

Law Offices
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

KENT W. FOSTER
ROBERT E. FARNAM
WILLIAM D. FALER
CHARLES A. HOMER
GARY L. MEIKLE
DONALD L. HARRIS
DALE W. STORER
MARIE T. TYLER
ROBERT M. FOLLETT
FREDERICK J. HAHN, III
KARL R. DECKER
THEL W. CASPER*
SHAN B. PERRY
AMELIA A. SHEETS
DeANNE CASPERSON**

1000 RIVERWALK DRIVE, SUITE 200
P.O. BOX 50130
IDAHO FALLS, IDAHO 83405

TELEPHONE (208) 523-0620
FACSIMILE (208) 523-9518
E-MAIL KFOSTER@HOLDENLEGAL.COM

RECEIVED ^{GLEN}

MAY 07 2004

Department of Water Resources

Robert B. Holden
(1877-1967)
Terry L. Crapo
(1911-1971)
William S. Holden
(1939-1982)
(1907-1988)

Of Counsel
Fred J. Hahn

*Also Licensed in Utah and Arizona
**Also Licensed in Missouri & Kansas

May 5, 2004

L. Glen Saxton, P.E.
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706

Re: Notice to Resume Water Use for Water Right No. 41-7030

Dear Mr. Saxton:

We are writing to follow up on the matter we discussed by telephone last week. You are familiar with the Tim Deeg well in the NWSWSE Section 6, T. 9S., R. 31E. As a result of various applications for permit and for transfer, there are five (5) water rights for which this well is the point of diversion; 41-7030, 41-7034, 41-7071, 41-7076, and 41-7081.

However, the last IDWR measurement indicated the total amount being pumped from the well was 6.68 cfs. The amounts under the five rights would total 15.09 cfs. The last transfer (no. 5120) order, dated May 15, 1998, provided that the combined diversion rate under the five rights could not exceed 6.68 cfs. Mr. Deeg had been advised by Mr. Charles E. Brockway prior to the entry of this transfer order that the capacity of the well to produce water is greater than 6.68 cfs. He had been considering putting a larger pump in the well or drilling another well to utilize more of the available amounts under the 5 rights, but had not yet been financially able to do so.

We were trying to pay close attention to the rights in the meantime so as to avoid any forfeiture issues because of inability to pump the full amounts under the rights. Two of the rights, numbers 41-7030 and 41-7034 are leased rights, and contractually Mr. Deeg cannot risk forfeiture of them.

With particular respect to right number 41-7030, Mr. Deeg was authorized to commence use of the right within one year from the date of the "Amended Final Order" in Transfer no. 4268 of March 21, 1995. Although he had increased the acreage irrigated to include the 126 acres authorized by this right, he had not been able to increase diversions from the well in the amount of 1.4 cfs before the issuance of the May 15 order in transfer no. 5120. Because he had every intention of doing so as soon as finances would permit, he filed the application for extension of time to avoid forfeiture of a water right in July 1999.

By 2000, Mr. Deeg was financially able to proceed with the equipment changes or drilling of an additional well to divert the additional amounts under 41-7030 and 41-7034. We then began a dialogue with IDWR officials about how to proceed. As I recall, we talked about a number of possibilities, but you eventually made the recommendation that Mr. Deeg retain Dr. Brockway's services to file another application for transfer. That was done, but the processing has not yet been completed.

A few days ago, we received a notice to resume water use before July 1, 2004. It appears that the transfer process will not be completed by then, and that Mr. Deeg continues to be prevented from doing so by the 1998 order. Mr. Deeg is eager to resume use of the 1.4 cfs; as we have said, he is already irrigating crops on the additional 126 acres authorized under the right.

We discussed the water bank option under Idaho Code § 42-223 (5). The fact that Mr. Deeg is irrigating an extra 126 acres (the place of use under right no. 41-7030), but is unable to divert the 1.4 cfs (the amount of the right) seems to present an issue as to the applicability of this procedure.

We also discussed that it may be possible to argue that the 1.4 cfs is being diverted from the well or has been at some time during the past five years, as part of the 6.68 cfs authorized for diversion. Again, this leaves questions that are difficult to answer. There are five rights, totaling up to 15.09 cfs authorized for diversion, but with the limit of 6.68 cfs, which amounts from which rights have actually been diverted?

After reviewing subsection (6) of Idaho Code § 42-223, it seems to us that it might be the most applicable statutory language to the facts of this matter. As we perceive it, Mr. Deeg is legally prohibited from diverting the additional amounts under rights 41-7030 and 41-7034 from the well, unless and until the pending application for transfer being processed by Mr. John Freitag in the Southern Region office of IDWR is approved. Unless we misunderstand, Mr. Deeg has no control over non-use of the amounts under the two rights for the present. It would appear to us that neither right would be at risk of forfeiture until such time as Mr. Deeg had failed to divert and apply the amounts under these two rights within whatever reasonable time period may be authorized by the anticipated transfer approval.

Since July 1, is less than 60 days away, we would very much appreciate your attention to this matter and some written response as soon as possible. Thank you for your continued assistance.

Yours very truly,



Kent W. Foster

c: Tim Deeg
Dr. Charles E. Brockway