

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

**IN THE MATTER OF DIVERSION AND)
USE OF WATER NOT IN CONFORMANCE)
WITH WATER RIGHTS OWNED OR)
BY CAPITOL WATER CORP. &/OR)
H. ROBERT PRICE)**

**NOTICE OF VIOLATION
AND CONSENT AGREEMENT**

The Director of the Department of Water Resources (IDWR) is charged with the duties of protecting vested water rights, enforcing specific statutes of the state of Idaho, and enforcing the rules promulgated by IDWR. The Director is also authorized to order the cessation of violations or attempted violations of the provisions of the law relating to all aspects of appropriation and distribution of water.

Based on the information gathered and the records of IDWR, IDWR finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On November 4, 1997, Capitol Water Corporation (Capitol) filed an application for transfer with the Idaho Department of Water Resources (IDWR), numbered as application for transfer no. 5180. The application sought the following for six water rights (63-03002, 63-03071, 63-03166, 63-03152, 63-07108, 63-11528) owned by Capitol: (a) Add all six existing wells in the integrated delivery system as authorized points of diversion to each of the water rights; (b) Change the nature of use for some of the water rights from domestic, irrigation and

fire protection to municipal use; (c) Change the place of use for some of the rights to include the entire service area of Capitol; and (4) Add a new well proposed for the SE1/4SE1/4SE1/4 of Section 36, T4N, R1E, B.M. to be described by each of the water rights as a point of diversion.

2. Some of the licenses for the water rights describing domestic, irrigation, and fire protection specified the annual volume and place of use of the water right. In attempting to consolidate these rights as described above, IDWR requested measurement of flow to determine the production capacity of the system during peak demand. IDWR wrote a letter to H. Robert Price (Price) of Capitol on March 23, 1998 requesting the measurements and submittal of the data.

3. On April 2, 1998, IDWR approved an expedited drilling permit for construction of the new well. The drilling permit was issued because of concerns about meeting peak water demand from the users of the Capitol system during the summer months.

4. The well was constructed between April 21 and May 5, 1998 by Riverside Inc. A well driller's report was submitted on May 20, 1998. The driller tested the productivity of the well. The well produced 1210 gallons per minute for six hours.

5. On May 15, 1998, Price, his consultant, Ed Squires, and Gary Spackman and Jim Johnson, both employees of IDWR, discussed the need for the measurements.

A second letter was mailed to Price by IDWR on May 19, 1998, again asking for a measurement of water at peak capacity.

6. The data requested was not received during the summer and fall of 1998. On November 3, 1998, IDWR sent another letter to Price of Capitol. The letter stated:

After a meeting with you and others on May 15, 1998, I wrote you a letter that set forth the terms of an agreement to determine the capacity of Capitol Water Corporation's system. A measurement of the capacity is necessary for limiting the diversion of water under Capitol Water Corporation's water right. I have

inquired of Ed Squires several times about whether that test was complete. He represents to me that it was not done during the summer of 1998.

The Idaho Department of Water Resources (IDWR) issued you a drilling permit prior to approval of the application for transfer because you felt some urgency about completing the well. If you have diverted any water from the new point of diversion without approval of the application for transfer, the diversion is in violation of Idaho law. Please be advised that until the capacity of Capitol Water Corporation's system is measured, and the application for transfer is approved, you should not divert water from the new point of diversion.

7. In November 2001, Capitol filed an application for drilling permit to replace one of the wells existing at the time of the application for transfer was filed in 1997. As part of its review, IDWR inquired about the use of water from all the wells and the status of the pending application for transfer. As a result of the inquiry, IDWR discovered that the tests requested in 1998 have never been completed. IDWR also discovered that the new well drilled in 1998 was connected into the integrated municipal system, and water has been pumped from the well for approximately three years. IDWR also discovered that the well drilled in 1998 has been the most productive and reliable well for Capitol after it began supplying water to the municipal system.

8. Capitol does not own a water right authorizing a point of diversion describing the well drilled in 1998, located in the SE1/4SE1/4SE1/4 of Section 36, T4N, R1E, B.M.

CONCLUSIONS OF LAW

1. Idaho Code Section 42-351 states:

If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural water course or from a ground water source without having obtained a valid water right to do so, or is applying water or has applied water not in conformance with a valid water right, then the director of the department of water resources shall have the discretion to issue a notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.

2. Idaho Code Section 42-1701B states:

(2) Notice. . . . the notice of violation shall identify the alleged violation and shall specify each provision of the designated chapter, rule, permit, condition of approval or order, which has been violated. The notice of violation shall state the remedy, including all restoration and mitigation measures, and the amount of any civil penalty the director seeks for redress of the violation. Factors the director may consider in seeking the appropriate remedy include the impact of the violation and whether the violation was willful, a repeat violation for which the violator had been given a prior written warning, or the violator has otherwise refused to comply with the department's lawful directives. The notice of violation shall inform the person to whom it is directed of an opportunity to confer with the director, or the director's designee in a compliance conference concerning the alleged violation.

(6) Penalties.

(a) . . . persons determined to be in violation of section 42-351, Idaho Code, shall be liable for a civil penalty not to exceed:

(i) For nonirrigation uses, fifty dollars (\$50.00) per one-tenth (0.1) cubic feet per second of water or part thereof, per calendar day, up to a maximum penalty of fifty thousand dollars (\$50,000) per year for water illegally used or diverted;

3. Capitol has diverted water from a well not authorized as a point of diversion by any water right for a period of three (3) years, including the last (12) twelve months.

4. The diversion and use of water described above violates Idaho Code § 42-351.

5. Assuming the well produces at or near the capacity measured by the well driller, 1,200 gallons per minute equates to a flow rate of 2.70 cubic feet per second. At the maximum rate of \$50 per day, and 27 tenths of a cubic foot per second, IDWR could seek a daily penalty of \$1,350 per day. The maximum penalty could accrue in 37 days. Even a significant reduction of flow rate and the daily penalty would still accrue the \$50,000 within a few months, and well within the year allowed for penalty assessment.

NOTICE OF VIOLATION AND CONSENT AGREEMENT

The Idaho Department of Water Resources seeks and Capitol Water Corporation agrees to the following as a joint notice of violation and consent agreement:

1. IDWR seeks and Capitol Water Corporation agrees to pay a penalty of \$2,500 for illegal diversion and use of water from the well located in the SE1/4SE1/4SE1/4 of Section 36, T4N, R1E, B.M.
2. IDWR grants a three-month grace period within which Capitol Water Corporation can continue to divert water from the well located in the SE1/4SE1/4SE1/4 of Section 36, T4N, R1E, B.M. Information must be submitted to IDWR about the capacity of the system within the grace period. If the information is timely submitted, no penalty will be sought for illegal diversion of water within the three-month grace period. If the information is not timely submitted, IDWR will seek substantial additional penalties as described by Idaho Code § 42-1701B.

Because of changes in the production capacity of the wells as they existed in 1998 (before the drilling of the well located in the SE1/4SE1/4SE1/4 of Section 36, T4N, R1E, B.M.) IDWR agrees that actual measurement of the production capacity of the wells in 2001 would

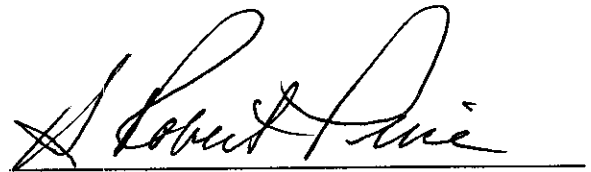
underestimate the 1998 production capacity of the system. Capitol Water Corporation may submit theoretical information about the system. The theoretical information must be based on reasonable pumping depths and municipal wellhead pumping pressures, conservative pump and motor efficiencies, and should also take into account known well or pump limitations in addition to actual known combinations of well pumping and operation at peak production capacity.

Dated this 26th day of November, 2001.

A handwritten signature in black ink, appearing to read "Gary Spackman", written over a horizontal line.

GARY SPACKMAN
Western Regional Manager
Idaho Department of Water Resources

Dated this 26th day of November, 2001.

A handwritten signature in black ink, appearing to read "Robert F. Smith", written over a horizontal line.

Capitol Water Corporation

Idaho Department of Water Resources Receipt

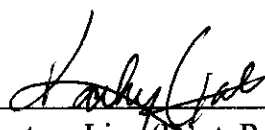
Receipt ID W028527

Payment Amount Date Received Region Status
Payment Type Check Number

Payer Comment

Fee Detail

Amount	Description	Fund	FD	PCA	SO
\$2,500.00	WATER RIGHT ENFORCEMENT	0229	22	55506	1315



Signature Line (Dept. Representative)