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**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO**

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER OF WATER RIGHTS	)	
NOS. 65-03103, 65-10746, 65-10747	)	FINAL
AND 65-02540 IN THE NAME OF	)	ORDER
DOUBLE DIAMOND, INC.	)	

A recommended order was issued on July 30, 1993, attempting to resolve protests against an application for transfer filed by Double Diamond, Inc. Because of unresolved questions of fact, the hearing officer ordered that additional evidence be taken. On March 9, 1994, a supplemental hearing was conducted for the taking of additional evidence. The supplemental hearing was conducted prior to the 1994 irrigation season, and the parties stipulated to measure the flow in the Porter Creek system according to fixed criteria established prior to the measurement at the beginning of the 1994 irrigation season. The flow capacity of the system was measured on May 11th and 12th, 1994.

On July 8, 1994, an amended recommended order was issued. In response to the amended recommended order, the protestant, George Dovel (Dovel), through his attorney, Richard B. Eismann, filed exceptions to the amended recommended order, and requested oral arguments.

EXCEPTION ANALYSIS

Exceptions to Findings of Fact

The exceptions are detailed and lengthy, and prevent a full recitation here. They will be addressed in subject groups.

Dovel alleges that Double Diamond's early priority right may not have been deliverable, or at least not fully deliverable during some years. The allegation does not change the statement in finding of fact number eleven that George Dovel's number six and seven rights were only deliverable in the early part of the irrigation season during low water years.

Dovel argues that when a full supply of Porter Creek water could not be diverted to the Double Diamond properties, Double Diamond diverted its full water supply from the Payette River, and he was able to divert water later in the season. This statement is

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disputed by later testimony by Donald Rumsey, who testified regarding the operation of the system, including when the river pump was turned on, and when the booster pump was operating prior to excavation by the Idaho Department of Transportation. Furthermore, the Department will not hold that a portion of the water right is lost during a part of the year because at times Double Diamond had decided to use its water supply from the Payette River rather than from Porter Creek.

Dovel alleges that excavation of the gravel pit began in 1987, not 1988. Furthermore, Dovel alleges that gravel pit land had not been irrigated with Porter Creek water. The records show that the contract for the Idaho Department of Transportation was signed in 1987, but significant excavation did not begin until 1988. Furthermore, there is testimony in the record that the gravel pit lands were irrigated with Porter Creek water up through 1987. Dovel bore the burden of establishing nonuse on the gravel pit lands for the period he alleges. He did not clearly establish nonuse for any period earlier than 1988 through 1992.

Dovel alleges that the estimate of the total gravel pit excavation, and the finished gravel pit are inaccurate and not supported by the record. The estimates of 56 acres total excavation during the peak of construction, and the area of 22 acres remaining in the gravel pit are supported by the record. Rumsey was the only witness who physically measured the area of the Double Diamond property remaining as the gravel pit.

Nottingham, an employee of the Department of Transportation, testified that reclamation was not complete because a portion of the gravel pit was left as an excavation. He also testified that other partially reclaimed portions, were not completely restored, but gave no testimony whether there was any topsoil or not. In fact, Nottingham testified he lacked knowledge as to whether the topsoil was placed on the land.

At the second hearing held in the spring of 1994, Donald Rumsey testified that all of the land except for the 22 acres within the gravel pit had been irrigated with Porter Creek water during 1993.

Dovel alleges a portion of finding of fact number 17 states that there is sufficient head to operate sprinklers is a misrepresentation. Dovel then seeks to have the decision recite information about the number of sprinkler heads that can operate, and that there were changes made in the system which will increase the flow above his measurements.

Pressure may drop in the system as more sprinklers are added, until the pressure (or more accurately, velocity exiting the nozzles of the sprinklers) will no longer operate the impact sprinklers. Dovel agrees, however, there is sufficient pressure to

operate some sprinklers, which is all the statement intends to establish.

Dovel states the Department misquotes his testimony in finding of fact number 20. The decision states: "Dovel alleges the system can be managed correctly" by adjusting valves in the Payette River line until there is no overflow. The record reveals Dovel's exception is correct. The misquote is stricken from finding of fact number 20.

Dovel objects to a statement that watermaster records show Double Diamond diverted the full amount of its reduced entitlement of 2.79 cfs. Dovel established at the time that there was water wasted into Jackass Creek when 2.79 cfs was diverted. Therefore the following statement will be added to finding of fact number 25: "Dovel established that water was wasted through the overflow flow pipe into Jackass Creek when 2.79 cfs was diverted."

Dovel alleges that finding of fact number 28 misrepresents the method Dovel used to measure Double Diamond's water diversion. Dovel may have, at times, measured all of the sprinklers in a particular line. The finding of fact, however, tracks Dovel's testimony that he did not always measure every sprinkler, and that at times, he would measure representative sprinkler heads, average the discharge, and multiply by the number of sprinklers. The distinction is not significant.

Dovel alleges that finding of fact number 29 misrepresents his testimony. Dovel clearly testified, however, that he estimated a discharge of 60 inches from the Double Diamond sprinklers.

Dovel also estimated that Double Diamond could divert approximately 2.0 cfs before there was significant waste in Jackass Creek. His estimate of discharge through the system of 1.2 cfs (60 miners inches) is significantly more than 15% of the total output alleged in the exceptions.

Dovel testified once that up to 1.4 cfs could be diverted without any waste to Jackass Creek. Testimony regarding diversion of 2.0 cfs is the testimony that the hearing officer relied upon, however.

Dovel objects to portions of finding of fact number 29 and 30, which discuss a restricted ability of Double Diamond to divert its full water entitlement. Finding of fact number 30 states that "the decrease in irrigated acreage as a result of gravel pit excavation," decreased "the ability of Double Diamond to divert its full water right." Dovel alleges that this statement ignores hydrologic principles, and Dovel's measurements established that any increase in the number of sprinkler heads beyond 148 sprinklers substantially reduced the pressure to where the system would not operate properly.

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Dovel's measurements may or may not be correct. The later measurement of the system capacity by Scott King suggests a higher system capacity than alleged by Dovel.

Dovel alleges that the measurement by Scott King was not conducted according to criteria agreed upon by the parties. At the second hearing, the parties discussed mutually agreeing to measure the capacity of the system. The hearing officer expressed reservation about allowing a post hearing measurement because of fears that the dissatisfied party would object, and, as a result, perhaps raise the specter of a third hearing. Based on assurances from the parties that acceptable criteria could be established for measurement, the Department assigned Scott King, a person who was not familiar with any of the Porter Creek controversy, to establish the criteria with the parties, and measure the water flow. In addition, Dovel hired Sherl Chapman, a professional geologist, to attend and oversee the measurements. The date was prearranged, and the criteria was agreed to by the parties. Mr. Chapman had to leave midway through the measurement.

If the focus of this decision is limited to the gravel pit impact area, as suggested by the amended recommended decision, and is not expanded to a review of the entire flow rate diverted and the total number of acres irrigated, the measurement of total system diversion, and total acreage irrigated is irrelevant. The question of whether the further discussion of the total diversion and place of use measurements should be considered is dependent upon a discussion about the conclusions of law. This discussion is contained in the following analysis of exceptions to conclusions of law.

Dovel argued that certain lands lying between the airstrip and the Payette River had never been irrigated. Again this issue relates to the physical boundaries within which the Department will consider the issue of forfeiture, which is discussed below.

Exceptions to Conclusions of Law

The exceptions to the conclusions of law are better discussed in a narrative form without following the order of the exceptions.

First, I agree with the hearing officer that the scope of the review should be limited to the gravel pit impact area. It is only within the gravel pit impact area that the excavation for the gravel pit took place, and it is to and from the 22 acres remaining as a gravel pit Double Diamond is attempting to transfer water. The status of the entire diversion rate was not brought into question by this application for transfer. Furthermore, the status of the entire place of use described by the right is not brought into question by this application for transfer. The larger issues of forfeiture of the total system flow rate and forfeiture of portions of the entire place of use are now pending before the

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adjudication court, and should be resolved there. Conclusion of law number 13 in the amended proposed order, which refers to an interim order by the adjudication judge prohibiting communication with claimants, should not be quoted because the order has been lifted. The conclusion of law should be stricken.

A more difficult question of law is whether a portion of the Double Diamond right within the gravel pit area has been forfeited. I hold that the right originally applied to the gravel pit impact area is not forfeited, and the right sought to be transferred into the gravel pit is not forfeited. There are at least two defenses to forfeiture which could be applied in this case, together with equitable reasons why the rights diverted from Porter Creek should not be forfeited.

Double Diamond filed an application for transfer in March of 1991, two irrigation seasons before a forfeiture could have occurred. The application for transfer was protested by Dovel. Because of a change in the reclamation plan, Double Diamond filed an amended application for transfer in April of 1992, before the fifth irrigation season. Double Diamond was anticipating the change in the place of use. Were it not for protests against the application, the application may have been approved prior to the expiration of the five years. I am not proposing that the filing of a protest tolls the running of the forfeiture period. Double Diamond could have protected itself by seeking an application for extension of time to avoid forfeiture pursuant to Idaho Code § 42-204. Nevertheless, Double Diamond pursued the application for transfer in good faith long before the fifth irrigation season expired.

The first hearing was conducted after the expiration of the fifth irrigation season, but prior to the beginning of the sixth irrigation season. For Double Diamond to have avoided the technical forfeiture provisions of Idaho Code § 42-222, it must have irrigated prior to the expiration of the fifth irrigation season. In other words, to beneficially use the water, Double Diamond must have irrigated a growing crop or planted early enough in 1992 that the water could be beneficially used. At the very least, he must have irrigated sometime in September or October of 1992, before the full five years had expired.

Idaho Courts have recognized a defense to forfeiture when failure to use water is caused by circumstances beyond the control of the waterusers. Hedges v. Trail Creek Irrigation, 78 Idaho 10, 297 P.2d 524 (1956). In this case, the Department of Transportation was reclaiming the land in 1992, a protest to the application for transfer had been filed, impeding quick approval. The irrigation season ended without the legal or physical ability to plant a crop and beneficially use the water before the total five years of nonuse expired. These are cumulative circumstances beyond the control of the wateruser which prevented use before

completion of the forfeiture period.

Shortly before the expiration of the fifth irrigation season, it was impossible for the wateruser to beneficially apply the water because to begin at the end of October or first of November would not have been a beneficial use. Double Diamond's first opportunity to beneficially apply the water was in the spring of 1993. Double Diamond diverted the water from Porter Creek in 1993 for irrigation purposes, and used the water as approved by the original recommended order.

Finally, the defense of resumption of use may apply in this case. I hesitate to apply the resumption of use defense, however, because, if it does apply, it should be applied very narrowly. The early cases which established the resumption of use defense were based on facts where there were no later in time appropriations from a stream which would interfere with the resumption, Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937), or the person alleging forfeiture had no subsequent claim to the water which was alleged to be forfeited, Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400 (1945). For streams with appropriations of water junior to the right for which forfeiture is alleged, when the right is forfeited, the junior priority rights advance in their order of priorities.

In this case, Double Diamond could be said to have resumed its right because it had never been forfeited unless the junior users stepped into place following expiration of the fifth irrigation season. Because Double Diamond began using its right in the sixth year, junior users couldn't have relied on the nonuse to move up the ladder of priority.

Having addressed the protestants' exceptions, the following is the final order:

FINDINGS OF FACT

1. Double Diamond, Inc. (Double Diamond) filed an application for transfer on March 9, 1991, and amended the application for transfer on April 22, 1992. The amended application proposes to change the place of use and/or nature of use of two water rights which authorize diversion of water from Porter Creek, and two water rights which authorize diversion from the Payette River.

2. The application for transfer proposes to change the place of use for water right no. 65-03103 (Porter Creek), which bears an 1872 priority, from lands which are not now irrigable because of the construction of a gravel pit, to lands which have been irrigated by water diverted pursuant to right no. 65-10746 (Porter Creek), a 1960 priority water right. The application seeks to transfer right 65-10746 to the gravel pit to sustain a pond in the gravel pit for recreational uses. The application also proposes to

change the nature of use of the Payette River water rights (65-02540 and 65-10747) by reducing existing irrigation use and adding a use of recreation storage. Correspondence in the files states water will be stored for a fish pond and a wetland area.

3. The rights are described in the Payette River decree as follows:

65-03103

Source: Porter Creek

Flow Rate: 3.82 cfs

Priority: January 1, 1872

Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23															39		39
7N	2E	26	13	40	39	3	23			22						14			154
TOTAL ACRES																			193

65-10746

Source: Porter Creek

Flow Rate: .44 cfs

Priority: April 1, 1960

Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23													2				2
7N	2E	26	11								9								20
TOTAL ACRES																			22

65-02540

SEP 30 1965

Source: Payette River
Flow Rate: 3.20 cfs
Priority: April 26, 1951
Point of Diversion: Sec. 23, T7N, R2E, B.M.
Place of Use:

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23													2		39	1	42
7N	2E	26	13	40	39	3	23			22	9					14			163
TOTAL ACRES																			205

65-10747

Source: Payette River
Flow Rate: .90 cfs
Priority: April 1, 1960
Point of Diversion: Sec. 23, T7N, R2E, B.M.
Place of Use:

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23													2		39	1	42
7N	2E	26	13	40	39	3	23			22	9					14			163
TOTAL ACRES																			205

4. The application for transfer proposed a change in the place of use as follows for each of the rights:

65-03103

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23												8		2	31		41
7N	2E	26	24	35	32	3				16	9					14			152
TOTAL ACRES																			193

65-10746 (R is an abbreviation for recreation and recreation

storage)

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	26		R	R		L1 R			L2 R									
				5	7		4			6									
TOTAL ACRES																			

5-02540 (R is an abbreviation for recreation and recreation storage)

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23												8		2	31	1	42
7N	2E	26	13	35	32	3	19		16	9						14			141
7N	2E	26		R	R		R		R										
TOTAL ACRES																			183

65-10747

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23												8		2	31	1	42
7N	2E	26	13	35 R	32 R	3	19 R			16 R	9					14			141
TOTAL ACRES																			183

5. George Dovel and Horseshoe Bend Hydroelectric Company filed protests against the application for transfer.

6. At hearings conducted on March 8 and 11, 1993, and on March 9, 1994, Double Diamond, Inc. appeared and was represented by Jack Riddlemoser, Attorney at Law. Dovel appeared and was represented by Richard Eismann, Attorney at Law. Horseshoe Bend Hydroelectric Company failed to appear.

7. George Dovel owns the following water rights diverted from

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Porter Creek:

<u>Right no.</u>	<u>Priority</u>	<u>Flow rate (cfs)</u>	<u>Use</u>
65-10950	6/1/1908	1.61	Irrigation
65-10951	6/1/1912	0.84	Irrigation
65-10953	6/1/1946	0.04	Domestic

8. Water District no. 65-B was formed to administer delivery of water to users of Porter Creek according to the priority of the water rights. The district refers to the water rights in descending numerical order according to priority. Right no. 65-03103, owned by Double Diamond, is the earliest priority right, and is locally referred to as the number one right. Right no. 65-10746, also owned by Double Diamond, is locally referred to as the number 12 right.

9. Right nos. 65-10950 and 65-10951, both owned by Dovel, are locally referred to as the number 6 and number 7 rights, respectively.

10. Dovel's point of diversion is located upstream of the Double Diamond diversion. The watermaster closes Dovel's headgate when necessary during low water periods to satisfy Double Diamond's calls for water downstream.

11. During low water years, George Dovel's no. 6 and no. 7 rights are only deliverable during the early part of the irrigation season. The number 12 right, owned by Double Diamond, is only deliverable during high flow periods.

12. The Idaho Department of Transportation contracted with Double Diamond to excavate a gravel pit on a portion of the Double Diamond property to which water right no. 65-03103 is appurtenant and a small portion of the Double Diamond property to which water right no. 65-10746 is appurtenant, for the construction of a section of Highway 55 between Boise and Horseshoe Bend.

13. The Department of Transportation began excavating the gravel pit on the Double Diamond property during 1988. Prior to excavation, the land was irrigated with water diverted from Porter Creek pursuant to the first priority right.

14. Dovel testified that 43 acres were not irrigated in 1988. Dovel did not measure or walk the gravel pit boundaries, but observed the work from the other side of the river. His estimate of nonirrigated acreage was not contested by Double Diamond.

15. During the peak of construction, approximately 56 acres could not be farmed because of the gravel pit excavation. Approximately 52 acres of the 56 acres was land irrigated by water diverted pursuant to the number one priority Porter Creek right.

16. As construction was ending in 1991 and in 1992, the Idaho Department of Transportation reclaimed a portion of the gravel pit, but did not fully complete the reclamation. Approximately 22 acres are still excavated as a gravel pit or not irrigable as a result of the gravel pit construction. Double Diamond does not intend to reclaim any more of the 22 acres.

17. Porter Creek water is deliverable to the Double Diamond property through a combination open channel and closed pressurized system. The diversion from Porter Creek delivers water into approximately two miles of open ditch. The water then enters a headbox at the top of a hill. A pipeline inlet is located in the headbox. The pipeline is constructed from the top of the hill to the bottom, and then extends to the Double Diamond property. Pressure develops in the pipeline because of the change in elevation, and there is sufficient head between the top of the pipe and the bottom to operate sprinklers.

18. A second pipeline is installed in the headbox where the main pipeline begins. The second pipe is an overflow pipe. An overflow spillway in the headbox separates the inlets to the pipes. Presumably, no water flows into the overflow pipe until the elevation of the water rises in the headbox because of increased flow or decreased usage at the end of the mainline, which causes water to spill into the overflow compartment of the headbox, and finally, into the overflow pipe.

19. The overflow pipe parallels the main delivery pipe downhill toward the Double Diamond property. At the base of the hill, the main pipeline crosses Jackass Creek, and the overflow pipe ends with an open orifice which discharges into Jackass Creek. The main pipeline continues onto the Double Diamond property.

20. A second mainline junctions with the Porter Creek pressurized line. The second mainline delivers water pumped from the Payette River. George Dovel testified at the first hearing, that when the Payette River pump is operating, the flow from Porter Creek is more manageable. He explained his earlier testimony at the March 9, 1994 hearing, by stating that when the Payette River pump is pumping, the Porter Creek line will overflow. A valve located in the Payette River pipeline can be closed until pressure in the Payette river line reduces pressure and equalizes with the pressure in the Porter Creek line, and the Porter Creek line no longer overflows.

21. A 40 horsepower booster pump is located in the mainline downstream of the Payette River line - Porter Creek line junction.

22. George Dovel testified that the booster pump was not operated during 1986 through 1992. He does not know whether the booster pump was operated in 1993. Dovel also testified the meter base was removed in 1986, but was replaced in 1993.

23. In 1990, the Department determined 52 acres were not irrigable because of the gravel pit excavation. The authorized rate of flow was reduced 1.03 cfs from 3.82 cfs to 2.79 cfs.

24. In 1991, Double Diamond was again only allowed to divert 2.79 cfs because 52 acres were not irrigable.

25. Watermaster records show Double Diamond diverted the full amount of reduced entitlement of 2.79 cfs at least once during both the 1990 and 1991 irrigation seasons. Dovel established that water was wasted into Jackass Creek when 2.79 cfs was diverted.

26. In 1992, the authorized rate of diversion was only reduced 0.43 cfs, from 3.82 cfs to 3.39 cfs, because of the anticipated reclamation of the gravel pit.

27. Dovel and his employees have carefully monitored and observed Double Diamond's use of water. In 1991, Christy Shirley, one of Dovel's employees observed and recorded the use of water on the Double Diamond property, and also observed and recorded water being discharged into Jackass Creek through the overflow pipe.

28. In addition to the monitoring by Ms. Shirley in 1991, Dovel measured the water diverted, measured or observed the overflow to Jackass Creek, and also estimated the water applied to the Double Diamond property by measuring pressures in rainbird sprinklers with a pitot gage, averaging the pressures measured, and multiplying the average discharge of a single sprinkler head by the number of sprinklers operating.

29. The maximum discharge from sprinklers estimated by Dovel in 1991 is approximately 60 inches, or 1.2 cfs. His measurements do not account, however, for delivery losses, particularly in the open ditch. The measurements also do not account for the reduction in the authorized diversion rate because approximately 52 acres were not being irrigated.

30. Protestant's Exhibit I summarizes Shirley's and Dovel's observations. Dovel testified that any diversion over 1.4 cfs results in a waste of water into Jackass Creek, but later stated that water significantly wasted only when the diversion rate exceeded 2.0 cfs into Jackass Creek. These estimates do not account for the decrease in irrigated acreage as a result of gravel pit excavation, and the corresponding decrease in the ability of Double Diamond to divert its full water right.

31. On May 11 and 12, 1994, Donald Rumsey, a principal owner of Double Diamond, George Dovel, Sherl Chapman, a consultant hired by Dovel, and Scott King, a Department employee, met at the Double Diamond ranch. Flows, discharges, and pressures were measured according to criteria agreed upon by the parties.

32. The parties measured 3.57 cfs entering the Double Diamond ditch at the Porter Creek diversion.

33. The discharge of the system was first measured with the booster pump on and then with the booster pump off. The river pumps were off, and the gate valve in the Payette River line was closed, isolating it from the Porter Creek gravity pressure system.

34. One short hand line, was shut off because the average pressure was less than 20 psi. All other lines were operating with sufficient pressure.

35. With the booster pump off, the flow in the Porter Creek pipeline was measured in two ways. Double Diamond installed an inline McCrometer meter which measured 2.58 cfs. The mainline was tapped and a Collins meter was inserted into the line by Mr. King. The Collins meter measured 2.39 cfs.

36. The flow in the pipeline with the booster pump operating could not be measured with a Collins meter or an inline McCrometer meter because the booster pump entrained air in the water. Mr. King measured a flow of 3.12 cfs in the Porter Creek line by measuring the inflow to the collection box, and by subtracting the overflow at Jackass Creek.

37. After the measurements agreed to and observed by Dovel and his consultant, Dovel objected to the results, alleging the Porter Creek line was repaired and lines were added which were never used. These objections were not raised at the time of the test.

38. Several individuals have diverted water from the Double Diamond ditch referred to locally as "courtesy water." The quantity of water diverted is only approximately two inches per user. These diversions are represented by adjudication claims. "Courtesy water" was not delivered in 1993 to the individuals who diverted it in previous years.

39. An engineer, Don Watts, hired by Dovel, computer digitized the boundaries of irrigated fields depicted on Protestant's Exhibit A, and superimposed public survey information on top of the irrigated fields, dividing the fields into segments within each 40 acre tract. Protestant's Exhibit A is a 1992 aerial photograph of the Double Diamond property.

40. Watts plotted each segment and compared his calculations to an ASCS aerial photograph predating the gravel excavations. His calculations were comparable to the acreage shown on an ASCS map predating the gravel pit excavation. Protestant's Exhibit V-1 depicts segment boundaries, and summarizes segment acreage.

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41. Attachments to protestant's Exhibit V conclude the number one priority right irrigates approximately 164.5 acres and the number 12 priority right irrigates approximately 18 acres.

42. The application for transfer proposes use of the no. 12 Porter Creek right (65-10746) when deliverable early in the year, and use of a portion of the Payette River rights (65-02540 and 65-10747) to maintain pond water levels for the remainder of the irrigation season.

43. At the hearing for additional evidence, the parties testified regarding the extent of irrigation in 1993. Except for the 22 acres which was not reclaimed, and remains as a gravel pit and pond, all of the acres which were a part of the original gravel excavation were irrigated with Porter Creek water.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, sets forth the criteria that the Department can consider in determining whether an application for transfer should be approved:

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 applicant carries the burden of coming forward with evidence that his proposed transfer will not result in an enlargement in use, will not injure other water rights, and that it is consistent with conservation of Idaho's water.

3. All parties carry the burden of coming forward with the evidence regarding matters of local public interest of which each is most cognizant, but the applicant bears the burden to show that his proposal is in the local public interest, or that public interest factors which favor the proposal are of greater worth than the public interest considerations with which it conflicts.

4. The applicant carries the burden of proof for all the criteria of Idaho Code § 42-222.

5. The Department may determine the issue of forfeiture when considering an application for transfer. Jenkins v. State of Idaho, 103 Idaho 384, 647 P.2d 1256 (1982).

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6. Forfeiture is not favored and must be established by clear and convincing evidence.

7. Idaho Code § 42-222 is the statute which defines forfeiture:

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 and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; . . .

8. Dovel argues Porter Creek water has not been delivered to the gravel pit area (approximately 43-56 acres) for a period of at least five years. Dovel also argues the filing of the application for transfer subjects each of the rights to full forfeiture scrutiny by the Department, and the Department cannot narrowly focus only on the gravel pit, but must review the use of the whole right, including the entire place of use, and the total quantity of water diverted. Evidence presented by Dovel questions the total number of acres described as a place of use, and the total quantity of water capable of being diverted by Double Diamond.

9. Double Diamond contests the expansive review requested by Dovel. Double Diamond argues the application for transfer only seeks a change for the 22 acres within the gravel pit, and argues the Department is not authorized to scrutinize other portions of the place of use or the quantity of water diverted.

10. Jenkins does not state whether the Department may review the entire water right when an application for transfer is filed which seeks to change only a portion of the right.

11. The Department's review of the validity of the right when considering an application for transfer is limited by an initial determination of whether a narrow focus on the portion sought to be transferred, without looking at the entire right, will result in an enlargement, injury to other users, a conflict with the public interest, or is inconsistent with principles of conservation of water. In this case, the Department must review more than the 22 acres identified as the gravel pit because 56 acres were part of the gravel pit during peak construction in 1990 and 1991. The Department cannot rule regarding the forfeiture issue for a portion of the gravel pit area (22 acres) and ignore the rest of the gravel pit, because the excavation of the entire gravel pit was, for the most part, simultaneous, and cannot be separated into a 22 acre parcel and a 34 acre parcel because the ruling will apply to all the gravel pit lands.

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12. The review of the Department should be limited to the gravel pit impact area, however, and should not extend to all other elements of the water right. A consideration of the total flow rate authorized, the use of the booster pump and the total acreage irrigated should be reserved for the ongoing Snake River Basin Adjudication.

13. The May 11 and 12, 1994 measurements by Scott King exceeded the flow estimates by Dovel. Both the flow measurement by Dovel, and the flow measurement by Scott King will not be used in this decision for determining the water right of Double Diamond, however. A final determination of the total diversion authorized will be reserved for the adjudication.

14. There is uncontroverted evidence in the record that at least 43 acres were not irrigated during the five irrigation seasons in 1988 through 1992. However, Double Diamond indicated its intent to use the water by filing applications for transfer prior to the end of the fifth irrigation season. Notice of these applications was published.

15. Filing of a protest to the proposed transfer by Dovel, reclamation during 1992, and the difficulty of beneficially using water at the end of the irrigation season prevented Double Diamond from irrigating prior to the expiration of the fifth irrigation season. These circumstances qualify as a defense to forfeiture because Double Diamond was prevented from using water by circumstances beyond its control. Irrigation in 1993 after the transfer was approved, prevented the forfeiture.

16. Dovel should not be allowed to benefit by delays caused by the filing of a protest to an application for transfer.

17. "[F]orfeiture is not effective, if after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party." Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944); Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952).

18. The first hearing for this application was conducted on March 8 and 11, 1993, before the commencement of the 1993 irrigation season. The second hearing was conducted on March 9, 1994, after the 1993 irrigation season.

19. Other users could not establish a legal claim of right to the forfeited water until after forfeiture. If Double Diamond resumed its use during the 1993 irrigation season, the other users would not have established a reliance on the water, and the forfeiture is not effective.

20. In 1993, Double Diamond resumed irrigation of all lands in the gravel pit impact area and the lands originally irrigated by

the no. 12 right with Porter Creek water, except the 22 acres which remained as a gravel pit and pond.

21. Most of the testimony established the area of unrestored gravel pit at approximately 20-22 acres. The measurement and calculation of 22 acres by Donald Rumsey is accepted as the area of the unrestored gravel pit.

22. The protestant established that Double Diamond (or its tenant) does not cautiously use only the water it needs. Substantial waste of valuable Porter Creek water into Jackass Creek has been occurring and is not acceptable, except when Porter Creek fluctuations or other unforeseeable occurrences cause waste.

23. The protestant raised a substantial question about the total number of acres irrigated. These issues should be addressed by the Snake River Basin Adjudication.

24. Double Diamond should know how much water is necessary to operate various sprinkler line combinations. Double Diamond should call for the quantity of water needed.

25. Double Diamond is obligated to operate its irrigation system in a manner that will not result in the waste of a substantial quantity of water during times when sprinkler lines are being moved or modified. Double Diamond is further obligated to inform the watermaster when its reduced diversion rate requirement is such that later priority right holders could make beneficial use of the water.

26. Use of the water for recreational fish rearing and wetlands is a beneficial use.

27. "Courtesy water" should not be delivered to water users who do not hold a valid water right.

28. Failure to appear at a hearing is cause for dismissal of a protest. Horseshoe Bend Hydroelectric Company's protest should be dismissed.

29. Request for oral argument by Dovel should be denied.

ORDER

IT IS HEREBY ORDERED that application for transfer of water right nos. 65-03103, 65-10746, 65-02540, and 65-10747 is APPROVED subject to the following conditions:

1. Use of water under these water rights shall be regulated by the watermaster of State Water District no. 65B.

2. The right holder under this transfer shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.

3. Approval of this transfer in no way grants any right-of-way or easement for use of a delivery system owned by person (s) other than the right owner.

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

5. Water shall be used only on the place of use described by the transfer approval document, incorporated and made a part of this decision.

6. The validity of the portion of the water rights not transferred was not determined and may be questioned in a subsequent proceeding, including the Snake River Basin Adjudication.

7. The owner of this right, or his tenant, shall inform the watermaster on a day to day basis of the flow needed to operate his sprinkler system whenever the use changes significantly.

8. Failure to comply with the conditions of this transfer is cause for the director to issue an order to cease and desist pursuant to Idaho Code § 42-352.

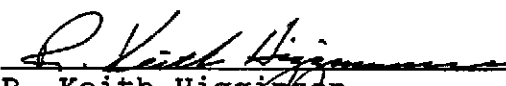
9. This right when combined with all other rights shall provide no more than 0.02 cfs per acre no more than 4.5 afa per acre for the lands above.

10. Spill of a substantial quantity of water into Jackass Creek is a waste of water, and is an illegal use of water pursuant to Idaho Code § 42-351. Determination of "substantial quantity" is left to the future determination of the Department and the watermaster.

IT IS FURTHER ORDERED that Horseshoe Bend Hydroelectric Company's protest is dismissed.

IT IS FURTHER ORDERED that Dovel's request for oral argument is DENIED.

Dated this 30TH day of January, 1995.



R. Keith Higginson
Director, Department of Water Resources

CERTIFICATE OF MAILING

I hereby certify that on this 30th day of January, 1995,
I mailed a true and correct copy, postage prepaid, of this **final**
order to the following:

George Dovel
Rt. 1 Box 61
Horseshoe Bend, ID 83629

Jack Riddlemoser
P.O. Box 37
Meridian, ID 83780

David P. Hirshci
Horseshoe Bend Hydroelectric
180 S. 300 W., Ste. 200
Salt Lake City, UT 84101

Richard B. Eismann
Eismann Law Offices
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Nampa, ID 83651

Double Diamond, Inc.
C/O Don Rumsey
200 Sunrise River
Boise, ID 83705

IDWR Western Office


Kris Rhodes

JAN 30 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	AMENDED
FOR TRANSFER OF WATER RIGHTS	)	RECOMMENDED
NOS. 65-03103, 65-10746, 65-10747	)	ORDER
AND 65-02540 IN THE NAME OF	)	
DOUBLE DIAMOND, INC.	)	

A recommended order was issued on July 30, 1993, attempting to resolve protests against an application for transfer filed by Double Diamond, Inc. Because of unresolved questions of fact, the hearing officer ordered that additional evidence be taken. On March 9, 1994, a hearing was conducted for the taking of additional evidence. The hearing was conducted prior to the 1994 irrigation season, and the parties stipulated to measure the flow in the Porter Creek system according to fixed criteria established prior to the measurement. The flow capacity of the system was measured on May 11th and 12th, 1994, and will be discussed further in the findings of fact.

Upon submittal of the evidence, the hearing officer, as a representative of the Director of the Department of Water Resources (Department), recommends the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Double Diamond, Inc. (Double Diamond) filed an application for transfer on March 9, 1991, and amended the application for transfer on April 22, 1992. The amended application proposes to change the place of use and/or nature of use of two water rights which authorize diversion of water from Porter Creek, and two water rights which authorize diversion from the Payette River.

2. The application for transfer proposes to change the place of use for water right no. 65-03103 (Porter Creek), which bears an 1872 priority, from lands which are not now irrigable because of the construction of a gravel pit, to lands which have been irrigated by water diverted pursuant to right no. 65-10746 (Porter Creek), a 1960 priority water right. The application seeks to transfer right 65-10746 to the gravel pit to sustain a pond in the gravel pit for recreational uses. The application also proposes to change the nature of use of the Payette River water rights (65-

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02540 and 65-10747) by reducing existing irrigation use and adding a use of recreation storage. Correspondence in the files states water will be stored for a fish pond and a wetland area.

3. The rights are described in the Payette River decree as follows:

65-03103

Source: Porter Creek

Flow Rate: 3.82 cfs

Priority: January 1, 1872

Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23															39		39
7N	2E	26	13	40	39	3	23			22						14			154
TOTAL ACRES																			193

65-10746

Source: Porter Creek

Flow Rate: .44 cfs

Priority: April 1, 1960

Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23													2				2
7N	2E	26	11								9								20
TOTAL ACRES																			22

65-02540

Source: Payette River

Flow Rate: 3.20 cfs

Priority: April 26, 1951

Point of Diversion: Sec. 23, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	

7N	2E	23												2		39	1	42
7N	2E	26	13	40	39	3	23			22	9				14			163
TOTAL ACRES																		205

65-10747

Source: Payette River

Flow Rate: .90 cfs

Priority: April 1, 1960

Point of Diversion: Sec. 23, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23													2		39	1	42
7N	2E	26	13	40	39	3	23			22	9					14			163
TOTAL ACRES																			205

4. The application for transfer proposed a change in the place of use as follows for each of the rights:

65-03103

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23												8		2	31		41
7N	2E	26	24	35	32	3				16	9					14			152
TOTAL ACRES																			193

65-10746 (R is an abbreviation for recreation and recreation storage)

T w p	R g e	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	26		R	R		L1 R			L2 R									
				5	7		4			6									
TOTAL ACRES																			

DEC 29 1985

65-02540 (R is an abbreviation for recreation and recreation storage)

T w p	R g c	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23												8		2	31	1	42
7N	2E	26	13	35	32	3	19		16	9						14			141
7N	2E	26		R	R		R		R										
TOTAL ACRES																			183

65-10747

T w p	R g c	S e c	NE¼				NW¼				SW¼				SE¼				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7N	2E	23												8		2	31	1	42
7N	2E	26	13	35 R	32 R	3	19 R			16 R	9					14			141
TOTAL ACRES																			183

5. George Dovel and Horseshoe Bend Hydroelectric Company filed protests against the application for transfer.

6. At hearings conducted on March 8 and 11, 1993, and on March 9, 1994, Double Diamond, Inc. appeared and was represented by Jack Riddlemoser, Attorney at Law. Dovel appeared and was represented by Richard Eismann, Attorney at Law. Horseshoe Bend Hydroelectric Company failed to appear.

7. George Dovel owns the following water rights diverted from Porter Creek:

<u>Right no.</u>	<u>Priority</u>	<u>Flow rate (cfs)</u>	<u>Use</u>
65-10950	6/1/1908	1.61	Irrigation

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65-10951	6/1/1912	0.84	Irrigation
65-10953	6/1/1946	0.04	Domestic

8. Water District no. 65-B was formed to administer delivery of water to users of Porter Creek according to the priority of the water rights. The district refers to the water rights in descending numerical order according to priority. Right no. 65-03103, owned by Double Diamond, is the earliest priority right, and is locally referred to as the number one right. Right no. 65-10746, also owned by Double Diamond, is locally referred to as the number 12 right.

9. Right nos. 65-10950 and 65-10951, both owned by Dovel, are locally referred to as the number 6 and number 7 rights, respectively.

10. Dovel's point of diversion is located upstream of the Double Diamond diversion. The watermaster closes Dovel's headgate when necessary during low water periods to satisfy Double Diamond's calls for water downstream.

11. During low water years, George Dovel's no. 6 and no. 7 rights are only deliverable during the early part of the irrigation season. The number 12 right, owned by Double Diamond, is only deliverable during high flow periods.

12. The Idaho Department of Transportation contracted with Double Diamond to excavate a gravel pit on a portion of the Double Diamond property to which water right no. 65-03103 is appurtenant and a small portion of the Double Diamond property to which water right no. 65-10746 is appurtenant, for the construction of a section of Highway 55 between Boise and Horseshoe Bend.

13. The Department of Transportation began excavating the Double Diamond property during the summer of 1988. Prior to excavation, the land was irrigated with water diverted from Porter Creek pursuant to the first priority right.

14. Dovel testified that 43 acres were not irrigated in 1988. Dovel did not measure or walk the gravel pit boundaries, but only observed the work from the other side of the river. His estimate of nonirrigated acreage was not contested by Double Diamond.

15. During the peak of construction, approximately 56 acres could not be farmed because of the gravel pit excavation. Approximately 52 acres of the 56 acres was land irrigated by water diverted pursuant to the number one priority Porter Creek right.

16. As construction was ending in 1991 and in 1992, the Idaho Department of Transportation reclaimed a portion of the gravel pit area as farm land. Approximately 22 acres are still excavated as a gravel pit or not irrigable as a result of the gravel pit

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construction. Double Diamond does not intend to reclaim any more of the 22 acres.

17. Porter Creek water is deliverable to the Double Diamond property through a combination open channel and closed pressurized system. The diversion from Porter Creek delivers water into approximately two miles of open ditch. The water then enters a headbox at the top of a hill. A pipeline inlet is located in the headbox. The pipeline is constructed from the top of the hill to the bottom, and then extends to the Double Diamond property. Pressure develops in the pipeline because of the change in elevation, and there is sufficient head drop between the top of the pipe and the bottom to operate sprinklers.

18. A second pipeline is installed in the headbox where the main pipeline begins. The second pipe is an overflow pipe. An overflow spillway in the headbox separates the inlets to the pipes. Presumably, no water flows in the overflow pipe until the elevation of the water rises in the headbox because of increased flow or decreased usage at the end of the mainline, which causes water to spill into the overflow compartment of the headbox, and finally, into the overflow pipe.

19. The overflow pipe parallels the main delivery pipe downhill toward the Double Diamond property. At the base of the hill, the main pipeline crosses Jackass Creek, and the overflow pipe ends with an open orifice which discharges into Jackass Creek. The main line continues onto the Double Diamond property.

20. A second mainline junctions with the Porter Creek pressurized line. The second mainline delivers water pumped from the Payette River. George Dovel testified at the first hearing, that when the Payette River pump is operating, the flow from Porter Creek is more manageable. He explained his earlier testimony at the March 9, 1994 hearing, by stating that when the Payette River pump is pumping, the Porter Creek line will overflow. A valve located in the Payette River pipeline can be closed until pressure in the Payette river line reduces pressure and equalizes with the pressure in the Porter Creek line, until the Porter Creek line no longer overflows. In this way, Dovel alleges the system can be managed correctly.

21. A 40 horsepower booster pump is located in the mainline downstream of the Payette River line - Porter Creek line junction.

22. George Dovel testified that the booster pump was not operated during 1986 through 1992. He does not know whether the booster pump was operated in 1993. Dovel also testified the meter base was removed in 1986, but was replaced in 1993.

23. In 1990, the Department determined 52 acres were not irrigable because of the gravel pit excavation. The authorized

rate of flow was reduced 1.03 cfs from 3.82 cfs to 2.79 cfs.

24. In 1991, Double Diamond was again only allowed to divert 2.79 cfs because 52 acres were not irrigable.

25. Watermaster records show Double Diamond diverted the full amount of reduced entitlement of 2.79 cfs at least once during both the 1990 and 1991 irrigation seasons.

26. In 1992, the authorized rate of diversion was only reduced 0.43 cfs, from 3.82 cfs to 3.39 cfs, because of the anticipated reclamation of the gravel pit.

27. Dovel and his employees have carefully monitored and observed Double Diamond's use of water. In 1991, Christy Shirley, one of Dovel's employees observed and recorded the use of water on the Double Diamond property, and also observed and recorded water being discharged into Jackass Creek through the overflow pipe.

28. In addition to the monitoring by Ms. Shirley in 1991, Dovel measured the water diverted, measured or observed the overflow to Jackass Creek, and also estimated the water applied to the Double Diamond property by measuring pressures in rainbird sprinklers with a pitot gage, averaging the pressures measured, and multiplying the average discharge of a single sprinkler head by the number of sprinklers operating.

29. The maximum discharge from sprinklers estimated by Dovel in 1991 is approximately 60 inches, or 1.2 cfs. His measurements do not account, however, for delivery losses, particularly in the open ditch. The measurements also do not account for the reduction in the authorized diversion rate because approximately 52 acres were not being irrigated.

30. Protestant's Exhibit I summarizes Shirley's and Dovel's observations. Dovel testified that any diversion over 2.0 cfs results in a waste of water into Jackass Creek. The testimony again ignores the decrease in irrigated acreage as a result of gravel pit excavation, and the corresponding decrease in the ability of Double Diamond to divert its full water right.

31. On May 11 and 12, 1994, Donald Rumsey, a principal owner of Double Diamond, George Dovel, Sherl Chapman, a consultant hired by Dovel, and Scott King, a Department employee, met at the Double Diamond ranch. Flows, discharges, and pressures were measured according to criteria agreed upon by the parties.

32. The parties measured 3.57 cfs entering the Double Diamond ditch at the Porter Creek diversion.

33. The discharge of the system was first measured with the booster pump on and then with the booster pump off. The river

pumps were off, and the gate valve in the Payette River line was closed, isolating it from the Porter Creek gravity pressure system.

34. One short hand line, was shut off because the average pressure was less than 20 psi. All other lines were operating with sufficient pressure.

35. With the booster pump off, the flow in the Porter Creek pipeline was measured in two ways. Double Diamond installed an inline McCrometer meter which measured 2.58 cfs. The mainline was tapped and a Collins meter was inserted into the line by Mr. King. The Collins meter measured 2.39 cfs.

36. The flow in the pipeline with the booster pump operating could not be measured with a Collins meter or an inline McCrometer meter because the booster pump entrained air in the water. Mr. King and Mr. Chapman measured a flow of 3.12 cfs in the Porter Creek line by measuring the inflow to the collection box, and by subtracting the overflow at Jackass Creek.

37. After the measurements agreed to and observed by Dovel and his consultant, Dovel objected to the results, alleging the Porter Creek line was prepared and lines were added which were never used. These objections were not raised at the time of the test.

38. Several individuals have diverted water from the Double Diamond ditch referred to locally as "courtesy water." The quantity of water diverted is only approximately two inches per user. These diversions are represented by adjudication claims. "Courtesy water" was not delivered in 1993 to the individuals who diverted it in previous years.

39. An engineer, Don Watts, hired by Dovel, computer digitized the boundaries of irrigated fields depicted on Protestant's Exhibit A, and superimposed public survey information on top of the irrigated fields, dividing the fields into segments within each 40 acre tract. Protestant's Exhibit A is a 1992 aerial photograph of the Double Diamond property.

40. Watts plotted each segment and compared his calculations to an ASCS aerial photograph predating the gravel excavations. His calculations were comparable to the acreage shown on an ASCS map predating the gravel pit excavation. Protestant's Exhibit V-1 depicts segment boundaries, and summarizes segment acreage.

41. Attachments to protestant's Exhibit V conclude the number one priority right irrigates approximately 164.5 acres and the number 12 priority right irrigates approximately 18 acres..

42. The application for transfer proposes use of the no. 12 Porter Creek right (65-10746) when deliverable early in the year,

and use of a portion of the Payette River rights (65-02540 and 65-10747) to maintain pond water levels for the remainder of the irrigation season.

43. At the hearing for additional evidence, the parties testified regarding the extent of irrigation in 1993. Except for the 22 acres which was not reclaimed, and remains as a gravel pit and pond, all of the acres which were a part of the original gravel excavation were irrigated.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, sets forth the criteria that the Department can consider in determining whether an application for transfer should be approved:

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 applicant carries the burden of coming forward with evidence that his proposed transfer will not result in an enlargement in use, will not injure other water rights, and that it is consistent with conservation of Idaho's water.

3. All parties carry the burden of coming forward with the evidence regarding matters of local public interest of which each is most cognizant, but the applicant bears the burden to show that his proposal is in the local public interest, or that public interest factors which favor the proposal are of greater worth than the public interest considerations with which it conflicts.

4. The applicant carries the burden of proof for all the criteria of Idaho Code § 42-222.

5. The Department may determine the issue of forfeiture when considering an application for transfer. Jenkins v. State of Idaho, 103 Idaho 384, 647 P.2d 1256 (1982).

6. Forfeiture is not favored and must be established by clear and convincing evidence.

7. Idaho Code § 42-222 is the statute which defines forfeiture:

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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 and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; . . .

8. Dovel argues Porter Creek water has not been delivered to the gravel pit area (approximately 43-56 acres) for a period of at least five years. Dovel also argues the filing of the application for transfer subjects each of the rights to full forfeiture scrutiny by the Department, and the Department cannot narrowly focus only on the gravel pit, but must review the use of the whole right, including the entire place of use, and the total quantity of water diverted. Evidence presented by Dovel questions the total number of acres described as a place of use, and the total quantity of water capable of being diverted by Double Diamond.

9. Double Diamond contests the expansive review requested by Dovel. Double Diamond argues the application for transfer only seeks a change for the 22 acres within the gravel pit, and argues the Department is not authorized to scrutinize other portions of the place of use or the quantity of water diverted.

10. Jenkins does not state whether the Department may review the entire water right when an application for transfer is filed which seeks to change only a portion of the right.

11. The Department's review of the validity of the right when considering an application for transfer is limited by an initial determination of whether a narrow focus on the portion sought to be transferred, without looking at the entire right, will result in an enlargement, injury to other users, a conflict with the public interest, or is inconsistent with principles of conservation of water. In this case, the Department must review more than the 22 acres identified as the gravel pit because 56 acres were part of the gravel pit during peak construction in 1990 and 1991.

12. The department need not look beyond the boundaries of the gravel pit. Double Diamond proposes to change the place of use from the gravel pit lands to new lands. Double Diamond is not seeking to change the remainder of the place of use. The definition of the entire place of use and total authorized flow rate can be addressed in the Snake River Basin Adjudication.

13. A recent interim order prohibiting communications between the Director of the Idaho Department of Water Resources and all claimants, signed by Judge Daniel C. Hurlbutt, Jr., states that "the Director and IDWR are prohibited from participating in any settlement discussions or negotiations about any water right or

element thereof for which a notice of claim has been filed in the SRBA as well as any issue raised for judicial resolution in the SRBA."

14. The Department does not interpret Judge Hurlbutt's order as prohibiting a narrow application of the Jenkins reasoning which allows the Department to review issues of forfeiture. The review of the Department should be limited to the gravel pit impact area, however, and should not extend to all other elements of the water right. A consideration of the total flow rate authorized, the use of the booster pump and the total acreage irrigated should be reserved for the ongoing adjudication.

15. The May 11 and 12, 1994 measurements by Scott King established a diversion capacity exceeding the estimates by Dovel. A final determination of the total diversion authorized will be reserved for the adjudication.

16. There is uncontroverted evidence in the record that at least 43 acres were not irrigated during the five irrigation seasons in 1988 through 1992. However, Double Diamond indicated its intent to use the water by filing applications for transfer prior to the end of the fifth irrigation season. Notice of these applications was published.

17. The right to irrigate 43 acres was forfeited at the end of the 1992 irrigation season.

18. "[F]orfeiture is not effective, if after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party." Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944); Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952).

19. The first hearing for this application was conducted on March 8 and 11, 1993, before the commencement of the 1993 irrigation season. The second hearing was conducted on March 9, 1994, after the 1993 irrigation season.

20. Other users could not establish a legal claim of right to the forfeited water until after forfeiture. If Double Diamond resumed its use during the 1993 irrigation season, the other users would not have established a reliance on the water, and the forfeiture is not effective.

21. Double Diamond resumed irrigation of all lands in the gravel pit impact area, except the 22 acres which remained as a gravel pit and pond.

22. Most of the testimony established the area of unrestored gravel pit at approximately 20-22 acres. The measurement and calculation of 22 acres by Donald Rumsey is accepted as the area of

the unrestored gravel pit.

23. The protestant did not establish that the flow rate authorized for diversion should be reduced because of nonuse. Double Diamond diverted the maximum flow to which it was entitled in 1990 and 1991. The restored gravel pit acreage and the new acres (once irrigated by the number 12 right) were irrigated in 1993.

24. The protestant established that Double Diamond (or its tenant) does not cautiously use only the water it needs. Substantial waste of valuable Porter Creek water into Jackass Creek has been occurring and is not acceptable, except when Porter Creek fluctuations or other unforeseeable occurrences cause waste.

25. The protestant raised a substantial question about the total number of acres irrigated. These issues should be addressed by the Snake River Basin Adjudication.

26. Double Diamond should know how much water is necessary to operate various sprinkler line combinations. Double Diamond should call for the quantity of water needed.

27. Double Diamond is obligated to operate its irrigation system in a manner that will not result in the waste of a substantial quantity of water during times when sprinkler lines are being moved or modified. Double Diamond is further obligated to inform the watermaster when its reduced diversion rate requirement is such that later priority right holders could make beneficial use of the water.

28. Use of the water for recreational fish rearing and wetlands is a beneficial use.

29. "Courtesy water" should not be delivered to water users who do not hold a valid water right.

30. Failure to appear at a hearing is cause for dismissal of a protest. Horseshoe Bend Hydroelectric Company's protest should be dismissed.

ORDER

IT IS HEREBY ORDERED that application for transfer of water right nos. 65-03103, 65-10746, 65-02540, and 65-10747 is APPROVED subject to the following conditions:

1. Use of water under these water rights shall be regulated by the watermaster of State Water District no. 65B.

2. The right holder under this transfer shall maintain a

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measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.

3. Approval of this transfer in no way grants any right-of-way or easement for use of a delivery system owned by person (s) other than the right owner.

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

5. Water shall be used only on the place of use described by the transfer approval document, incorporated and made a part of this decision.

6. The validity of the portion of the water rights not transferred was not determined and may be questioned in a subsequent proceeding, including the Snake River Basin Adjudication.

7. The owner of this right, or his tenant, shall inform the watermaster on a day to basis of the flow needed to operate his sprinkler system whenever the use changes significantly.

8. Failure to comply with the conditions of this transfer is cause for the director to issue an order to cease and desist pursuant to Idaho Code § 42-352.

9. This right when combined with all other rights shall provide no more than 0.02 cfs per acre no more than 4.5 afa per acre for the lands above.

10. Spill of a substantial quantity of water into Jackass Creek is a waste of water, and is an illegal use of water pursuant to Idaho Code § 42-351. Determination of "substantial quantity" is left to the future determination of the Department and the watermaster.

IT IS FURTHER ORDERED that Horseshoe Bend Hydroelectric Company's protest is dismissed.

Dated this 8th day of July, 1994.



Gary Spackman
Hearing Officer

measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.

3. Approval of this transfer in no way grants any right-of-way or easement for use of a delivery system owned by person (s) other than the right owner.

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

5. Water shall be used only on the place of use described by the transfer approval document, incorporated and made a part of this decision.

6. The validity of the portion of the water rights not transferred was not determined and may be questioned in a subsequent proceeding, including the Snake River Basin Adjudication.

7. The owner of this right, or his tenant, shall inform the watermaster on a day to basis of the flow needed to operate his sprinkler system whenever the use changes significantly.

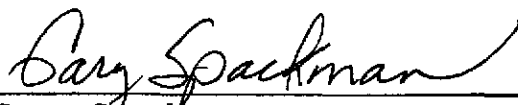
8. Failure to comply with the conditions of this transfer is cause for the director to issue an order to cease and desist pursuant to Idaho Code § 42-352.

9. This right when combined with all other rights shall provide no more than 0.02 cfs per acre no more than 4.5 afa per acre for the lands above.

10. Spill of a substantial quantity of water into Jackass Creek is a waste of water, and is an illegal use of water pursuant to Idaho Code § 42-351. Determination of "substantial quantity" is left to the future determination of the Department and the watermaster.

IT IS FURTHER ORDERED that Horseshoe Bend Hydroelectric Company's protest is dismissed.

Dated this 8th day of July, 1994.



Gary Spackman
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of July, 1994, I mailed a true and correct copy, postage prepaid, of this Amended Notice Of Hearing to the following:

George Dovel
Rt. 1, Box 61
Horseshoe Bend, ID 83629

Jack Riddlemoser, Esq.
P.O. Box 37
Meridian, ID 83780

David P. Hirschi
Horseshoe Bend Hydroelectric
180 S. 300 W., Ste. 200
Salt lake City, UT 84101

Richard B. Eismann, Esq.
Eismann Law Offices
3016 Caldwell Blvd.
Nampa, ID 83651

Double Diamond, Inc.
c/o Donald Rumsey
200 Sunrise River
Boise, Id 83705

IDWR Western Office
Boise, Idaho

Carolyn Andregg
Carolyn Andregg
Secretary

MAR 29 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 4159, WATER	)	AMENDED
RIGHTS NOS. 65-03103, 65-10746,	)	NOTICE OF HEARING
65-02540 AND 65-10747, IN THE	)	
NAME OF DOUBLE DIAMOND, INC.	)	

Because of conflicting calendar commitments, THE IDAHO DEPARTMENT OF WATER RESOURCES (Department) HAS RESCHEDULED A HEARING ON REMAND FOR TAKING ADDITIONAL EVIDENCE FOR MARCH 9, 1994. THE HEARING WILL COMMENCE AT 9:00 A.M., AND CONTINUE UNTIL CONCLUDED. The place for the hearing has not been set, but will either be at the state offices of The Department of Water Resources or at The Division of Environmental Quality. The parties will be notified at a later date. The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code and the adopted Rules of Procedure of the Department. A copy of the rules may be obtained from the Department upon request. The presiding officer at the hearing will be Gary Spackman.

Evidence presented at the augmentation hearing shall be limited to the following issues:

1. How long has the number one Porter Creek right not been used on the gravel pit impact area (56 acres)?

2. What are the present hydraulic characteristics of the Porter Creek and Payette River lines? This evidence may be submitted in the form of an actual water measurement of the flow into the head box, the flow in the waste pipe, and the water flowing in the mainline. If the capacity of the system cannot be measured, then the following system characteristics should be described: pipeline diameters, lengths and construction materials, pump sizes and capacities, location and capacity of boosters, location of valves, elevations of pipe outlets and inlets, and configuration of the head box.

3. What was the maximum quantity of water diverted and total acreage irrigated in 1993? What water, if any, was wasted in 1993 during periods of peak diversion? Were the hydraulic characteristics of the system changed in 1993? If so, what was changed?

MAR 29 1995

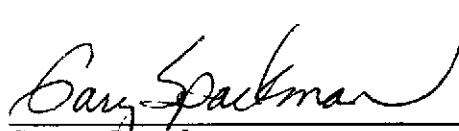
4. The Department understands water is diverted out of the Double Diamond ditch by several domestic users. Under what right is water presently diverted?

5. How did the present irrigation system evolve from the early diversion from Porter Creek? Of particular interest is the use of the booster pump. The capacity or horsepower rating of the booster pump should be submitted. When was the booster pump installed and when was its use discontinued?

In addition to presenting evidence relative to the above facts, the parties may also orally argue any fact already in the record, or that will be presented at the hearing. In addition, the issues of law set forth in the recommended decision may also be argued.

The hearing will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within ten (10) days prior to the hearing.

Dated this 8th day of February, 1994.



Gary Spackman
Hearing Officer

1995

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of August, 1994, I mailed a true and correct copy, postage prepaid, of this Amended Notice Of Hearing to the following:

George Dovel
Rt. 1, Box 61
Horseshoe Bend, ID 83629

Jack Riddlemoser, Esq.
P.O. Box 373
Meridian, ID 83642

David P. Hirschi
Horseshoe Bend Hydroelectric
180 S. 300 W., Ste. 200
Salt lake City, UT 84101

Richard B. Eismann, Esq.
Eismann Law Offices
3016 Caldwell Blvd.
Nampa, ID 83651

Double Diamond, Inc.
c/o Donald Rumsey
200 Sunrise River
Boise, Id 83705

IDWR Western Office
Boise, Idaho

Carolyn Andregg
Secretary

59 1995

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of February, 1994, I mailed a true and correct copy, postage prepaid, of this Amended Notice Of Hearing to the following:

George Dovel
Rt. 1, Box 61
Horseshoe Bend, ID 83629

Jack Riddlemoser, Esq.
P.O. Box 3721
Meridian, ID 83642

David P. Hirschi
Horseshoe Bend Hydroelectric
180 S. 300 W., Ste. 200
Salt lake City, UT 84101

Richard B. Eismann, Esq.
Eismann Law Offices
3016 Caldwell Blvd.
Nampa, ID 83651

Double Diamond, Inc.
c/o Donald Rumsey
200 Sunrise River
Boise, Id 83705

IDWR Western Office
Boise, Idaho

Carolyn Andregg
Carolyn Andregg
Secretary

3 9 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	ORDER VACATING
FOR TRANSFER OF WATER RIGHTS	)	AUGMENTATION ORDER AND
NOS. 65-03103, 65-10746, 65-10747	)	HEARING AND REMANDING
AND 65-02540 IN THE NAME OF	)	THE MATTER FOR
DOUBLE DIAMOND INC.	)	ADDITIONAL HEARINGS
	)	

On July 30, 1993, the Idaho Department of Water Resources (Department) issued a recommended order. Protestant George Dovel filed lengthy exceptions to the recommended order. In response to the exceptions, the hearing officer issued an Order for Augmentation of the Record on October 27, 1993, and also issued a Notice of Hearing on December 16, 1993. Both documents scheduled the augmentation hearing for January 5, 1994.

On December 23, 1993, protestant Dovel filed a motion to vacate the augmentation order and hearing based on many alleged flaws, compiled into the following general categories:

1. The hearing record was irrevocably closed after the hearing was completed.

2. Issues of fact identified by the hearing officer in the augmentation order are irrelevant, or have already been sufficiently addressed. The hearing officer could have inspected the system, and facts regarding the issues cannot be gathered before the augmentation hearing.

3. The hearing officer has no statutory authority to order an augmentation hearing.

4. A final decision was not issued within fifty-six (56) days as required by law, and an augmentation hearing cannot be issued eleven (11) days after the 56-day period has expired.

5. Dovel will be deprived of due process if the hearing is held.

ANALYSIS

Idaho Code § 67-5244 states:

(2) Unless otherwise required, the agency head shall either:

- (a) issue a final order in writing within fifty-six (56) days of the receipt of the final briefs or oral argument, whichever is later, unless the period is waived or extended with the written consent of all parties or for good cause shown;
- (b) remand the matter for additional hearings; or
- (c) hold additional hearings.

In contrast, Rule 720.02.c. of the Department's Rules of Practice and Procedure states:

The agency head or designee will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order.

The administrative rules imply the hearing officer has authority to issue an order for further evidentiary hearings. The statute, however, only authorizes the agency head to remand the matter for additional evidence. The order of augmentation was not properly issued.

In addition, the agency head is required to issue a final decision within fifty-six (56) days unless good cause is shown for an additional delay. As mentioned earlier, Dovel filed extensive and detailed exceptions. In addition, Dovel retained a reporter who stenographically recorded the testimony. Dovel refers to testimony according to transcript references, which are not available to the Department. The official record is the electronically taped testimony in the possession of the Department. In trying to reconcile the record with transcript references by Dovel, additional time was necessary.

Finally, after a review of the exceptions, and the taped record, the Department felt sufficient factual and legal questions remain unanswered that further evidence should be taken. The circumstances constitute a good cause for a minor eleven-day delay

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in attempting to either issue a final decision, or act alternatively as allowed by Idaho Code § 67-5244.

Idaho statutes and Department rules authorizes the agency head to remand the matter for additional hearings. There are unresolved questions of fact and law. An additional hearing will create a more complete record, and will produce a better reasoned decision. There is good cause both for the issuance of an order to remand the matter and for some minor delay in disposing of the original recommended decision.

Issues raised regarding the relevance of certain issues should be addressed by the hearing officer. Had the hearing officer independently inspected the system, another hearing probably would have been required anyway. Constitutional issues raised by Dovel are unfounded. For purposes of efficiency, the hearing officer who conducted the initial hearing should also hear the additional evidence. I have instructed the hearing officer to issue a notice of hearing to accompany this order.

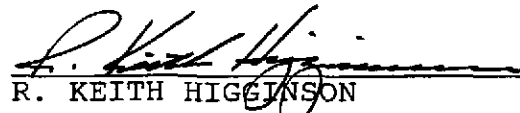
ORDER

IT IS HEREBY ORDERED that the Order of Augmentation of the Record, dated October 27, 1993, and the hearing scheduled for January 5, 1993, are VACATED.

IT IS FURTHER ORDERED that the Matter of Application for Transfer No. 4159 (Water Rights Nos. 65-03103, 65-10746, 65-0254 and 65-10747) is REMANDED for further hearing pursuant to Idaho Code § 67-5244.

IT IS FURTHER ORDER that the hearing officer shall be Gary Spackman.

Dated this 29TH day of December, 1993.



R. KEITH HIGGINSON
DIRECTOR

DEC 29 1995

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of December, 1993,
I mailed a true and correct copy, postage prepaid, of this ORDER
VACATING AUGMENTATION ORDER AND HEARING AND REMANDING THE MATTER
FOR ADDITIONAL HEARINGS to the following:

George Dovel

Rt 1 Box 61
Horseshoe Bend, ID 83629

Richard B. Eismann Esq
Eismann Law Offices
3016 Caldwell Blvd
Nampa, ID 83651

Jack Riddlemoser Esq

PO Box 373
Meridian, ID 83642

Double Diamond Inc.
c/o Donald Rumsey
200 Sunrise River
Boise, ID 83705

David P. Hirschi
Horseshoe Bend Hydroelectric
180 S 300 W, Ste 200
Salt Lake City, UT 84101

Claudette J. Kinney
Claudette J. Kinney
Secretary

69 1995

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 4159 (WATER	)	
RIGHTS NOS. 65-03103, 65-10746,	)	NOTICE OF HEARING
65-02540 AND 65-10747)	)	
IN THE NAME OF DOUBLE DIAMOND INC.	)	

THE IDAHO DEPARTMENT OF WATER RESOURCES (Department) HAS SCHEDULED A HEARING ON REMAND FOR TAKING ADDITIONAL EVIDENCE FOR FEBRUARY 9, 1994, IN THE LARGE CONFERENCE ROOM OF THE IDAHO DEPARTMENT OF WATER RESOURCES, 1301 N. ORCHARD STREET, BOISE, IDAHO 83706. THE HEARING WILL COMMENCE AT 9:30 A.M., AND CONTINUE UNTIL CONCLUDED. The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code and the adopted Rules of Procedure of the Department. A copy of the rules may be obtained from the Department upon request. The presiding officer at the hearing will be Gary Spackman.

Evidence presented at the augmentation hearing shall be limited to the following issues:

1. How long has the number one Porter Creek right not been used on the gravel pit impact area (56 acres)?
2. What are the present hydraulic characteristics of the Porter Creek and Payette River lines? This evidence may be submitted in the form of an actual water measurement of the flow into the head box, the flow in the waste pipe, and the water flowing in the mainline. If the capacity of the system cannot be measured, then the following system characteristics should be described: pipeline diameters, lengths and construction materials, pump sizes and capacities, location and capacity of boosters, location of valves, elevations of pipe outlets and inlets, and configuration of the head box.

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3. What was the maximum quantity of water diverted and total acreage irrigated in 1993? What water, if any, was wasted in 1993 during periods of peak diversion? Were the hydraulic characteristics of the system changed in 1993? If so, what was changed?

4. The Department understands water is diverted out of the Double Diamond ditch by several domestic users. Under what right is water presently diverted?

5. How did the present irrigation system evolve from the early diversion from Porter Creek? Of particular interest is the use of the booster pump. The capacity or horsepower rating of the booster pump should be submitted. When was the booster pump installed and when was its use discontinued?

In addition to presenting evidence relative to the above facts, the parties may also orally argue any fact already in the record, or that will be presented at the hearing. In addition, the issues of law set forth in the recommended decision may also be argued.

The hearing will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the Department within ten (10) days prior to the hearing.

Dated this 29th day of December, 1993.



Gary Spackman
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 29th day of December, 1993,
I mailed a true and correct copy, postage prepaid, of this Notice
of Hearing to the following:

George Dovel

Rt 1 Box 61

Horseshoe Bend, ID 83629

Richard B. Eismann Esq

Eismann Law Offices

3016 Caldwell Blvd

Nampa, ID 83651

Jack Riddlemoser Esq

PO Box 373

Meridian, ID 83642

Double Diamond Inc.

c/o Donald Rumsey

200 Sunrise River

Boise, ID 83705

David P. Hirschi

Horseshoe Bend Hydroelectric

180 S 300 W, Ste 200

Salt Lake City, UT 84101

Claudette J. Kinney
Claudette J. Kinney
Secretary

WLB

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER NO. 4159 (WATER	)	
RIGHTS NOS. 65-03103, 65-10746,	)	NOTICE OF HEARING
65-02540 AND 65-10747)	)	
IN THE NAME OF DOUBLE DIAMOND INC.	)	

On July 30, 1993, a recommended decision was issued for application for transfer no. 4159 in the name of Double Diamond, Inc. Following issuance of the order, George Dovel filed exceptions to the decision. After reviewing the exceptions, and the record, the hearing officer determined that additional information was necessary to finally determine the issues of fact and law. An Order for Augmentation of the Record was issued on October 27, 1993.

THE DEPARTMENT HAS SCHEDULED THE AUGMENTATION HEARING ON JANUARY 5TH, 1993, IN THE LARGE CONFERENCE ROOM OF THE DEPARTMENT OF WATER RESOURCES, 1301 N. ORCHARD STREET, BOISE, IDAHO 83706. THE HEARING WILL COMMENCE AT 9:30 A.M., AND CONTINUE UNTIL CONCLUDED. The hearing will be held in accordance with the provisions of Chapters 2 and 17, Title 42 and Chapter 52, Title 67, Idaho Code and the adopted Rules of Procedure of the department. A copy of the rules may be obtained from the department upon request. The presiding office at the hearing will be Gary Spackman.

Evidence presented at the augmentation hearing shall be limited to the following issues:

1. How long has the number one Porter Creek right not been used on the gravel pit impact area (56 acres)?

2. What are the present hydraulic characteristics of the Porter Creek and Payette River lines? This evidence may be submitted in the form of an actual water measurement of the flow

into the head box, the flow in the waste pipe, and the water flowing in the mainline. If the capacity of the system cannot be measured, then the following system characteristics should be described: pipeline diameters, lengths and construction materials, pump sizes and capacities, location and capacity of boosters, location of valves, elevations of pipe outlets and inlets, and configuration of the head box.

3. What was the maximum quantity of water diverted and total acreage irrigated in 1993? What water, if any, was wasted in 1993 during periods of peak diversion? Were the hydraulic characteristics of the system changed in 1993? If so, what was changed?

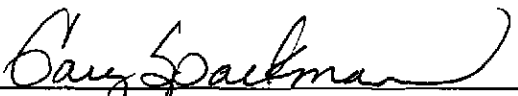
4. The Department understands water is diverted out of the Double Diamond ditch by several domestic users. Under what right is water presently diverted?

5. How did the present irrigation system evolve from the early diversion from Porter Creek? Of particular interest is the use of the booster pump. The capacity or horsepower rating of the booster pump should be submitted. When was the booster pump installed and when was its use discontinued?

In addition to presenting evidence relative to the above facts, the parties may also orally argue any fact already in the record, or that will be presented at the hearing. In addition, the issues of law set forth in the recommended decision may also be argued.

The hearing will be conducted in a facility which meets the accessibility requirements of the Americans with Disabilities Act. If you require special accommodations in order to attend, participate in or understand the hearing, please advise the department within ten (10) days prior to the hearing.

Dated this 16th day of December, 1993.


Gary Spackman
Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of December, 1993, I mailed a true and correct copy, postage prepaid, of this Notice of Hearing to the following:

George Dovel
Rt 1 Box 61
Horseshoe Bend, ID 83629

Richard B. Eismann Esq
Eismann Law Offices
3016 Caldwell Blvd
Nampa, ID 83651

Jack Riddlemoser Esq
PO Box 373
Meridian, ID 83642

Double Diamond Inc.
c/o Donald Rumsey
200 Sunrise River
Boise, ID 83705

David P. Hirschi
Horseshoe Bend Hydroelectric
180 S 300 W, Ste 200
Salt Lake City, UT 84101

Claudette J. Kinney
Word Processing Specialist

29772

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR) TRANSFER OF WATER RIGHTS NOS.) 65-03103, 65-10746, 65-10747, AND) 65-02540 IN THE NAME OF DOUBLE) DIAMOND INC.) 	ORDER FOR AUGMENTATION OF THE RECORD
---	---

After reviewing the recommended decision, the record, and exceptions filed by the parties, several issues of fact are unresolved. The outcome of this dispute may hinge on the resolution of these issues of fact.

Furthermore, the recommended decision determined that the portion of number one right which had irrigated the gravel pit lands had been forfeited, but could be resumed during the 1993 season. Because of the resumption reasoning, the decision could not define the extent of the right. If the department adheres to the reasoning of the recommended decision, it must gather facts to determine the extent of resumption.

Finally, although the recommended decision limited the scope of the Department's review to the gravel pit impact area in determining forfeiture, the hearing officer is not convinced, as yet, that the review shouldn't extend to the entire right.

ORDER

IT IS HEREBY ORDERED that the record shall be augmented at a hearing conducted on January 5, 1993, in the large conference room of the Department of Water Resources, 1301 North Orchard, Boise, Idaho 83720. The hearing will commence at 9:30 a.m. and continue until concluded.

Evidence presented at the augmentation hearing shall be limited to the following issues:

1. How long has the number one Porter Creek water right not been used on the gravel pit impact area (56 acres)?

JAN 29 1995

2. What are the present hydraulic characteristics of the Porter Creek and Payette River lines? This evidence may be submitted in the form of an actual water measurement of the flow into the head box, the flow in the waste pipe and the water flowing in the mainline. If the capacity of the system cannot be measured, then the following system characteristics should be described: pipeline diameters, lengths and construction materials, pump sizes and capacities, location and capacity of boosters, location of valves, elevations of pipe outlets and inlets, and configuration of the headbox.

3. What was the maximum quantity of water diverted and total acreage irrigated in 1993? What water, if any, was wasted in 1993 during periods of peak diversion? Were the hydraulic characteristics of the system changed in 1993? If so, what was changed?

4. The Department understands water is diverted out of the Double Diamond ditch by several domestic users. Under what right is water presently diverted?

5. How did the present irrigation system evolve from the early diversion from Porter Creek? Of particular interest is the use of the booster pump. The capacity or horse power rating of the booster pump should be submitted. When was the booster pump installed and when was its use discontinued?

In addition to presenting evidence relative to the above facts, the parties may also orally argue any fact already in the record, or that will be presented at the hearing. In addition, the issues of law set forth in the recommended decision may also be argued.

Dated this 27th day of October, 1993.



Gary Spackman
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of October, 1993, I mailed a true and correct copy of the foregoing Order for Augmentaion of the Record, postage prepaid, to the following:

George Dovel

Rt 1 Box 61
Horseshoe Bend, ID 83629

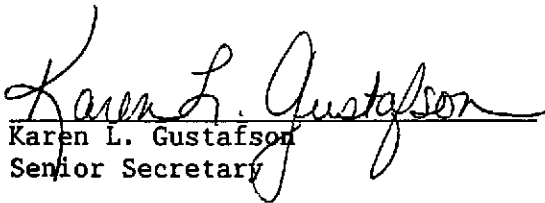
David P Hirschi
Horseshoe Bend Hydroelectric
180 S 300 W Ste 200
Salt Lake City, UT 84101

Double Diamond Inc
c/o Donald Rumsey
200 Sunrise Rim
Boise, ID 83705

Jack Riddlemoser Esq

PO Box 373
Meridian, ID 83642

Richard Be Eismann Esq
Eismann Law Offices
3016 Caldwell Blvd
Nampa, ID 83651


Karen L. Gustafson
Senior Secretary

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION	)	
FOR TRANSFER OF WATER RIGHTS	)	
NOS. 65-03103, 65-10746, 65-10747	)	RECOMMENDED
AND 65-02540 IN THE NAME OF	)	ORDER
DOUBLE DIAMOND, INC.	)	
	)	

A hearing having been held to address protests filed against an application for transfer filed by Double Diamond, Inc., the hearing officer, as a representative of the Director of the Department of Water Resources, recommends the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Double Diamond, Inc. (Double Diamond) filed an application for transfer on March 19, 1991, and amended the application for transfer on April 2, 1992. The amended application proposes to change the place of use and/or nature of use of two water rights which authorize diversion of water from Porter Creek, and two water rights which authorize diversion from the Payette River.

2. The application for transfer proposes to change the place of use for water right no. 65-03103 (Porter Creek), which bears an 1872 priority, from lands which are not now irrigable because of the construction of a gravel pit, to lands which have been irrigated by water diverted pursuant to right no. 65-10746 (Porter Creek), a 1960 priority water right. The application seeks to transfer right 65-10746 to the gravel pit to sustain a pond in the gravel pit for recreational uses. The nature of use of the Payette River water rights (65-02540 and 65-10747) will be amended to reduce existing irrigation use and add a use of recreation storage. Correspondence in the file states water will be stored for a fish

MAR 29 1995

pond and a wetland area.

3. The rights are described in the Payette River decree as follows:

65-03103

Source: Porter Creek

Flow Rate: 3.82 cfs

Priority: January 1, 1872

Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3															39		39
7 N	2 E	2 6	13	40	36	3	23			22						14			154
TOTAL ACRES																			193

65-10746

Source: Porter Creek

Flow Rate: .44 cfs

Priority: April 1, 1960

Point of Diversion: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 12, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3													2				2
7 N	2 E	2 6	11								9								20
TOTAL ACRES																			22

65-02540

Source: Payette River

Flow Rate: 3.20 cfs

Priority: April 26, 1951

Point of Diversion: Sec. 23, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3													2		39	1	42
7 N	2 E	2 6	13	40	36	3	23			22	9					14			163
TOTAL ACRES																			205

65-10747

Source: Payette River

Flow Rate: .90 cfs

Priority: April 1, 1960

Point of Diversion: Sec. 23, T7N, R2E, B.M.

Place of Use:

T w p	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3													2		39	1	42
7 N	2 E	2 6	13	40	36	3	23			22	9					14			163
TOTAL ACRES																			205

4. The application for transfer proposed a change in the place of use as follows for each of the rights:

65-03103

T W P	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3												8		2	31		41
7 N	2 E	2 6	24	35	3	19			16	9						14			152
TOTAL ACRES																			193

65-10746 (R is an abbreviation for recreation and recreation storage)

T W P	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3		R	R		R L1			R L2									
7 N	2 E																		
TOTAL ACRES																			

65-02540 (R is an abbreviation for recreation and recreation storage)

T W P	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3												8		2	31	1	42
7 N	2 E	2 6	13	35	32	3	19		16	9						14			141
7 N	2 E	2 6		R	R		R		R										
TOTAL ACRES																			183

SEP 29 1995

65-10747

T W P	R g e	S e c	NE $\frac{1}{4}$				NW $\frac{1}{4}$				SW $\frac{1}{4}$				SE $\frac{1}{4}$				ACRES
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
7 N	2 E	2 3												8		2	31	1	42
7 N	2 E	2 6	13	35 R	32 R	3	19 R			16 R	9					14			141
TOTAL ACRES																			183

5. George Dovel and Horseshoe Bend Hydroelectric Company filed protests against the application for transfer.

6. At a hearing conducted on March 8 and 11, 1993, Double Diamond Inc. appeared and was represented by Jack Riddlemoser, Attorney at Law. Dovel appeared and was represented by Richard Eismann, Attorney at Law. Horseshoe Bend Hydroelectric Company failed to appear.

7. George Dovel owns the following water rights diverted from Porter Creek:

<u>Right no.</u>	<u>Priority</u>	<u>Flow rate (cfs)</u>	<u>Use</u>
65-10950	6/1/1908	1.61	Irrigation
65-10951	6/1/1912	0.84	Irrigation
65-10953	6/1/1946	0.04	Domestic

8. Water District no. 65-B was formed to administer delivery of water to users of Porter Creek according to the priority of the water rights. The district refers to the water rights in descending numerical order according to priority. Right no. 65-03103, owned by Double Diamond, is the earliest priority right, and is locally referred to as the number one right. Right no. 65-10746, also owned by Double Diamond, is locally referred to as the number 12 right.

9. Right nos. 65-10950 and 65-10951, both owned by Dovel, are locally referred to as the number 6 and number 7 rights, respectively.

29 1995

10. Dovel's point of diversion is located above the Double Diamond diversion. The watermaster closes Dovel's headgate when necessary during low water periods to satisfy Double Diamond's calls for water downstream.

11. During low water years, George Dovel's no. 6 and no. 7 rights are only deliverable during the early part of the irrigation season. The number 12 right, owned by Double Diamond is only deliverable during high flow periods.

12. The Idaho Department of Transportation contracted with Double Diamond to excavate a gravel pit on a parcel of Double Diamond property to which water right no. 65-03103 is appurtenant for the construction of a portion of Highway 55 between Boise and Horseshoe Bend.

13. The Department of Transportation began excavating the Double Diamond property during the summer of 1988. Prior to excavation, the land was irrigated with water diverted from Porter Creek pursuant to the first priority right.

14. Dovel testified that a large portion of the land was scarified in 1988, and he estimated 43 acres were not irrigated in 1988. Dovel did not measure or walk the gravel pit boundaries, but only observed the work from the other side of the river. His estimate of nonirrigated acreage was not contested by Double Diamond.

15. During the peak of construction, approximately 56 acres could not be farmed because of the gravel pit excavation. Approximately 52 acres of the 56 acres was land irrigated by water diverted pursuant to the number one priority Porter Creek right.

16. As construction was ending in 1991 and in 1992, the Idaho Department of Transportation reclaimed a portion of the gravel pit area as farm land. Approximately 22 acres are still excavated as a gravel pit or not irrigable as a result of the gravel pit construction. Double Diamond does not intend to reclaim any more of the 22 acres. Double Diamond intends to irrigate the reclaimed land in 1993.

17. Porter Creek water is delivered to the Double Diamond

property through a combination open channel and closed pressurized system. The diversion from Porter Creek delivers water into approximately two miles of open ditch. The water then enters a headbox at the top of a hill. A pipeline inlet is located in the headbox. The pipeline is constructed from the top of the hill to the bottom, and then extends to the Double Diamond property. Pressure develops in the pipeline because of the change in elevation and the gravity pressure is sufficient to operate the Double Diamond sprinklers.

18. A second pipeline is installed in the headbox where the main pipeline begins. The second pipe is an overflow pipe. An overflow spillway in the headbox separates the inlets to the pipes. Presumably, no water flows in the overflow pipe until the elevation of the water rises in the headbox because of increased flow, or decreased usage at the end of the mainline, which causes water to spill into the overflow compartment of the headbox, and finally, into the overflow pipe.

19. The overflow pipe parallels the main delivery pipe downhill toward the Double Diamond property. At the base of the hill, the main pipeline crosses Jackass Creek, and the overflow pipe ends with an open orifice which discharges into Jackass Creek. The main line continues on to the Double Diamond property.

20. Water from the Payette River is pumped through a mainline which junctions with the Porter Creek pressurized line. At an earlier time, a booster pump pressurized water in the mainline when many of the sprinklers were operating and water was also being delivered from the Payette River. The booster pump was located in the Porter Creek pipeline upstream of the junction of the Porter Creek pipeline and the Payette River pipeline, but has not been used in several years.

21. A larger pump was installed in the Payette River which allegedly pressurized the line sufficiently that the booster pump was no longer needed. George Dovel testified that when the Payette River pump is pumping, the flow from Porter Creek is more manageable. This statement implies that the Payette River pump

9 1995

increases the flow in the Porter Creek line upstream of the Payette River line - Porter Creek line junction.

22. The testimony is inconsistent with hydraulic principles. Increasing the pressure in the Payette River line would also increase the pressure at the junction. Without the booster pump operating, hydraulic head will build in the Porter Creek line to match the head caused by the Payette River pump. More water should spill into the Porter Creek overflow when the Payette River pump is pumping.

23. In 1990, the Department determined 52 acres were not irrigable because of the gravel pit excavation. The authorized rate of flow was reduced 1.03 cfs from 3.82 cfs to 2.79 cfs.

24. In 1991, Double Diamond was again only allowed to divert 2.79 cfs because 52 acres were not irrigable.

25. Watermaster records show Double Diamond diverted the full amount of reduced entitlement of 2.79 cfs at least once during both the 1990 and 1991 irrigation seasons.

26. In 1992, the authorized rate of diversion was only reduced 0.43 cfs, from 3.82 cfs to 3.39 cfs, because of reclamation of the gravel pit.

27. Dovel and his employees have carefully monitored and observed Double Diamond's use of water. In 1991, Christy Shirley, one of Dovel's employees observed and recorded the use of water on the Double Diamond property, and also observed and recorded water being discharged into Jackass Creek through the overflow pipe.

28. In addition to the monitoring by Shirley in 1991, Dovel measured the water diverted, measured or observed Jackass Creek overflowing, and also estimated the water applied to the Double Diamond property by measuring pressures in a single rainbird sprinkler with a pitot gage and by multiplying the discharge of a single sprinkler head at the measured pressure by the number of sprinklers operating.

29. The maximum discharge from the sprinklers measured by Dovel in 1991 is approximately 60 inches, or 1.2 cfs. The measurements do not account, however, for delivery losses,

particularly in the open ditch. The measurements also do not account for the reduction in the authorized diversion rate because approximately 52 acres were not being irrigated. Finally, the measurements of sprinkler discharge are not correlated to water availability. There may not have been any more water available for diversion, minus losses, than Dovel measured.

30. Protestant's Exhibit I summarizes Shirley's and Dovel's observations. Dovel testified that any diversion over 2.0 cfs results in a waste of water into Jackass Creek. The testimony again ignores the decrease in irrigated acreage as a result of gravel pit excavation, and the corresponding decrease in the ability of Double Diamond to divert its full water right.

31. Several individuals divert water from the Double Diamond ditch as "courtesy water." While the quantity of water diverted is only approximately two inches per user, no rights to this water are found in records of the Department of Water Resources.

32. An engineer, Don Watts, hired by Dovel, computer digitized the boundaries of irrigated fields depicted on Protestant's Exhibit A, and superimposed public survey information on top of the irrigated fields, dividing the fields into segments within each 40 acre tract. Protestant's Exhibit A is a 1992 aerial photograph of the Double Diamond property.

33. Watts plotted each segment and compared his calculations to an ASCS aerial photograph predating the gravel excavation. His calculations were comparable to the acreage shown on an ASCS map predating the gravel pit excavation. Protestant's Exhibit V-1 depicts segment boundaries, and summarizes segment acreage.

34. Attachments to protestant's Exhibit V conclude the number one priority right irrigates approximately 164.5 acres and the number 12 priority right irrigates approximately 18 acres.

35. The application for transfer proposes use of the no. 12 Porter Creek right (65-10746) when deliverable early in the year, and use of a portion of the Payette River rights (65-02540 and 65-10747) to maintain pond water levels for the remainder of the irrigation season.

CONCLUSIONS OF LAW

1. Section 42-222, Idaho Code, sets forth the criteria that the Department can consider in determining whether an application for transfer should be approved:

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 applicant carries the burden of coming forward with evidence that his proposed transfer will not result in an enlargement in use, will not injure other water rights, and that it is consistent with conservation of Idaho's water.

3. All parties carry the burden of coming forward with the evidence regarding matters of local public interest of which each is most cognizant, but the applicant bears the burden to show that his proposal is in the local public interest, or that public interest factors which favor the proposal are of greater worth than the public interest considerations with which it conflicts.

4. The applicant carries the burden of proof for all the criteria of Idaho Code § 42-222.

5. The Department may determine the issue of forfeiture when considering an application for transfer. Jenkins v. State of Idaho, 103 Idaho 384, 647 P.2d 1256 (1982).

6. Forfeiture is not favored and must be established by clear and convincing evidence.

7. Idaho Code § 42-222 is the statute which defines forfeiture:

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 and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; . . .

8. Dovel argues Porter Creek water has not been delivered to the gravel pit area (approximately 43-56 acres) for a period of at least five years. Dovel also argues the filing of the application for transfer subjects each of the rights to full forfeiture scrutiny by the Department, and the Department cannot narrowly focus only on the gravel pit, but must review the use of the whole right, including the entire place of use, and the total quantity of water diverted. Evidence presented by Dovel questions the total number of acres irrigated, and the total quantity of water capable of being diverted by Double Diamond.

9. Double Diamond contests the expansive review requested by Dovel. Double Diamond argues the application for transfer only seeks a change for the 22 acres within the gravel pit, and argues the Department is not authorized to scrutinize other portions of the place of use or the quantity of water diverted.

10. Jenkins does not state whether the Department may review the entire water right when an application for transfer is filed which seeks to change only a portion of the right.

11. The Department's review of the validity of the right when considering an application for transfer is limited by an initial determination of whether a narrow focus on the portion sought to be transferred, without looking at the entire right, will result in an enlargement, injury to other users, a conflict with the public interest, or is inconsistent with principles of conservation of water. In this case, the Department must review more than the 22 acres identified as the gravel pit because 56 acres were part of the gravel pit during peak construction in 1990 and 1991.

12. The department need not look beyond the boundaries of the gravel pit. Double Diamond proposes to change the place of use from the gravel pit lands to new lands. Double Diamond is not

MAY 29 1995

seeking to change the remainder of the place of use. The definition of the entire place of use and total authorized flow rate can be addressed in the Snake River Basin Adjudication.

13. There is uncontroverted evidence in the record that at least 43 acres were not irrigated during the five irrigation seasons in 1988 through 1992. However, Double Diamond indicated its intent to use the water by filing applications for transfer prior to the end of the fifth irrigation season. Notice of these applications was published.

14. Technically, the right to irrigate 43 acres was forfeited at the end of the 1992 irrigation season.

15. "[F]orfeiture is not effective, if after the five-year period, the original owner or appropriator resumed the use of the water prior to the claim of right by a third party." Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944); Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952).

16. The hearing for this application was conducted on March 8 and 11, 1993, before the commencement of the 1993 irrigation season.

17. Other users could not establish a legal claim of right to the forfeited water until after forfeiture. If Double Diamond resumes its use during the 1993 irrigation season, the other users will not have established a reliance on the water, and the forfeiture is not effective.

18. Most of the testimony established the area of unrestored gravel pit at approximately 20-22 acres. The measurement and calculation of 22 acres by Donald Rumsey is accepted as the area of the unrestored gravel pit.

19. The protestant did not establish that the flow rate authorized for diversion should be reduced because of nonuse. Double Diamond diverted the maximum flow to which it was entitled in 1990 and 1991. When the restored gravel pit acreage and the new acres (once irrigated by the number 12 right) are irrigated more water will be needed.

20. The protestant established that Double Diamond (or its

MAR 29 1995

tenant) does not cautiously use only the water it needs. Substantial waste of valuable Porter Creek water into Jackass Creek is not acceptable.

21. The protestant raised a substantial question about the total number of acres irrigated. These issues should be addressed by the Snake River Basin Adjudication.

22. Double Diamond should know how much water is necessary to operate various sprinkler line combinations. Double Diamond should call for the quantity of water needed.

23. Spill into Jackass Creek of a substantial quantity of water is not acceptable except when Porter Creek fluctuations or other unforeseeable occurrences cause waste.

24. Double Diamond is obligated to operate its irrigation system in a manner that will not result in the waste of a substantial quantity of water during times when sprinkler lines are being moved or modified. Double Diamond is further obligated to inform the watermaster when its reduced diversion rate requirement is such that later priority right holders could make beneficial use of the water.

25. Approval of this transfer will not injure other water rights.

26. Approval of this transfer will not result in an enlargement. Approval does not confirm the irrigation of the entire place of use, and the issues of forfeiture and abandonment may be raised in the Snake River Basin Adjudication.

27. Approval of this transfer will not conflict with the local public interest.

28. If Double Diamond, including its tenant, timely informs the watermaster of changes in its delivery, the transfer will be consistent with principles of conservation of water within the state of Idaho.

29. Use of water for recreational fish rearing and wetlands is a beneficial use.

30. "Courtesy water" should not be delivered to water users who do not hold a valid water right.

31. Failure to appear at a hearing is cause for dismissal of a protest. Horseshoe Bend Hydroelectric Company's protest should be dismissed.

ORDER

IT IS HEREBY ORDERED that application for transfer of water rights nos. 65-03103, 65-10746, 65-02540, and 65-10747 is APPROVED subject to the following conditions:

1. Use of water under these water rights shall be regulated by the watermaster of State Water District No. 65B.

2. The right holder under this transfer shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.

3. Approval of this transfer in no way grants any right-of-way or easement for use of a delivery system owned by person(s) other than the right owner.

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

5. Water shall be used only on the place of use described by the transfer approval document, incorporated and made a part of this decision.

6. The validity of the portion of the water rights not transferred was not determined and may be questioned in a subsequent proceeding, including the Snake River Basin Adjudication.

7. The owner of this right, or his tenant, shall inform the watermaster of the flow needed to operate his sprinkler system whenever the use changes significantly.

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

9. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre for the lands above.

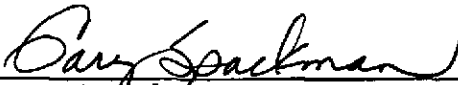
10. Spill of a substantial quantity of water into Jackass

MAY 29 1935

Creek is a waste of water, and is an illegal use of water pursuant to Idaho Code §42-351. Determination of "substantial quantity" is left to the future determination of the Department and the watermaster.

IT IS FURTHER ORDERED that Horseshoe Bend Hydroelectric Company's protest is dismissed.

Dated this 30th day of July, 1993.



Gary Spackman
Hearing Officer

DEC 29 1995

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of August, 1993, I mailed a true and correct copy of the foregoing Recommended Order and Order Issuing the Recommended Order, postage prepaid, to the following:

George Dovel
Rt 1 Box 61
Horseshoe Bend, ID 83629

David P Hirschi
Horseshoe Bend Hydroelectric
180 S 300 W Ste 200
Salt Lake City, UT 84101

Double Diamond Inc
c/o Donald Rumsey
200 Sunrise Rim
Boise, ID 83705

Jack Riddlemoser Esq
PO Box 373
Meridian, ID 83642

Richard Be Eismann Esq
Eismann Law Offices
3016 Caldwell Blvd
Nampa, ID 83651


Karen L. Gustafson
Secretary/Records Manager

MAR 2 8 1993

I hereby certify that on the 30th day of July, 1993, I mailed a true and correct copy, postage prepaid, of this document to the applicant(s) and protestant(s) listed:

Carolyn Andregg
Carolyn Andregg
Secretary

Double Diamond, Inc.
% Donald Rumsey
200 Sunrise Rim
Boise, Idaho 83705

George Dovel
Rt. 1, Box 61
Horseshoe Bend, Id. 83629

Jack C. Riddlemoser, Esq.
712 E. Fairview
P.O. Box 373
Meridian, Idaho 83642

Richard B. Eismann, Esq.
Eismann Law Offices
3016 Caldwell Blvd.
Nampa, Idaho 83651-6416

SEP 29 1995

MAR 02, 1979

PROPOSED FINDING OF WATER RIGHTS - PAYETTE RIVER DRAINAGE

PAGE 275

INDICATES TOTAL

SOURCE: PAYETTE RIVER

RIGHT NUMBER	NAME AND ADDRESS	PRIORITY DATE	USE	USE PERIOD FROM TO	MAX AMOUNT MAX RATE	DIVERSION POINT	PLACE OF USE AND ACREAGE	BASIS FOR RIGHT
65-2667	DRAKE, CALVIN C. ROUTE 1, HORSESHOE BEND, IDAHO 83629	10/15/1959	IRRIGATION	4/ 1 11/ 1	--- AFA .15 CFS	NW1/4 S23 T 7N R 2E	SWSW1/4 S1 S13 T 7N R 2E *5*	LICENSE
65-2668	DRAKE, ALLEN R. HORSESHOE BEND, IDAHO 83629	10/21/1959	IRRIGATION	4/ 1 11/ 1	--- AFA .20 CFS	LOT 6 S26 T 7N R 2E	LOT 71 4) LOT 61 6) S26 T 7N R 2E *10*	LICENSE
65-10747	DOUBLE DIAMOND INC. C/O DON RUMSEY, HORSESHOE BEND, IDAHO 83629 REMARKS: THIS RIGHT WHEN COMBINED WITH RIGHTS 65-3163, 65-10746 & 65-2540 SHALL PROVIDE NO MORE THAN .02 CFS/ACRE.	4/ 1/1960	IRRIGATION	4/ 1 11/ 1	--- AFA .90 CFS	LOT 4 S23 T 7N R 2E	SE1/4 11 LOT 4(2) LOT 5(39) S23 T 7N R 2E NENE(13) NWNE(40) SWNE(39) SENE(3) NWSE(14) LOT 1(23) LOT 2(22) LOT 3(9) S26 T 7N R 2E *205*	BENEFICIAL USE
65-10749	DOUBLE DIAMOND INC. C/O DON RUMSEY, HORSESHOE BEND, IDAHO 83629 REMARKS: THIS RIGHT WHEN COMBINED WITH RIGHT 65-10746 SHALL PROVIDE NO MORE THAN .02 CFS/ACRE.	4/ 1/1960	IRRIGATION	4/ 1 11/ 1	--- AFA .22 CFS	LOT 4 S23 T 7N R 2E	NENE(11) S26 T 7N R 2E *11*	BENEFICIAL USE
65-10453	MAL GREGGIR LAND & LIVESTOCK COMPANY BOX 5128, BOISE, IDAHO 83705	6/ 1/1960	IRRIGATION	4/ 1 11/ 1	--- AFA .62 CFS	SWSW 519 T 7N R 1E	NWNW(12) SWNW(1) SENW(16) SWNE(2) S30 T 7N R 1E *31*	BENEFICIAL USE
65-2674	REAY, DAVID B. & REAY, LINDA SUE P.O. BOX 131, HORSESHOE BEND, IDAHO 83629	8/22/1960	IRRIGATION	4/ 1 11/ 1	--- AFA .02 CFS	LOT 9 S23 T 7N R 2E	LOT 9(1) S23 T 7N R 2E *1*	LICENSE
65-8532	PEARL KENNEDY ESTATE & KENNEDY, HUGH C/O IDAHO FIRST NAT'L BANK, TRUST DEPT., BOX 7928, BOISE, IDAHO 83707 REMARKS: TWO POINTS OF DIVERSION IN LOT 3, SEC. 28, T.7N, R.2E.	2/ 1/1961	IRRIGATION	4/ 1 11/ 1	--- AFA .46 CFS	LOT 5 S26 T 7N R 2E LOT 5 S27 T 7N R 2F LOT 1 S28 T 7N R 2C LOT 2 S28 T 7N R 2E LOT 3 S28 T 7N R 2C LOT 4 S28 T 7N R 2F	LOT 2(4) S33 T 7N R 2C LOT 11 4) LOT 31 4) LOT 41 4) LOT 51 2) LOT 21 3) S20 T 7N R 2E LOT 4(2) S27 T 7N R 2E *23*	BENEFICIAL USE



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

November 24, 1995

Don Rumsey
Double Diamond Ranch
311 4th Street No. Ext.
Nampa, ID 83687

RE: TRANSFER NO. 4159 OF WATER RIGHT NOS. 65-03103, 65-10746,
65-10747 AND 65-02540 IN THE NAME OF DOUBLE DIAMOND, INC.

Dear Mr. Rumsey:

Your letter to Steve Lester of the department's Western Regional Office requesting more time to install measuring devices has been forwarded to me for response.

On January 30, 1995, The department issued the Final Order approving the transfer with certain conditions and limitations including Condition of Approval No. 2 which required you to maintain a measuring device and lockable controlling works of a type approved by the department and Condition of Approval No. 4. which required that you complete the change authorized by the transfer within one (1) year.

While your letter is not explicitly clear, it appears that your concern is not completing the installation of the measuring devices and lockable controlling works within one year of the transfer approval i.e. by January 30, 1996.

The department will grant more time in which to install the measuring devices and controlling works provided the installation is complete and operable on or before May 1996 or by the time the watermaster is called to duty, whichever is earlier.

I also noted that your letter refers to right no. 65-10746 from Porter Creek and right no. 65-10747 from the Payette River. The transfer involved four (4) water rights, all of which must be measured under terms of approved transfer no. 4159.

Sincerely,
Gary Spackman

GARY SPACKMAN, Mgr
Water Distrib. Sec.

c: IDWR - W. Region
George Dovel

MICHAEL L. LINDLEY
NOV 29 1995

MEMORANDUM

TO: FILE 65-10747

FROM: PAM SKAGGS

RE: TRANSFER # 4159

DATE: 5-24-93

Original Transfer Application, Form and correspondence regarding the above referenced Transfer is located within file # 65-02540.

See file # 65-02540 for Large exhibits.

See flat mailer in small supply room in vault for exhibits to large for expansion.

File labeled "Large Exhibits, file # 65-02540".

RECORDED

MAR 29 1995

WR0749NP
No. T65-10747

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT

DATE: 03/16/95
PAGE: 1

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD		DIVERSION RATE	DIVERSION VOLUME
				FROM	TO		
C	DOUBLE DIAMOND INC C/O DON RUMSEY 200 SUNRISE RIM BOISE ID 83705 (208) 336-4801	04/01/1960	IRRIGATION	04-01	11-01	0.800 CFS	341.20 AFA
			RECREATION	04-01	11-01	0.100 CFS	42.60 AFA
			RECREATION STORAGE	04-01	11-01		42.60 AFA
			DIVERSION TO STORAGE	04-01	11-01	0.100 CFS	
			TOTAL DIVERSION:			0.900 CFS	383.80 AFA

Water Source: PAYETTE RIVER

Tributary to: SNAKE RIVER

Stage: DECREED

Point(s) of Diversion Capacity: 0.90 CFS

Point(s) of Diversion: T07N R02E S23 Lot 04(NESE)

BOISE County

Place of use Legal Description for: IRRIGATION

Place of Use				Legal Description for: IRRIGATION																								
				NE				NW				SW				SE												
				NENE	NWNE	SWNE	SENE	:	NENW	NWNW	SWNW	SENW	:	NESW	NWSW	SWSW	SESW	:	NESE	NWSE	SWSE	SESE	:	SUM				
T	R	S	:	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	:	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	:			
07N	02E	23	:											:											:	42.0		
07N	02E	26	:	13		35		32		03				:	01-19										:	141.0		

Place of use Legal Description for: RECREATION

NE												NW				SW				SE							
				NENE	NWNE	SWNE	SENE	:	NENW	NWNW	SWNW	SENW	:	NESW	NWSW	SWSW	SESW	:	NESE	NWSE	SWSE	SESE	:				
T	R	S	:	Lt	Ac	Lt	Ac	:	Lt	Ac	Lt	Ac	:	Lt	Ac	Lt	Ac	:	Lt	Ac	Lt	Ac	:				
-----				-----				:	-----				-----				:	-----				:	-----				:
07N	02E	26	:			R	R	:	01-R				:					:					:				

Pou County: BOISE

Other Water Rights with Same Point(s) of Diversion and Source:
65-02540 65-10747 65-10749

Other Water Rights Listing Overlapping Place(s) of use:
65-02532 65-02540 65-03103 65-10746 65-10747 65-10749 65-11393 T65-02540 T65-03103

Conditions of Approval:

- R04 - Use of water under this water right will be regulated by the watermaster of State Water District No. 65B.
- T07 - The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.
- T08 - Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval of the transfer should not be rescinded.
- R32 - This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 4.5 afa per acre for the lands above.

Conditions of Approval:

- R43 - A measuring device and lockable controlling works of a type
 - approved by this Department shall be maintained on the diverting
 - works in a manner that will provide the watermaster suitable
 - control of the diversion.
- T04 - Approval of this transfer in no way grants any right-of-way or
 - easement for use of a delivery system owned by person(s) other
 - than the right owner.

Remarks: Water shall be used only on the place of use described by the transfer approval document, incorporated and made a part of this decision.

The validity of the portion of the water rights not transferred was not determined and may be questioned in a subsequent proceeding, including the Snake River Basin Adjudication. The owner of this right, or his tenant, shall inform the watermaster on a day to day basis of the flow needed to operate his sprinkler system whenever the use changes significantly. Spill of a substantial quantity of water into Jackass Creek is a waste of water, and is an illegal use of water pursuant to Idaho Code 42-351. Determination of "substantial quantity" is left to the future determination of the Department and the watermaster.

Dates: App. Received: Priority Date: 04/01/1960
Proof Due Date: Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

Misc: Water District Number: 65B Field Exam Fee:

Comments: Date: 06/07/1993 User-ID: SKAGGS Subject: TRANSFER #4159
Transfer #4159 was filed to change the place of use and the nature of use under rights 65-02540/03103/10746 & 10747.
APPROVED BY FINAL ORDER DATED 01-30-95.

Audit: 05/27/93 SKAGGS 06/07/93 SKAGGS 06/15/93 SKAGGS 06/16/93 SKAGGS
03/16/95 PSKAGGS

DATE: 06/15/93
PAGE: 1

Per G. Spackman.

WR0749NP
No. T65-10747

IDAHO DEPARTMENT OF WATER RESOURCES
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Conditions of Approval:

- T09 - Approval of this transfer does not preclude the opportunity for
 - review of the validity of the water right(s) in the ongoing
 - Snake River Basin Adjudication.
- R32 - This right when combined with all other rights shall provide no
 - more than .02 cfs per acre nor more than 4.5 afa per acre for the
 - lands above.

Dates: App. Received: Priority Date: 04/01/1960
 Proof Due Date: Proof Made Date:
 Exam Made Date: Exam Sent to S.O.:
 Licensed Date:

Misc: Water District Number: 65B Field Exam Fee:

Comments: Date: 06/07/1993 User-ID: SKAGGS Subject: TRANSFER #4159
 Transfer #4159 was filed to change the place of use and the
 nature of use under rights 65-02540/03103/10746 & 10747.

Audit: 06/15/93 SKAGGS

WR0749NP
No. 165-10747

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROFILE REPORT
(REGIONAL)

DATE: 06/07/93
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OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM TO	DIVERSION RATE	DIVERSION VOLUME
C	DOUBLE DIAMOND INC C/O DON RUMSEY 200 SUNRISE RIM BOISE ID 83705 (208) 336-4801	04/01/1960	IRRIGATION	04-01 11-01	0.90 CFS	382.0 AFA
TOTAL DIVERSION:					0.90 CFS	382.0 AFA

Water Source: PAYETTE RIVER

Tributary to: SNAKE RIVER

Stage: DECREED

Point(s) of Diversion Capacity: 0.90 CFS

Point(s) of Diversion: T07N R02E S23 Lot 04(NE SE)

Place of use Legal Description for: IRRIGATION

			NE				NW				SW				SE								
			NENE	NWNE	SWNE	SENE	:	NENW	NWNW	SWNW	SENW	:	NESW	NWSW	SWSW	SESW	:	NESE	NWSE	SWSE	SESE	:	SUM
T	R	S	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	Lt	Ac	
07N	02E	23	:						:														42.0
07N	02E	26	:	24	35	32	03	:	01-19			02-16	:	03-09					14				152.0
																					TOTAL ACRES		194.0

Pou County: BOISE

Other Water Rights with Same Point(s) of Diversion and Source:
65-02540 65-10747 65-10749

Other Water Rights Listing Overlapping Place(s) of use:
65-02532 65-02540 65-03103 65-10746 65-10747 65-10749 65-11393 T65-02540 T65-03103 T65-10746

Conditions of Approval:

- R04 - Use of water under this water right will be regulated by the watermaster of State Water District No. 65B.
- R01 - A measuring device of a type approved by this Department shall be maintained as a part of the diverting works.
- R02 - A lockable device subject to the approval of the Department shall be maintained on the diverting works in a manner that will provide the watermaster suitable control of the diversion.
- T07 - The change authorized by this transfer shall be accomplished within one (1) year of the date of this approval.
- T08 - Failure to comply with the conditions of this transfer is cause for the director to issue an order to show cause why the approval of the transfer should not be rescinded.
- T09 - Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
- R32 - This right when combined with all other rights shall provide no more than .02 cfs per acre nor more than 4.5 afa per acre for the lands above.

WR0749NP
No. T65-10747

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Remarks: This right is limited to the irrigation of 183 acres within the
place of use described above in a single irrigation season.

Dates: App. Received: Priority Date: 04/01/1960
Proof Due Date: Proof Made Date:
Exam Made Date: Exam Sent to S.O.:
Licensed Date:

Misc: Water District Number: 65B Field Exam Fee:

Comments: Date: 06/07/1993 User-ID: SKAGGS Subject: TRANSFER #4159
Transfer #4159 was filed to change the place of use and the
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Audit: 06/07/93 SKAGGS