

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR EXCHANGE OF WATER)
RIGHT NOS. 65-3222 AND 65-8290)
IN THE NAME OF PTR, INC.)
_____)

PRELIMINARY ORDER

On May 1, 2003, PTR, Inc. ("PTR") filed an application for exchange of water with the Idaho Department of Water Resources ("IDWR"). The application for exchange proposes the exchange of water authorized for diversion from Scriver Creek under water right nos. 65-3222 and 65-8290 with water flowing in the Middle Fork of the Payette River. To accomplish the exchange, PTR proposes to add a point of diversion to water right nos. 65-3222 and 65-8290 to divert the water from the Middle Fork of the Payette River. PTR filed an exchange because the proposed point of diversion from the Middle Fork of the Payette River is located upstream from the confluence of Scriver Creek with the Middle Fork of the Payette River.

Notice of the application for exchange was published, and the application was protested by Stuart and Rhonda Weimer ("Weimers").

A hearing for the protest was conducted on January 25, 2005. PTR was represented by S. Bryce Farris. Weimers were represented by George G. Hicks. Attorneys for the parties submitted post-hearing briefs through approximately the end of February.

Having reviewed the evidence presented at the hearing and the briefs submitted by the parties, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. PTR filed an application for exchange of water seeking to add a point of diversion to water right nos. 65-3222 and 65-8290.

2. Water right nos. 65-3222 and 65-8290 both describe the source of water as Scriver Creek. Scriver Creek is tributary to the Middle Fork of the Payette River. The application for exchange proposes to add a point of diversion on the Middle Fork of the Payette River approximately one to two miles upstream from the confluence of Scriver Creek with the Middle Fork of the Payette River.

3. PTR proposes to pump water from the Middle Fork of the Payette River at the new proposed point of diversion and deliver the pumped water to lands located at a higher elevation than the river. The lands proposed to be served by water pumped from the Middle Fork of the Payette River were once served by water delivered from Scriver Creek. This decision will refer to these lands as the River Ranch Subdivision and the Stone Property. The stated purpose for the additional point of diversion is to eliminate a failed pipeline at the tail end of the PTR delivery system.

4. Water right nos. 65-3222 and 65-8290 were recently decreed in the Snake River Basin Adjudication (SRBA). The SRBA recognized the following elements of the water right:

Water Right No. 65-3222:

Owner:	Pine Tree Ranch, Inc.
Source of Water:	Scriver Creek, Tributary to Payette River, Middle Fork
Flow Rate:	2.90 cubic feet per second (cfs)
Priority Date:	September 26, 1881
Point of Diversion:	NWSW ¹ , Sec. 22, T10N, R04E, Boise County
Purpose of Use:	Irrigation

Water Right No. 65-8290:

Owner:	Pine Tree Ranch, Inc.
Source:	Scriver Creek, Tributary to Payette River, Middle Fork
Flow Rate:	0.32 cfs
Priority Date:	February 4, 1928
Point of Diversion:	NWSW, Sec. 22, T10N, R04E, Boise County
Purpose of Use:	Irrigation

Places of Use for both water rights:

Irrigation within Boise County						
T10 R04E	Sec. 22	Lot 2	(SWSE) 1.0	Lot 1	(SESE) 12.0	
					SENE 1.0	
	Sec. 23		NESW 33.0		NWSW 39.0	
			SWSW 29.0		SESW 16.0	
			Sec. 26		NWNW 2.0	SWNW 1.0
			Sec. 27		NENE 22.0	NWNE 2.0
	161.0 Acres Total					

¹ In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the NW1/4SW1/4, Section 22, Township 10 North, Range 4 East, Boise Meridian.

Use of the combined rights is limited to the irrigation of a combined total of 161.0 acres in a single irrigation season.

5. The point of diversion for water right nos. 65-3222 and 65-8290 is also identified as a point of diversion by water right no. 65-3223. Water right no. 65-3223 authorizes diversion of 0.54 cubic feet per second (cfs) for the irrigation of 34 acres. The 34-acre place of use is served by a different delivery system after the initial diversion and conveyance and was not included in the application for exchange.

6. Water right nos. 65-3222, 65-3223, and 65-8290 cumulatively authorize a total diversion flow rate of 3.76 cfs.

7. A corporation named Pine Tree Ranch, Inc. was incorporated in the State of Idaho on June 22, 1973. The purpose of Pine Tree Ranch, Inc. was to “engage in and conduct a general real estate land development business . . . [and] . . . to acquire, hold, manage and operate irrigation ditches, canals, reservoirs, dams, flumes, aqueduct pipes, water or water rights, and all machinery and other property necessary for the purposes of watering and irrigation, including irrigation pumping plants and sprinkling systems.”

8. On June 30, 1973, a warranty deed was filed with Boise County that conveyed the Beck Ranch, located in Garden Valley, Idaho, to Pine Tree Ranch, Inc.

9. Pine Tree Ranch, Inc. subdivided the Beck Ranch into smaller parcels and began selling the parcels.

10. On February 28, 1978, PTR, Inc. (PTR) was incorporated in the State of Idaho. PTR is a non-profit corporation formed for the purpose of holding and operating a water system for the owners of the properties subdivided by Pine Tree Ranch, Inc.

11. On March 14, 1978, Pine Tree Ranch, Inc. conveyed one of the subdivided parcels of ground to Thomas D. Elam and Sharon Elam. This parcel of property was subsequently conveyed to Stuart R. Weimer and Rhonda J. Weimer, the protestants in this matter.

12. On November 11, 1994, a quitclaim deed was filed in Boise County in which Pine Tree Ranch, Inc. conveyed to PTR all of the surface water rights appurtenant to the Beck Ranch.

13. Despite the conveyance of the water rights to PTR, evidence of the change of ownership was not submitted to IDWR or the SRBA Court. On March 7, 2003, the SRBA court issued partial decrees for water right nos. 65-3222 and 65-8290. The rights were decreed to Pine Tree Ranch, Inc.

14. The application for exchange filed by PTR seeks recognition of the change of ownership.

15. Weimers contest full ownership of the water rights by PTR. A dispute about rotation among the landowners of the property developed by Pine Tree Ranch, Inc. and about the ownership of the water rights is presently being litigated in an Idaho court.

16. The point of diversion for water right nos. 65-3222, 65-3223, and 65-8290 is located approximately one-mile northwest of the Beck Ranch. The point of diversion is in a canyon, and the delivery ditch from the point of diversion is “hung on the wall of the canyon.”

17. The uncontroverted evidence at the hearing established that no more than 1.59 cfs has been diverted from the existing point of diversion. The ditch delivering the water from the point of diversion to the Beck Ranch cannot be improved to carry more water without significant, costly construction.

18. A flow of water in excess of the quantity of water diverted at the point of diversion for water right nos. 65-3222, 65-3223, and 65-8290 always flows in Scriver Creek past the existing point of diversion on Scriver Creek. The flow of Scriver Creek continues to the mouth of Scriver Creek where it discharges into the Middle Fork of the Payette River.

19. A ditch delivers water by gravity flow from Scriver Creek first to the Weimer property and then delivers water to properties owned by Kane, Granieri, and Burnside in that order. The Weimer, Kane, Granieri, and Burnside properties are located in an area known as “the Bluff.” These properties are depicted on PTR’s exhibit no. 1, and the photographs labeled as images 1, 2, 3, 4, and 5. Following delivery of water to the Burnside property at the edge of the Bluff, the open ditch discharges into a pipeline that drops over the hill of the Bluff and delivers water to additional lands listed in the water right place of use. These lands are known as the River Ranch Subdivision and the Stone Property.

20. During the 2002 irrigation season, PTR attempted to deliver water through the pipeline to the River Ranch Subdivision and the Stone Property, but the pipeline failed. On several occasions, PTR attempted to repair the pipeline and redeliver water, but was unable to deliver the water because of reoccurring pipeline failures.

21. PTR analyzed the cost of repairing or replacing the pipeline. PTR determined the cost of repairing/replacing the pipeline was exorbitant, and explored other options for delivering water to the River Ranch Subdivision and the Stone Property.

22. River Ranch Subdivision is bounded on the North and East by the Middle Fork of the Payette River. PTR determined it would be cheaper to install a pump and pressurized system diverting water from the Middle Fork of the Payette River than to repair/replace the pipeline and maintain the long delivery system from Scriver Creek to River Ranch Subdivision and the Stone Property.

23. This application for exchange proposes to continue the historical diversion of 1.59 cfs from Scriver Creek without reduction, and to deliver the 1.59 cfs to properties located on the

Bluff owned by Weimer, Cane, Granieri, and Burnside, and the place of use described by water right no. 65-3223. The application for exchange also proposes the diversion of up to an additional 2.17 cfs from the Middle Fork of the Payette River to the River Ranch Subdivision and Stone Property.

24. At the hearing, officer stated that IDWR staff would analyze the places of use for water right nos. 65-3222 and 65-8290. The analysis was printed on a map distributed to the parties on February 3, 2005. The map shows approximately 42 acres irrigated on the Bluff (Weimer, Cane, Granieri, and Burnside). The map also shows 119 acres within the River Ranch Subdivision and the Stone Property. The total number of acres irrigated is 161 acres. Another 34 acres is depicted as the place of use for water right no. 65-3223.

25. If the proposed exchange were approved, diversion of 1.59 cfs for the irrigation of 42 acres on the Bluff and the 34-acre place of use for water right no. 65-3223 would result in a diversion rate of 0.021 cfs per acre. Approval of the application for exchange would result in diversion of 2.17 cfs for the irrigation of 119 acres in River Ranch Subdivision and the Stone Property, resulting in a diversion rate of 0.018 cfs per acre.

26. If the proposed exchange were approved, the diversion rate for the Scriver Creek diversion would exceed the standard rate of diversion of 0.02 cfs per acre.

CONCLUSIONS OF LAW

1. Idaho Code § 42-240 states, in pertinent part:

(1) Any person holding a right for the use of surface water may make application to the director of the department of water resources to exchange water authorized to be diverted under the right with the same or a different source

(5) The director shall examine all the evidence and available information and shall approve the exchange in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the exchange does not constitute an enlargement in use of the original right or rights, the exchange is consistent with the conservation of water resources within the state of Idaho, the exchange is in the local public interest as defined in section 42-202B, Idaho Code, and the exchange will not adversely affect the local economy of the water shed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the water shed or local area where the source of water originates.

2. The applicant bears the ultimate burden of persuasion for all of the criteria set forth in Idaho Code § 42-240.

3. The Idaho court litigation between Weimer and PTR might have some bearing on this particular matter if the application for exchange proposed delivery of less water per acre than

has traditionally been delivered, or proposed delivery of less water than is authorized statutorily. The application for exchange proposes neither. Regardless of who prevails in the litigation, the application for exchange proposes that sufficient water will be diverted from the Scriver Creek point of diversion to fully irrigate Weimer's property.

4. The enlargement standard described by Idaho Code § 42-240 is an enlargement of use of the water right, not an enlargement of the water right.

5. In *Barron v. Idaho Department of Water Resources*, 135 Idaho 414, 18 P.3d 219 (Idaho 2001), the Idaho Supreme Court stated:

Under I.C. § 42-222(1), the director may consider historical consumptive use . . . as a factor in determining whether a proposed transfer would result in an enlargement in use or injure other water rights.

6. Following the reasoning in *Barron*, the hearing officer may also consider the historical flow rate diverted under the water rights offered for exchange to determine whether the exchange proposed by PTR would result in an enlargement of use.

7. In many cases, the IDWR would presume that the flow rate authorized by the water rights has been diverted and used by the water right holder. In this case, however, the applicant established that it intended to divert the same flow of water it has historically diverted from its point of diversion, and that the exorbitant cost of reconstructing the diversion works and conveyance works prohibits construction to divert and transport more water from Scriver Creek than the 1.59 cfs presently diverted.

8. Addition of another point of diversion from the Middle Fork of the Payette River for water right nos. 65-3222 and 65-8290 will enlarge the use of water by PTR.

9. The diversion of water in excess of the maximum flow historically diverted will reduce the quantity of water available to other water rights.

10. The application for exchange is not in the local public interest because approval of the exchange would result in an enlargement of use and injury to other water rights.

11. The proposed exchange would be consistent with principles of conservation of water resources within the State of Idaho. By pumping water from the Middle Fork of the Payette River, the difficulties in delivery and loss of water through pipe failure will be eliminated.

12. The application for exchange, filed by PTR, Inc. should be denied.

ANALYSIS

When a water right holder brings an application for transfer or an application for exchange to IDWR, IDWR must evaluate the beneficial use of the water right proposed to be transferred/exchanged. The existence of a decreed right creates a presumption of beneficial use. When the testimony establishes, however, that the applicant historically diverted no more than 1.59 cfs, that it intends to divert the same quantity of water diverted historically from the old point of diversion, and intends to add another point of diversion from another source to more than double its historically diverted flow rate, the proposal would result in an enlargement of use.

This decision does not affect water right nos. 65-3222 and 65-8290 as they presently exist. This decision also does not find any portion of water right nos. 65-3222 and 65-8290 forfeited. PTR, Inc. can exercise its water rights as described and decreed by the SRBA Court to the full extent of the rights from the source and point of diversion described by the partial decrees.

ORDER

IT IS HEREBY ORDERED that the application for exchange of water right nos. 65-3222 and 65-8290 filed by PTR, Inc. is **DENIED**.

Dated this 17th day of May, 2005.



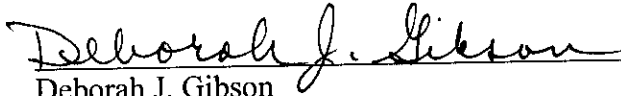
Gary Spackman
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of May, 2005, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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Deborah J. Gibson
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