when his financial circumstances allow him to do so. The maximum diversion rate measured in the past from the well is 6.68 cfs.
2. A change to Condition of Approval No. 5 in T5120 to allow Deeg to increase the rate of diversion from his well by 1.82 cfs.
3. An order from the department allowing an increase in rate of diversion from Deeg's well of 1.82 cfs under the T5120 and 1.4 cfs under T4268 or authorization to drill an additional well to increase diversion capacity from ground water and to publish the notice in the same manner as provided in section 42-222, Idaho Code.

My response to these items in the order presented above is as follows:

1. At the hearing conducted in connection with protested T5120 on February 3, 1998, Deeg testified that he did not intend to increase the rate of diversion from his well in excess of 6.68 cfs. Deeg's testimony had a direct bearing on the decision to approve T5120. The department should not change Finding of Fact 11 to allow an increase in diversion capacity contrary to Deeg's testimony presented at the hearing. A change to a finding would have to be accomplished in a separate proceeding than T5120, since the prior action is final.
2. See comment 1. above.
3. To increase well capacity or to add an additional point of diversion, Deeg needs to file an application for transfer with the department. Such changes will have to be accomplished in a separate proceeding than T4268 and T5120, since the prior actions are final.

I think, however, that the Department can consider a change to the conditions of approval of T5120 if Deeg is seeking the addition of a condition of approval stating something like the following:

"Upon termination of Deeg's lease of water right no. 41-07034 and a change in place of use of water right no. 41-07034 back to the licensed place of use through a transfer of water right, the right holder is entitled to divert up to 1.82 cfs of water without regard to Condition of Approval No. 5. in T5120 which limits the diversion rate of 41-07034".

A change to the conditions of approval is the sort of request that could be noticed in terms of a readvertisement along the lines of the past discussions between you, Deeg, Norm and Phil. The fee you submitted with the petition in the amount of \$50 is the proper fee for readvertisement, but is not the proper fee to accompany a new action such as an application for transfer.

After you confirm that your intent is to seek a change in the conditions of approval of T5120, similar to that described above, I will prepare an advertisement to provide notice. Deeg will need to pursue the other relief described in the petition by filing an application for transfer. If you have questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Glen Saxton". The signature is fluid and cursive, with the first name "L." being small and the last name "Saxton" being larger and more prominent.

L. GLEN SAXTON, P.E.

Chief, Water Allocation Bureau

c: Norm Young
Phil Rassier
IDWR - Regional Office