

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF DIVERSION AND)
USE OF WATER NOT IN CONFORMANCE)
WITH CONDITIONS OF APPROVAL OF)
TRANSFER NO. 5197 INVOLVING WATER)
RIGHTS NOS. 36-02457B, 36-07770B, AND)
36-08063F IN THE NAME OF F.F. GUNNING)
_____)

**ORDER TO
SHOW CAUSE**

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

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

FINDINGS OF FACT

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

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

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

- The dairy operation authorized under this approval shall comply with applicable city and county zoning and use requirements.
- Failure of the right holder to comply with any condition of approval of this transfer is cause for the Director to rescind approval of the transfer.

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

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

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

CONCLUSIONS OF LAW

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

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

Notwithstanding the issuance of a notice of violation, the director may also file an action seeking injunctive relief directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right.

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

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

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

4. The Director of the department should issue an Order to Show Cause to the owner of the water rights used at Gunning Dairy (also known as Hillcrest Dairy)

directing the owner to show within forty-five (45) days that the diversion and use of water complies with the conditions of approval of Transfer No. 5197.

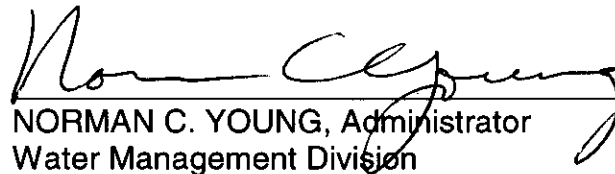
ORDER

IT IS HEREBY ORDERED as follows:

1. F. F. Gunning, shall within forty-five (45) days of the date of this order, show to the satisfaction of the Director that the diversion and use of water approved under Transfer No. 5197 is in compliance with Gooding County zoning requirements and other requirements of Gooding County relating to the operation of Gunning Dairy (Hillcrest Dairy).

2. Failure of F. F. Gunning to show that Gunning Dairy is in compliance with Gooding County zoning requirements and other requirements of Gooding County relating to the operation of Gunning Dairy (Hillcrest Dairy) is cause for the Director of the Department of Water Resources to commence a proceeding to rescind the approval of Transfer No. 5197.

DATED this 7TH day of December, 1999.


NORMAN C. YOUNG, Administrator
Water Management Division

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this the 7th day of December, 1999, the above and foregoing document was served upon the following, by certified mail, by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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

(Certified Mail No. 326 991612)

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

(Certified Mail No. 326991613)

A handwritten signature in cursive script, reading "Rita L. Fleck", written over a horizontal line.

Rita L. Fleck
Administrative Assistant