

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF DIVERSION AND)
USE OF WATER NOT IN CONFORMANCE)
WITH CONDITIONS OF APPROVAL OF)
TRANSFER NO. 5197 INVOLVING WATER)
RIGHTS NOS. 36-02457B, 36-07760B, AND)
36-08063F IN THE NAME OF F. F. GUNNING)
_____)

PRELIMINARY ORDER

The Department of Water Resources (department), being charged with the duties of protecting vested water rights, enforcing specific statutes of the state of Idaho and the rules promulgated by the department, and being authorized to order the cessation of violations or apparent violations of the provisions of the law relating to the appropriation, distribution and use of water, has conducted an investigation of certain diversions of water being made by or under approved Transfer No. 5197.

Based upon the department's investigation and understanding of the law, the department makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Water use at the Gunning Dairy (also known as the Hillcrest Dairy) was authorized pursuant to approved Transfer No. 5197, which involved changes to License Nos. 36-02457B, 36-07760B and 36-08063F.

2. At the hearing for Transfer No. 5197 the applicant and protestants stipulated that issues of compliance of the dairy with county zoning requirements were on appeal to the courts and should not be argued in the department's administrative hearing on the protested application for transfer.

3. The Final Order approving Transfer No. 5197 included the following conditions of approval:

(Condition No. 2)

The dairy operation authorized under this approval shall comply with applicable city and county zoning and use requirements.

(Condition No. 15)

Failure of the right holder to comply with any condition of approval of this transfer is cause for the Director to rescind approval of the transfer.

4. Subsequent to approval of Transfer No. 5197, the department has received complaints and information from interested parties asserting that the dairy has not come into compliance with county zoning requirements.

5. In response to an inquiry from the department, Gooding County officials have indicated that the dairy has not received a Confined Animal Feeding Operation (CAFO) permit or received other authorizations from Gooding County required to continue operation as a dairy.

6. The records of the department indicate that F. F. Gunning is the owner of the water rights used at Gunning Dairy (Hillcrest Dairy).

7. On December 7, 1999, F. F. Gunning as the owner of record of the water rights for Gunning Dairy was ordered to show within 45 days that water rights at the dairy are being used in compliance with the Gooding County Ordinance. The order indicated that failure to do so would be cause for the department to initiate an action to rescind approval of Transfer No. 5197.

8. On January 4, 2000, the order was resent to clarify the addresses of the parties with a response required within 45 days.

9. On February 23, 2000, Robert E. Williams, an attorney acting for the Gunning Family, requested an extension of time to comply with the order. The request indicated that the issues with Gooding County would either be resolved by an agreement or an action for declaratory judgment. On March 20, 2000, the department extended the time within which to comply with the order to May 1, 2000.

10. No further correspondence has been received to respond to the order.

CONCLUSIONS OF LAW

1. Section 42-351(1), Idaho Code, provides as follows:

If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a valid right to do so or is applying water or has applied water not in conformance with a valid water right, then the director of the department of water resources shall have the discretion to issue a written notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water. Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.

2. Section 42-201, Idaho Code, provides in part as follows:

All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise.

3. Diversion and use of the public waters of the state of Idaho not in compliance with existing water rights must be regulated to prevent injury to other water rights, to protect the water resources of the state and to assure that the allocation and use of available water supplies takes place in an orderly manner.

4. The information available to the department indicates that the use of water at Gunning Dairy is not in compliance with Condition No. 2 of the final order approving Transfer No. 5197. F. F. Gunning has not provided adequate information to demonstrate compliance with Condition No. 2.

5. Condition No. 15 of the Final Order approving Transfer No. 5197 provides that failure to comply with the conditions of approval is cause to rescind approval of the transfer.

ORDER

IT IS HEREBY ORDERED as follows:

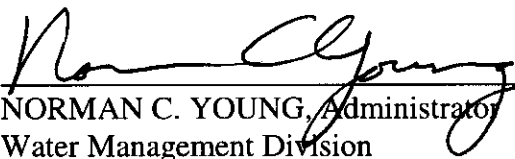
1. The approval of Application for Transfer No. 5197 should be and is hereby **RESCINDED**.

2. The effective date of this order is determined in accordance with the provisions of Rule 730 of the department's "Rules of Procedure," (IDAPA 37.01.01) covered in the attachment entitled "Responding to Preliminary Orders Issued by the Idaho Department of Water Resources."

3. Diversion and use of water in reliance upon Transfer No. 5197 shall cease on or before the effective date of this order.

4. If the dairy is operated under a claim of a domestic right, Gunning shall immediately begin measuring water use at the Gunning Dairy on a monthly basis and report the rate and volume of use to the department by the 10th of each following month. Measuring and reporting shall continue until further order of the department.

DATED this 25TH day of May, 2000.


NORMAN C. YOUNG, Administrator
Water Management Division

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this the 25th day of May, 2000, the Preliminary Order foregoing documents were served upon the following, by certified mail, by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

F. F. Gunning
P. O. Box 716
Wendell, Idaho 83355

Certified Mail No. Z 433 941 857

F. F. Gunning
c/o Gold Canyon RV Ranch
P. O. Box 217
Apache Junction, AZ 85219

Certified Mail No. Z 433 941 858

Robert E. Williams
Frederickson, Williams & Meservy
P. O. Box 168
Jerome, Idaho 83338-0168

Certified Mail No. Z 433 941 859

Susan Gunning
5104 West Cove
Boise, Idaho 83703

Certified Mail No. Z 433 941 860

Patrick D. Brown
109 S. Adams Street
Jerome, Idaho 83338

Certified Mail No. Z 433 941 861

A handwritten signature in black ink, appearing to read "Rita I. Fleck", written over a horizontal line.

Rita I. Fleck
Administrative Assistant
Director's Office