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RECEIVED
MAY 07 2004
GLEN
Department of Water Resources
Robert B. Holden
(1877-1967)
Terry L. Crapo
(1911-1971)
William S. Holden
(1939-1982)
(1907-1988)

Of Counsel
Fred J. Hahn

*Also Licensed in Utah and Arizona
**Also Licensed in Missouri & Kansas

May 5, 2004

L. Glen Saxton, P.E.
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706

Re: Notice to Resume Water Use for Water Right No. 41-7030

Dear Mr. Saxton:

We are writing to follow up on the matter we discussed by telephone last week. You are familiar with the Tim Deeg well in the NWSWSE Section 6, T. 9S., R. 31E. As a result of various applications for permit and for transfer, there are five (5) water rights for which this well is the point of diversion; 41-7030, 41-7034, 41-7071, 41-7076, and 41-7081.

However, the last IDWR measurement indicated the total amount being pumped from the well was 6.68 cfs. The amounts under the five rights would total 15.09 cfs. The last transfer (no. 5120) order, dated May 15, 1998, provided that the combined diversion rate under the five rights could not exceed 6.68 cfs. Mr. Deeg had been advised by Mr. Charles E. Brockway prior to the entry of this transfer order that the capacity of the well to produce water is greater than 6.68 cfs. He had been considering putting a larger pump in the well or drilling another well to utilize more of the available amounts under the 5 rights, but had not yet been financially able to do so.

We were trying to pay close attention to the rights in the meantime so as to avoid any forfeiture issues because of inability to pump the full amounts under the rights. Two of the rights, numbers 41-7030 and 41-7034 are leased rights, and contractually Mr. Deeg cannot risk forfeiture of them.

With particular respect to right number 41-7030, Mr. Deeg was authorized to commence use of the right within one year from the date of the "Amended Final Order" in Transfer no. 4268 of March 21, 1995. Although he had increased the acreage irrigated to include the 126 acres authorized by this right, he had not been able to increase diversions from the well in the amount of 1.4 cfs before the issuance of the May 15 order in transfer no. 5120. Because he had every intention of doing so as soon as finances would permit, he filed the application for extension of time to avoid forfeiture of a water right in July 1999.

By 2000, Mr. Deeg was financially able to proceed with the equipment changes or drilling of an additional well to divert the additional amounts under 41-7030 and 41-7034. We then began a dialogue with IDWR officials about how to proceed. As I recall, we talked about a number of possibilities, but you eventually made the recommendation that Mr. Deeg retain Dr. Brockway's services to file another application for transfer. That was done, but the processing has not yet been completed.

A few days ago, we received a notice to resume water use before July 1, 2004. It appears that the transfer process will not be completed by then, and that Mr. Deeg continues to be prevented from doing so by the 1998 order. Mr. Deeg is eager to resume use of the 1.4 cfs; as we have said, he is already irrigating crops on the additional 126 acres authorized under the right.

We discussed the water bank option under Idaho Code § 42-223 (5). The fact that Mr. Deeg is irrigating an extra 126 acres (the place of use under right no. 41-7030), but is unable to divert the 1.4 cfs (the amount of the right) seems to present an issue as to the applicability of this procedure.

We also discussed that it may be possible to argue that the 1.4 cfs is being diverted from the well or has been at some time during the past five years, as part of the 6.68 cfs authorized for diversion. Again, this leaves questions that are difficult to answer. There are five rights, totaling up to 15.09 cfs authorized for diversion, but with the limit of 6.68 cfs, which amounts from which rights have actually been diverted?

After reviewing subsection (6) of Idaho Code § 42-223, it seems to us that it might be the most applicable statutory language to the facts of this matter. As we perceive it, Mr. Deeg is legally prohibited from diverting the additional amounts under rights 41-7030 and 41-7034 from the well, unless and until the pending application for transfer being processed by Mr. John Freitag in the Southern Region office of IDWR is approved. Unless we misunderstand, Mr. Deeg has no control over non-use of the amounts under the two rights for the present. It would appear to us that neither right would be at risk of forfeiture until such time as Mr. Deeg had failed to divert and apply the amounts under these two rights within whatever reasonable time period may be authorized by the anticipated transfer approval.

Since July 1, is less than 60 days away, we would very much appreciate your attention to this matter and some written response as soon as possible. Thank you for your continued assistance.

Yours very truly,



Kent W. Foster

c: Tim Deeg
Dr. Charles E. Brockway



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

May 18, 1998

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

RE: In the Matter of Application for Transfer No. 5120 of
Water Right No. 41-07034 in the name of Timothy P. Deeg

Dear Interested Party:

The accompanying order is a "final order" issued by the department pursuant to section 67-5246 or 67-5247, Idaho Code.

Section 67-5246 provides as follows:

(1) If the presiding officer is the agency head, the presiding officer shall issue a final order.

(2) If the presiding officer issued a recommended order, the agency head shall issue a final order following review of that recommended order.

(3) If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code. If the preliminary order is reviewed, the agency head shall issue a final order.

(4) Unless otherwise provided by statute or rule, any party may file a petition for reconsideration of any order issued by the agency head within fourteen (14) days of the issuance of that order. The agency head shall issue a written order disposing of the petition. The petition is deemed denied if the agency head does not dispose of it within twenty-one (21) days after the filing of the petition.

(5) Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

(6) A party may not be required to comply with a final order unless the party has been served with or has actual knowledge of the order. If the order is mailed to the last known address of a party, the service is deemed to be sufficient.

(7) A non-party shall not be required to comply with a final order unless the agency has made the order available for public inspection or the nonparty has actual knowledge of the order.

(8) The provisions of this section do not preclude an agency from taking immediate action to protect the public interest in accordance with the provisions of section 67-5247, Idaho Code.

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a final order within fourteen (14) days of the service date of this order. The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5246(4) Idaho Code.

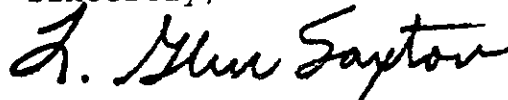
APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by a final order or orders previously issued in a matter before the department may appeal the final order and all previously issued orders in the matter to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days a) of the service date of the final order, b) of an order denying petition for reconsideration, or c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See section 67-5273, Idaho Code. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

Sincerely,



L. GLEN SAXTON, Chief
Water Allocation Bureau

Enclosure

c: IDWR - Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
TRANSFER NO. 5120 OF WATER RIGHT)
NO. 41-07034 IN THE NAME OF) **FINAL ORDER**
TIMOTHY P. DEEG)
_____)

On April 15, 1998, the hearing officer for the Idaho Department of Water Resources (department) issued a Recommended Order in connection with the above captioned matter. None of the parties filed a petition for reconsideration, briefs or exceptions in connection with the Recommended Order. Based upon his understanding of the law and the facts in this matter, the Director makes the following Findings of Fact, Conclusions of Law and Final Order:

FINDINGS OF FACT

1. On June 13, 1988, the department issued license No. 41-07034 as follows:

Source: Groundwater
Priority: April 7, 1978
Rate of div: 1.82 cfs
Point of div: SE1/4NW1/4 Section 28, T10S, R31E, B.M.
Use: Irrigation
Season of use: March 15 to November 15
Place of use: 91 acres in parts of Section 28, T10S, R31E, B.M.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. On May 29, 1997, Timothy P. Deeg (applicant) filed application for transfer No. 5120 (application) with the department proposing to change the point of diversion of license No. 41-07034 to an existing well located within the SWSE Section 6, T9S, R31E, B.M. and the place of use to 91 acres in parts of Section 12, T9S, R30E, B.M. The proposed change would move the point of diversion and place of use approximately 10 miles north and 2 miles west of the original use.

3. The department published notice of the application which was subsequently protested by Twin Falls Canal Company, North Side Canal Company, Warm Creek Irrigation Company, Harold Isaak and Steve Isaak. The protests of Twin Falls Canal Company and North Side Canal Company were subsequently withdrawn.

4. On February 3, 1998, the department conducted a hearing in the matter. The applicant was present and was represented by Kent Foster. Warm Creek Irrigation Company (protestant) was represented by members Don Zaring and Lane Kindall. Protestants Harold and Steve Isaak did not appear at the hearing.

5. Issues identified by the protestant include the following:

- a. The proposed changes will injure other water rights.
- b. The proposed changes will constitute an enlargement in use of the original right.
- c. The right sought to be transferred has been forfeited through non-use.

The general concern expressed by the protestant was that diversion of additional water from the applicant's irrigation well will make less water available for the protestant's use of water diverted from Cold Creek and Warm Creek.

6. Exhibits offered and accepted as a part of the record include the following:

- a. Applicant's Exhibit No. 1 - U.S.G.S. Quadrangle sheet titled Neeley, Idaho and Indian Springs, Idaho.
- b. Applicant's Exhibit No. 2 - U.S. Geological Survey Open File Report 82-755 titled Water Resources of Rockland Basin, Southeastern Idaho.
- c. Applicant's Exhibit No. 3 - Stipulation and Order for Dismissal in Case No. CV-94-01028.
- d. Applicant's Exhibit No. 4 - Letter dated February 21, 1997 to Timothy P. Deeg from Mark Slifka.
- e. Applicant's Exhibit No. 5 - Letter dated April 7, 1997 to Kathleen Barkdull from Mark Slifka.
- f. Applicant's Exhibit No. 6 - Graph of water levels in two (2) USGS observation wells.
- g. Applicant's Exhibit No. 7 - Schematic depiction of certain wells. The exhibit is titled "Elevation Contours".
- h. Applicant's Exhibit No. 8 - Technical Data: Little Creek.
- i. Applicant's Exhibit No. 9 - Combined Reconnaissance and Project Survey for Little Creek Irrigation Company, Power SCD.

- j. Applicant's Exhibit No. 10 - Technical Data: Cold Creek.
 - k. Applicant's Exhibit No. 11 - Technical Data: Mayer Wells.
 - l. Applicant's Exhibit No. 12 - Report of Charles E. Brockway of Brockway Engineering.
 - m. Applicant's Exhibit No. 13 - Photograph of Little Creek weir.
 - n. Applicant's Exhibit No. 14 - Copy of aerial photograph showing cultivated acreage.
 - o. Applicant's Exhibit No. 15 - ASCS Report of Acreage for Program Year 1995.
 - p. Applicant's Exhibit No. 16 - ASCS Report of Acreage for Program Year 1993.
 - q. Applicant's Exhibit No. 17 - Map titled "Geographical Change With the Proposed Transfer of Nelson to Deeg Transfer # 5120".
 - r. Applicant's Exhibit No. 18 - Photograph of Cold Creek weir.
 - s. Applicant's Exhibit No. 19 - ASCS Report of Acreage for Program Year 1991.
 - t. Applicant's Exhibit No. 20 - Conservation Reserve Program Contract No. 8731 signed in 1997, ASCS Report of Acreage for program years 1992, 1994, 1996 and 1997.
 - u. Protestant's Exhibit A - Warm Creek Measurements.
 - v. Protestant's Exhibit B - Cold Creek Measurements.
7. At the hearing the hearing officer officially noticed the following:
- a. The department's file for Application for Permit No. 41-07034.
 - b. Past decisions and orders of the department, including the Amended Final Order of the department issued on March 21, 1995 in connection with license No. 41-07030.
 - c. The department's water right records.
 - d. Reports, water measurements and stream flow records in department files including U.S. Geological Survey reports.

- e. Well Driller Reports (well logs) in the department's files.

8. The Deeg irrigation well (Deeg well) is located in the SWSE Section 6, T9S, R31E, B.M. The well was drilled during the summer of 1992 and was first used on 348 acres during the 1993 irrigation season. The Deeg well is 939 feet deep and is cased with 18 inch diameter casing which is perforated at depths of 210 feet to 330 feet, 450 feet to 490 feet and from 516 to 716 feet. The static water level in the well averages about 475 feet below land surface. The water level in the well when it is pumping at times exceeds 500 feet below land surface.

9. On February 8, 1997, the department logged the Deeg well using a down-hole video camera and a temperature probe. A small amount of water was observed dripping into the hole at about 261 feet and at 298 feet, about 5 to 10 gallons per minute (gpm) was observed running down the slotted liner. The static water level was measured at 458 feet below land surface and the bottom hole temperature was 60.8 degrees F.

10. Other water rights diverted from the Deeg well include 41-07030, 41-07071, 41-07076 and 41-07081. The department conducted a field examination in connection with permit Nos. 41-07076 and 41-07081. Measurement by the department of the Deeg well in 1997 shows that the total diversion capacity from the well is 6.68 cfs.

11. The applicant stated that it is not his intent to increase the total diversion capacity from the Deeg well if transfer No. 5120 is approved.

12. The applicant owns and uses a domestic well which is located about 700' from his irrigation well. The domestic well is about 400' deep with a static water level of about 200' below land surface. Measurements show that this domestic well is not affected by the pumping of Deeg's irrigation well.

13. License No. 41-07034 authorizes the irrigation of 91 acres. The applicant does not plan to irrigate more than 91 new acres at the new place of use if transfer No. 5120 is approved.

14. Richard Nelson who owns the land to which water right license No. 41-07034 is appurtenant, last irrigated the land in 1989. During 1990, 1992, 1994 and 1996, Nelson raised dry-land wheat on the property. During 1991, 1993, 1995 and 1997, Nelson placed land under the license in the Acreage Conservation Reserve (ACR) set aside program. The ACR set-aside program is similar in some respects to the Conservation Reserve Program set aside (CRP) in that a certain portion of farmed land is idled for a given period of time.

15. Warm Creek Irrigation Company (protestant) diverts water under statutory Claim to a Water Right No. 29-04338 from Warm Creek which consists of the commingled waters of Cold Creek and Warm Creek. Cold Creek originates at springs located approximately 2.25 miles northeast of the Deeg well. Water in the creek then flows northwesterly about 3.25 miles where Warm Creek and Cold Creek flow together near Indian Springs in Section 18, T8S, R31E, B.M. The commingled creeks then flow northwesterly about 2.5 miles through Neeley, Idaho to the Snake River. The claim shows that the water is diverted for use within the lower 2.5 mile reach.

16. The protestant has filed Snake River Basin Adjudication Claim No. A29-04338 based on the Claim to a Water Right as follows:

Source:	Warm Creek tributary to the Snake River
Priority:	April 1, 1889
Rate of div:	6.0 cfs
Point of div:	SESE Section 11, T8S, R30E, B.M. NENW Section 13, T8S, R30E, B.M. NWNE Section 14, T8S, R30E, B.M. NESW Section 18, T8S, R31E, B.M.
Use:	Irrigation and stockwater
Place of use:	482 acres within parts of Sections 10, 11, 12, 13 and 14, T8S, R30E, B.M. and Section 18, T8S, R31E, B.M.
Remarks:	During winter months, livestock drink from the natural channel.

17. Water right license No. 29-07157, issued to Roland Mayer, authorizes the diversion of 5.1 cfs of groundwater from wells which are within 0.75 miles of Cold Creek. The Deeg well is about 2.25 miles from Cold Creek.

18. The Deeg well is located within basin 41 south of the ground water divide between hydrologic basins 41 and 29. Cold Creek and Warm Creek are located within basin 29. Groundwater flow near the Deeg well is toward the northwest but does not flow as northerly as does the surface water in Cold Creek and Warm Creek.

19. Flows of Cold Creek and Warm Creek measured near Indian Springs Natatorium in Section 18, T8S, R31E, B.M. during 1994, 1995, 1996 and 1997 show a slightly decreasing trend over the four year period. The measured flows in Warm Creek are about 2 cfs and the flows in Cold Creek are about 4 cfs which when combined, average about 6 cfs.

20. The geology in the Rockland basin generally consists of three different aquifers as follows:

- a. Upper alluvium, consisting of silt, sand and gravels.
- b. Tertiary, consisting of sedimentary and volcanic rocks.
- c. Pre-Tertiary, consisting of the oldest rocks.

21. Limestone cuttings were found in the bottom of the Deeg well. Limestone is identified as being within the Pre-Tertiary sedimentary rocks.

22. In 1994, the applicant collected water samples from his well and from Cold Creek. Analysis of the samples showed significant differences in some of the elements analyzed in the samples.

23. On March 21, 1995, the department issued an Amended Final Order in connection with transfer No. 4268 approving the transfer with certain conditions and limitations. The change under approved transfer No. 4268 is similar to the proposed change under pending application for transfer No. 5120.

ANALYSIS

Evidence and testimony presented at the hearing did not show that diversion of ground water from the Deeg well was the reason for the slight decreasing trend in the discharge of Warm Creek and Cold Creek as measured during 1994 through 1997. The protestants, however, may wish to continue to take and compile additional measurements of the surface water discharge during the coming years, since there may be future applications for transfer which could affect flow in the surface water sources.

Conjunctive Management Rules (rules) promulgated in October 1994 as IDAPA 37.03.11 integrate the administration and use of surface water and ground water in a manner consistent with the traditional policy of reasonable use of both surface and ground water if data show regulation is needed. The rules provide a basis and procedure for responding to delivery calls made by the holder of a senior-priority surface or ground water right against the holder of a junior-priority ground water right. As uses of water change or increase, conjunctive management of the rights may become necessary.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. Section 42-222(2), Idaho Code, provided in pertinent part as follows:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated ... ; except that all water rights appurtenant to land contracted in a federal cropland set-aside program, shall not be lost and forfeited for nonuse during the contracted period.

3. The applicant carries the burden of coming forward with evidence that the proposed change will not injure other water right holders, that it will not constitute an enlargement of the use and will be consistent with principles of conservation of the water of the state of Idaho.

4. Both the applicant and the protestant have the responsibility of coming forward with evidence regarding matters of public interest of which they are each most cognizant.

5. The applicant has the ultimate burden of persuasion for all of the criteria of Section 42-222, Idaho Code.

6. Forfeiture of a water right must be shown by clear and convincing evidence.

7. The years when the land was contracted in a federal land set-aside program can not be counted as years of non-use as related to forfeiture. There has not been five (5) countable years of non-use subsequent to Nelson's last use of license No. 41-07034 in 1989.

8. The evidence presented and other available information do not indicate that the slight declining trend in the discharge of water in Cold Creek and Warm Creek is due to pumping of ground water from the Deeg well.

9. The proposed change will not injure other water rights.

10. The proposed change does not constitute an enlargement in use of the original right.

11. The proposed change is in the local public interest.

12. The proposed change is consistent with conservation of water resources within the state of Idaho.

13. The department should approve the application for transfer with certain conditions and limitations.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 5120 of water right license No. 41-07034 is **APPROVED** subject to the following conditions and limitations:

1. The change authorized by this transfer shall be accomplished within one (1) year of the date of the final order in this matter.

2. Approval of this transfer does not preclude the opportunity for the review of the validity of the water right in the ongoing Snake River Basin Adjudication.

3. Prior to the diversion of water under this right, the right holder shall provide a means of measurement acceptable to the department which will allow determination of the rate of diversion and annual volume of water pumped from the well.

4. The authorized season of use is from April 1 to October 31 of each year.

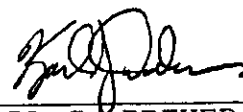
5. The maximum rate of diversion of water under this right when combined with water right Nos. 41-07030, 41-07071, 41-07076 and 41-07081 shall not exceed a total combined rate of 6.68 cfs nor more than 4.0 acre feet per acre per year at the well.

6. After specific notification by the department, the right holder shall annually report the amount of water diverted to the department.

7. Failure to comply with the conditions of this transfer is cause for the director to rescind approval of the transfer.

IT IS FURTHER hereby ORDERED that the protests of Harold and Steve Isaak are **SET ASIDE** for failure to appear at the time and place set for hearing and will not be further considered by the department.

Signed this 15th day of May, 1998.



KARL J. DREHER
Director

CERTIFICATE OF MAILING

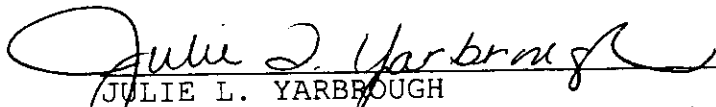
I DO HEREBY CERTIFY that on the 18th day of May, 1998, the above and foregoing document was served upon the following, via certified mail, by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

TIMOTHY P DEEG
2597 DEEG RD
AMERICAN FALLS ID 83211

KENT FOSTER
HOLDEN KIDWELL HAHN
AND CRAPO
PO BOX 50130
IDAHO FALLS ID 83405

HAROLD ISAAK
STEVE ISAAK
3315 ROCK CREEK RD
AMERICAN FALLS ID 83211

KATHLEEN BARKDULL SECRETARY
WARM CREEK IRRIGATION CO
3202 HEDSTROM LN
AMERICAN FALLS ID 83211


JULIE L. YARBROUGH
Senior Secretary, Water Allocation Bureau

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

TRANSFER OF WATER RIGHT

TRANSFER NO. 5120
WATER RIGHT NO. 41-07034

This is to certify that: TIMOTHY P DEEG
2597 DEEG ROAD
AMERICAN FALLS ID 83211

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL VOLUME</u>
IRRIGATION	04/01 to 10/31	1.82 CFS	364.0 AF

SOURCE

GROUNDWATER

Priority: 04/07/1978

LOCATION OF POINT(S) OF DIVERSION:

SWSE , Sec. 6, Township 09S, Range 31E
POWER County

PLACE OF USE: IRRIGATION

<u>TWN RGE SEC</u>	<u>ACRES</u>	<u>ACRES</u>	<u>ACRES</u>	<u>TOTAL</u>
09S 30E 12	NESW 22.8	SESW 22.7	NWSE 22.8	91
	SWSE 22.7			91

Total number of acres irrigated:

91

CONDITIONS OF APPROVAL AND REMARKS

Right 41-07034 is subject to the conditions of the Final Order in the matter of Application for Transfer No. 5120.

Dated this 15th day of May, 1998

A. Glen Saxton
Chief, Water Allocation Bureau



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

April 7, 1997

PHILIP E. BATT
GOVERNOR

Kathleen Barkdull, Secretary
Warm Creek Irrigation Company
3202 Hedstrom Lane
American Falls, Idaho 83211

KARL J. DREHER
DIRECTOR

REFERENCE: Deep Well Concerns

Dear Ms. Barkdull,

Thank you for your letter dated March 26, 1997 inquiring about our findings relative to the down-hole camera and temperature logging conducted on the well located in SWSE, Section 6, T9S, R31E, B.M. The well was logged with the video and temperature probe to determine if Low Temperature Geothermal water existed at the bottom of the hole and to observe the extent of commingling of shallow cool waters with the deeper, warm water believed to be present. Idaho Code 42-233 defines Low Temperature Geothermal water resources as having a water temperature of 85-212 degrees F and requires such water to be used principally for heat value. Department Rules require that waters of unlike quality, pressure or temperature to not be commingled if such commingling would constitute a waste or cause contamination of the water resources.

The video camera showed a small amount of water dripping into the hole at about 261 feet and at 298 feet about 5-10 gpm was observed running down the slotted liner. Static water was found at 458 feet. The temperature probe measured the bottom hole temperature at 60.76 degrees F. Therefore, the department determined the well was not commingling cold water with Low Temperature Geothermal water resources and that use of the water was not in violation to Idaho Code 42-233. The Department further determined that reconstruction of the well is not necessary.

Concerning your question related to the measuring device, this is part of the field examination which the Department will conduct prior to issuance of the license for water right 41-07076.

The Department is not authorizing further drilling under this water right.

I hope this information is helpful to you.

Sincerely,

Mark Slifka

Cc: Allen Merritt
Timothy Deeg



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

February 21, 1997

Mr. Timothy P. Deeg
2957 Deeg Road
American Falls, Idaho 83211

REFERENCE: DP# 41-92-S-002/WR# 41-07081

Dear Mr. Deeg,

Thank you for cooperating with the Department in the logging of your well. The Department ran a video camera and a temperature probe in your well on February 18, 1997. The results of the camera work and temperature logging provided no indication of the presence of Low Temperature Geothermal (85-212 degrees F) waters in your well. Therefore, it does not appear that the shallower aquifers are entering any thermal systems through your well.

This satisfies the Department's concern relating to the well construction described in the Stipulation and Order for Dismissal signed in March 1995.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Slifka'.

Mark Slifka, Manager
Ground Water Protection

cc: Kent W. Foster

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CV-94-01028
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IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF POWER

IN THE MATTER OF APPLICATION)	Case No. CV-94-01028
FOR TRANSFER NO. 4268 OF)	
WATER RIGHT NO. 41-07030 IN)	STIPULATION AND ORDER
THE NAME OF TIMOTHY P. DEEG.)	FOR DISMISSAL
_____)	

The appellant in this matter, Timothy P. Deeg, (hereinafter "Deeg") filed his Application for Transfer of Water Right No. 41-07030 with Idaho Department of Water Resources (hereafter "IDWR") pursuant to the provisions of Idaho Code Section 42-222 on the 30th day of December, 1993. Said application was assigned no. 4268 by IDWR and after publication of notice as required by said statute, protests were filed. IDWR conducted a hearing on said protests on May 17 and May 24, 1994. Following said hearing, the Director of IDWR issued a Final Order on August 23, 1994, granting said transfer, subject to certain conditions, including a condition requiring applicant to submit a plan for repair of applicant's well, under the Idaho Water Resource Board Well Construction Standard Rules, IDAPA Rule, 37.03.09025.031, because IDWR had formed a belief that cascading water from the upper aquifer was mixing with water from the lower aquifer which could result in a water quality problem. Applicant next filed a Petition for Reconsideration of said condition on or

about September 6, 1994, and the Director of IDWR issued an Order Denying Petition for Reconsideration on September 9, 1994.

Deeg filed his Notice of Appeal in this matter in the above entitled court on October 7, 1994, and a Statement of Issues on Appeal on October 21, 1994. IDWR filed its Notice of Appearance herein on or about October 19, 1994, and no other parties, including any of the protestants in the administrative proceeding below, have appeared or filed any pleadings or other documents herein.

Deeg and IDWR have continued to seek a satisfactory resolution of the well repair issue, and have now agreed to a settlement arrangement which permits the parties to stipulate to the dismissal by this court of the pending appeal from the administrative decision. The parties hereto, and their respective attorneys, do hereby stipulate and agree that the appeal herein may be dismissed with prejudice, on the following terms and subject to the following conditions:

1. Deeg shall not be required to submit a plan for repair of his well until such time as IDWR is able to confirm that a water quality problem of sufficient magnitude exists. At present the parties concur that there is not sufficient space in the well, because of the presence of the column and pump, to accommodate the performance of the necessary testing and use of necessary equipment. Removal of the column and pump would require a relatively significant expenditure of funds which would not otherwise be required until such time as the same occurs in the performance of regular maintenance and/or emergency repairs. Deeg shall notify IDWR, as far in advance as may be practicable, of the next time said pump

and column are removed from said well for any purpose, so that IDWR may conduct an appropriate test to determine whether such a water quality problem exists. Upon receipt of such notice, IDWR shall, at its own cost, as expeditiously as possible, and without causing any unnecessary delay, cause an appropriate test to be conducted by a person or persons having reasonable expertise and utilizing appropriate equipment or devices capable of adequately providing the necessary confirmation. Deeg shall provide the required notice both by a telephone call to IDWR, and in writing by facsimile transmission or regular mail, at the first such time he determines to cause the pump and column to be removed from said well, but in no event later than seven (7) years from the date hereof. The parties recognize that normal maintenance requirements would most likely require removal of the pump and column from the well within five (5) to ten (10) years after its installation, and that the cost of such removal is relatively great. In the event normal maintenance considerations do not require such removal at the expiration of said seven (7) year period, nothing herein shall prevent Deeg from requesting, or IDWR from granting, a further extension before removal occurs.

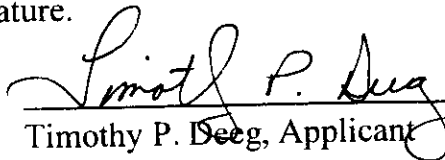
2. The condition, No. 1, of the Order portion of the director's Final Order, dated August 23, 1994, shall be stricken and an Amended Final Order, containing a new condition No. 1 in the Order portion thereof, consistent with this stipulation, shall be substituted therefore, a copy of which is attached hereto as Exhibit "A".

3. Each party shall bear its own costs and attorney fees incurred in connection with this appeal.

4. The terms and conditions of this stipulation shall be binding upon the heirs, personal representatives or successors in interest of Deeg, as well as any successor agency of IDWR.

This stipulation has been executed by the parties and their respective attorneys of record on the dates set opposite each such signature.

Dated: 3-14-95


Timothy P. Deeg, Applicant

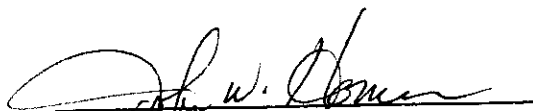
Dated: 3/16/95


Kent W. Foster
Holden, Kidwell, Hahn & Crapo, P.L.L.C.

Dated: 3/21/95


R. Keith Higginson, Director
Idaho Department of Water Resources

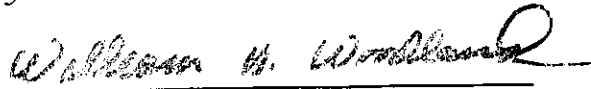
Dated: 3/21/95


John W. Homan, Deputy Attorney General
for Al Lance, Attorney General of the
State of Idaho and Idaho Department of
Water Resources

ORDER

The court having read and filed foregoing stipulation of the parties and their respective attorneys, and being fully advised herein, hereby orders that said appeal be, and the same is hereby dismissed with prejudice, subject to the terms and conditions set forth in said foregoing stipulation.

Dated this 29 day of March 1995



District Judge

(seal)

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 4268 OF WATER)
RIGHT NO. 41-07030 IN THE NAME)
OF TIMOTHY P. DEEG)
_____)

AMENDED
FINAL ORDER

On June 14, 1994, the Department of Water Resources (department) issued a Recommended Order in connection with Application for Transfer No. 4268 of Water Right No. 41-07030 in the name of Timothy P. Deeg (applicant). On June 23, 1994, the protestant submitted a Petition for Reconsideration of the Recommended Order (petition).

The petition was denied by operation of law as provided in Section 67-5243(3), Idaho Code, due to no action being taken by the hearing officer within twenty-one (21) days after the filing of the petition. Thereafter, pursuant to department Rule of Procedure 720, any party had twenty-one (21) days following the denial of the petition to file exceptions with the Director prior to the entry of a final order. No exceptions to the recommended order have been filed with the Director during this 21-day period.

Although the petition was denied by operation of law, the Director responds to the issues and concerns identified in the petition as follows:

1. IDAPA Rule 37.01.01600 provides that the presiding officer at hearing is not bound by the Idaho Rules of Evidence. The rule also states that no informality in any proceeding or in the manner of taking testimony invalidates any order.
2. Water level measurements at a pumping rate of 1170 gallons per minute are not immaterial and are not irrelevant and begs the question of water level measurements at a diversion rate of 8.35 cubic feet per second (cfs). More specifically the applicant can not provide well level and draw down information at a maximum pumping rate of 8.35 cfs unless the pending application of the applicant to pump at that rate is approved by the department.
3. See No. 2. above.
4. The protestant's disagreement with the decision reached is not reason to change the decision.
5. There is no error, since the protestant's own unrefuted testimony was that pumping of the Mayer wells did not affect the

flow of Cold Creek or Warm Creek.

6. See No. 4. above.

7. See No. 2. above.

8. The department does not agree with the argument of the protestant but nonetheless has changed Conclusion of Law No. 5. to more clearly describe the intent of the conclusion.

9. The department agrees with the argument of the protestant and has changed Condition of Approval No. 6. to insure that the right is not enlarged.

10. See no. 9. above.

11. The opinion of the applicant's expert witness supports the conclusion reached. In addition, general stream flow records, water measurements, depth to water measurements and other records in department files of which official notice was taken also support the conclusion reached.

12. The conclusion is correct and should not be changed. A protestant who diverts water from the Mayer wells testified that an additional 30 acres of potatoes had been planted during the 1994 irrigation season. This protestant did not show that additional water had been obtained thorough a rental agreement or from some other source of water.

13. The argument of the protestant relative to the provisions of a private contract is not within the purview of issues described in Section 42-222, Idaho Code, and thus can not be considered by the department.

14. See no. 9. above.

Based on his understanding of the law, the Director of the Department of Water Resources makes the following Findings of Fact, Conclusions of Law, Analysis and Final Order:

FINDINGS OF FACT

1. On December 3, 1993, Timothy P. Deeg filed Application for Transfer No. 4268 (application) with the department in connection with water right License No. 41-07030. The applicant proposed to change both the point of diversion and the place of use of the license to a location twelve (12) miles north and three (3) miles west of the original location.

2. The department advertised the application which was protested by Warm Creek Irrigation Co., Steve W. Isaak, Roland Mayer and Sons, the Twin Falls Canal Co. and the North Side Canal

Co. The Twin Falls Canal Co. and the North Side Canal Co. subsequently withdrew their protests.

3. On May 17, 1994 and May 24, 1994, the department conducted a hearing in the matter in American Falls, Idaho. The applicant was present and was represented by attorney Kent Foster. The protestants were present and were represented by attorney Roger Ling.

4. Issues identified by the protestants include the following:

- a. Approval of the application for transfer will injure existing water rights.
- b. Approval of the application will enlarge the right sought to be transferred.
- c. Approval of the application is not in the local public interest.

The general concern expressed by the protestants was that diversion of additional water from the applicant's irrigation well will make less water available for the protestant's use of water diverted from the Mayer wells, Little Creek, Cold Creek and Warm Creek.

5. Exhibits offered and accepted as a part of the record include the following:

- a. Applicant's Exhibit No. 1 - U.S.G.S. Quadrangle sheet titled Neeley, Idaho and Indian Springs, Idaho.
- b. Applicant's Exhibit No. 1-A - U.S. Geological Survey Open-File Report 82-755 titled Water Resources of Rockland Basin, South-Eastern Idaho. The study was conducted in 1982.
- c. Applicant's Exhibit No. 2 - Schematic depiction of certain wells. The exhibit is titled "Elevation Contours."
- d. Applicant's Exhibit No. 3 - Technical Data: Little Creek.
- e. Applicant's Exhibit No. 4 - Technical Data: Cold Creek.
- f. Applicant's Exhibit No. 5 - Technical Data: Mayer Wells.
- g. Applicant's Exhibit No. 6 - Potential Well Interference data and a graph titled Estimated Drawdown From Deeg Irrigation Well.
- h. Applicant's Exhibit No. 7 - Letter dated May 16, 1994 to Timothy Deeg from Rolf E. Larsen of Mountain States Analytical together with analytical results of three (3) water samples.

i. Applicant's Exhibit No. 8 - Miscellaneous information and water measurements.

j. Applicant's Exhibit No. 9 - Photograph showing a concrete water diversion structure on Cold Creek.

k. Applicant's Exhibit No. 10 - Well Test data of Pumpco for the Deeg irrigation well.

l. Protestant's Exhibit A - Letters dated April 10, 1992, April 21, 1993 and January 25, 1994 on Falls Irrigation District letterhead from Terrell O. Sorensen.

6. At the hearing, the hearing officer officially noticed the following:

a) Application for Permit file 41-07030.

b) Past decisions of the department as those decisions may apply to the protested application.

c) Water right records including recorded claims and rights of the protestants.

d) Reports, water measurements and stream flow records in department files such as U.S. Geological Survey reports.

e) Well Driller Reports (well logs) in department files.

7. License No. 29-07157 issued to Roland Mayer describes a water right with the following parameters:

Source:	Ground water
Priority:	September 19, 1973
Diversion rate:	5.10 cfs
Volume of water:	1,169 AF per year
Points of div:	NW1/4NW1/4, SW1/4NW1/4 Section 32, T8S, R31E, BM. (Mayer wells).
Use:	Irrigation
Place of use:	334 acres within parts of Sections 29, 31 and 32, T8S, R31E, BM.

8. License No. 41-07030 issued to Farold J. Nelson describes a water right with the following parameters:

Source:	Ground water
Priority:	January 2, 1978
Diversion rate:	1.4 cubic feet per second (cfs)
Volume of water:	441 AF per year
Point of div:	NE1/4SE1/4 Section 28, T10S, R31E, BM.
Use:	Irrigation
Place of use:	126 acres within parts of Section 28,

T10S, R31E,BM.

9. On June 20, 1991, the department issued Permit No. 41-07081 to the applicant with the following parameters:

Source: Ground water
Priority: February 28, 1990
Diversion rate: 6.95 cubic feet per second
Point of div: SW1/4SE1/4 Section 6, T9S, R31E,BM.
Use: Irrigation
Place of use: 348 acres in parts of Section 1, T9S, R30E,BM. and Section 6, T9S, R31E,BM.

Proof ben. use due: July 1, 1994

10. The applicant drilled the irrigation well authorized by Permit No. 41-07081 (Deeg well) during the summer of 1992 and diverted and used the water on 348 acres during the 1993 irrigation season. The land is sprinkler irrigated with two (2) pivots, four (4) wheel lines and handpipe. The Deeg well is 939 feet deep and is cased with 18 inch diameter casing which is perforated at depths of 210 feet to 330 feet, 450 feet to 490 feet and from 516 feet to 716 feet. There is some cascading water in the well. The static water level is about 452 feet below land surface.

11. The applicant has a five-year lease option for the use of water under License No. 41-07030 and proposes to change the point of diversion to the Deeg well located in the SW1/4SE1/4 Section 6, T9S, R31E,BM. The water would be diverted for the irrigation of an additional 126 acres within Section 1, T9S, R30E,BM using a center pivot.

12. The applicant has a domestic well which is located about 700' from his irrigation well. The domestic well is about 400' deep and the static water level in the well is about 200' to 210' below land surface.

13. Water level measurements in the Deeg well when the well was pumping are as follows:

April 22, 1994 - 463.0' - 1170 gpm
May 13, 1994 - 460.0' - 800 gpm
May 15, 1994 - 462.5' - 920 gpm

14. Pumping of the Deeg irrigation well has little effect upon the water level in the Deeg domestic well.

15. The flow of Little Creek as measured at the Little Creek Weir located in Section 36, T8S, R30E,BM. is approximately 1.8 cfs to 2.0 cfs. There are no diversions upstream from the Little Creek weir.

16. After flowing together, the rate of flow of Warm Creek and Cold Creek before the irrigation season when no diversions were being made is approximately 6.3 cfs to 7.5 cfs as measured in Section 13, T8S, R30E, BM.

17. Characteristics of the Roland Mayer irrigation wells include the following:

. North well

Location:	NW1/4NW1/4 Section 32, T8S, R31E, BM.
Total depth:	345'
Static water level:	157' to 162'
Pumping level:	305' - previously was 221'
Discharge rate:	About 1200 gpm (2.7 cfs)
Remarks:	This well was deepened from the original depth

South well

Location:	SW1/4NW1/4 Section 32, T8S, R31E, BM.
Total depth:	423'
Static water level:	96' to 97'
Pumping level:	200' - The pump was lowered from 160' to 200' in 1993.
Discharge rate:	850 gpm (1.9 cfs)
Remarks:	Pump has been diesel operated but is now operated by an electric motor.

18. The geology in the Rockland basin generally consists of three different aquifers as follows:

- a) Upper alluvium, consisting of silt, sand and gravels.
- b) Tertiary, consisting of sedimentary and volcanic rocks.
- c) Pre-Tertiary, consisting of the oldest rocks.

19. The source of water for Little Creek, Cold Creek and Warm Creek most likely is fault controlled springs originating between the Tertiary and Pre-Tertiary aquifers.

20. Limestone cuttings were found in the bottom of the Deeg well. Limestone is identified as being within the Pre-Tertiary sedimentary rocks.

21. The temperature of water in the Deeg well is higher than in surrounding wells suggesting that some geothermal water enters the well at depth.

22. The applicant conducted water quality analysis for samples taken from the Deeg well, Little Creek Spring and Cold Creek Spring. Water from the Deeg well showed higher electrical conductivity, more flouride and more sulfate than the samples taken

from the springs.

23. The applicant does not plan to irrigate more land than authorized by License No. 41-07030.

24. The protestants divide the available water on Warm Creek and Cold Creek and rotate the use of the water which is available. As an example, there are 84 shares of water in the Sorenson Ditch which diverts out of Cold Creek. Each share represents 2 hours and 17 minutes and is rotated every 8 days.

25. Water available in the Mayer wells has historically decreased annually as the irrigation season progresses. In 1993, however, the south well started to surge due to the lack of water for the first time, so the pump was lowered 40 feet in the well.

26. The Mayer wells which are closer to Little Creek and Cold Creek than the Deeg well do not noticeably affect the flow of the creeks.

27. Historic flow records of Cold Creek, Warm Creek and Little Creek are not extensive. Testimony of the protestants, however, was that in 1993, they received less water than in past years.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, provides in pertinent part as follows:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-203A(5), Idaho Code;

2. The drawdown in the Deeg well is about nine (9) feet when diverting at a rate of 1,170 gpm (2.6 cfs). The static water level in the Deeg well is over 300 feet below the expected regional water table in the alluvial system and is about 410 feet lower than that of the Mayer wells.

3. The Deeg well derives some of its water at depth from a warm water source and some of its water (cascading) from the upper alluvial system. The warm water source is an external source of water to water diverted from the Mayer wells which derive water from the alluvial system.

4. Pumping of the Deeg irrigation well has little effect

upon the Deeg domestic well which is 700' distant and will have an even smaller effect upon the Mayer wells which are 1.5 miles away.

5. The additional pumping of 1.4 cfs from the Deeg well as proposed in the application will not adversely impact flows in Little Creek Cold Creek or Warm Creek which is four (4) miles north of the Deeg well.

6. The construction of the Deeg well does not meet minimum well construction standards, since water of different quality and from different zones is being mixed. (IDAPA Rule 37.03.09025.03. abbreviated as Well Constructions Standards Rule 25.03).

7. Approval of the application for transfer will not injure existing water rights.

8. Approval of the application will not enlarge the right sought to be transferred.

9. Approval of the application is consistent with the conservation of water resources in Idaho.

10. Approval of the application is not against the local public interest.

11. The department should approve the application for transfer with certain conditions and limitations.

ANALYSIS

There was consistent testimony from the protestants that during 1993, there was less water available for diversion than in prior years. The protestants, however, did not know the cause of the decline and did not show that diversion of water from the Deeg well was the cause of the decrease in water availability.

The residual effects of the 1987 to 1992 drought conditions in Idaho are more likely the cause of any decreased flow in Little Creek, Cold Creek or Warm Creek than the diversion of water from the Deeg well.

Some of the protestants have recently added irrigated acreage and have changed to crops which are more consumptive than previously grown.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Transfer No. 4268 of water right License No. 41-07030 is APPROVED subject to the following conditions:

1. The applicant shall notify the department by telephone

and by facsimile or regular mail when he removes the pump and column from the well in order that the department can conduct appropriate tests to determine whether construction of the well complies with the Idaho Well Construction Standards described in IDAPA 37.03.09, provided that the pump and column shall be removed from the well no later than seven (7) years from the date of this order.

2. The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.

3. Approval of this transfer does not preclude the opportunity for review of the validity of the water right in the ongoing Snake River Basin Adjudication.

4. Prior to the diversion of water under this right, the right holder shall provide a means of measurement acceptable to the department which will allow determination of the rate of diversion from the well.

5. The authorized season of use is from April 1 to October 31 of each year.

6. The right holder is not authorized to divert water under this transfer for the 126 acres at a rate larger than 1.4 cfs or to divert more than 441 AF for the 126 acres. Diversion of water under this approval is contingent upon the applicant to be able to readily show compliance with this condition.

7. Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval should not be rescinded.

Signed this 21st day of MARCH, 1994.


R. KEITH HIGGINSON
Director