

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

FRED J. HAHN
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
THEL W. CASPER
SHAN B. PERRY
AMELIA A. CANEGALY

U.S. BANK BUILDING
330 SHOUP AVENUE, THIRD FLOOR
P.O. BOX 50130
IDAHO FALLS, IDAHO 83405

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

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

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Department of Water Resources

October 16, 2000

Phillip Rassier
Department of Water Resource Office
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

Dear Phil:

I don't know if you will recall, but back in August, I called you and briefly discussed the issue of loss of a portion of a water right by "conditions in a transfer". Although it has been some time, I would like to follow up on our telephone conversation, I will try to give you enough facts so that you can consider some of the questions I raised when we spoke.

Tim Deeg has a well near Rockland, Idaho, in the NW SW SE, S. 6, 9 S, 31 E, some 939 feet deep, drilled about 1992, which he uses for irrigation of some 816 acres of land. Apparently, the well was drilled pursuant to Permit No. 41-07081 which claims a priority of 2/28/1990, an amount of 6.95 CFS, and a place of use of 348 acres.

Tim had a ground water right from a License No. 41-07071 for domestic use for his home and irrigation of 11 acres of the lands irrigated primarily from this large well. The domestic well is about 700 feet from the irrigation well, but is smaller and not as deep.

In 1993, Tim leased a ground water right from some people named Nelson, License No. 41-07030, which has a priority of 1/2/1978, a diversion rate of 1.4 CFS, and a place of use of another 126 acres. Application for Transfer No. 4268 was filed in late 1993 to provide irrigation of 126 acres of Tim's land from his deep well. It was protested, and after hearing in May of 1994, was finally approved in August of that year. There was some concern by the Department about the possibility of low temperature geothermal water entering the well, but that was finally determined in 1997 not to be the case.

In 1995, Tim purchased a ground water permit, No. 41-07076, with a proposed priority of September 11, 1985, a diversion rate of 4.8 CFS and a place of use of 240 acres. He then applied to amend the permit to change the point of diversion to his deep well and the place of use to additional lands he now irrigates therefrom. The amendment was approved in 1997. In about July of 1997, a field exam was conducted by IDWR with respect to permits No.'s 41-07076 and 41-07081. Apparently, on the day of the exam, the well was measured at 6.68 CFS and some sort of disagreement arose about the number of acres being irrigated because Tim had some portable sprinkling equipment which he moved from one field to another as needed, and the examiner didn't want to include both fields because one was not being irrigated the day he was present. Tim later acquired additional equipment, and, I think, on a subsequent visit the examiner found both fields being irrigated simultaneously. We have not seen any proposed or final licenses for Rights Nos. 41-07076 and 41-07081.

During the course of the contested proceedings regarding various transfers, Tim hired Dr. Charles E. Brockway to provide expert help. Dr. Brockway determined, among other things, that the well has a capacity of perhaps as much 10.0 CFS, although Tim has not had the resources to obtain the required new equipment to pump that much water. In 1997, Tim leased another ground water right from the Nelsons, Licence No. 41-07034 for 1.82 CFS and 91 acres and applied to transfer the point of diversion to his deep well and to irrigate an additional 91 acres therefrom. This transfer was assigned No. 5120. Many of the same protestants who had protested Transfer No. 4268, protested this one. This time they were not represented by counsel. During the course of the hearing, Tim testified that he hoped to be able to increase the capacity of the well in the future, but did not currently have the resources to do so and no specific plan as to when he would. The Hearing Office found that "the applicant stated that it is not his intent to increase the total diversion capacity from the deep well if Transfer No. 5120 is approved." A final decision was entered May 15, 1998, with a condition that the diversion rate for Rights Nos. 41-07030, 41-07034, 41-07071, 41-07076 and 41-07081 "shall not exceed a combined rate of 6.68 CFS...." Then, in late June, Tim received SRBA preliminary recommendations for Rights Nos. 41-07030 and 41-07034. Each contained the condition that when they are used in combination with each other and Rights Nos. 41-07071, 41-07076 and 41-07081 (none of which are being processed in the SRBA), the diversion rate cannot exceed 6.68 CFS.

One of Tim's major concerns, besides the increasing of the capacity of his well, is that 41-07030 and 41-07034 are leased rights, and at the termination or expiration of one or both leases the lessor may very well desire to transfer one or both rights back to the original

place of use, or to some other place of use. When, and if that happens, Tim always assumed that the owner of the right would get both the amount of each right and the acreage irrigated and Tim would lose only the right to irrigate the extra acreage he had been irrigating. When he received the preliminary recommendations, he sought clarification from Department Officials in Twin Falls, but was able to learn nothing, and only had his concerns heightened.

The total acreage irrigable under the five rights appears to be about 816, and Tim indicates he in fact irrigates and grows crops on that much land, but needs more water. He has tried to improve the operation each year, and now feels he has the resources to increase the capacity of the well. Once again the five rights under which water is diverted from this well are as follows:

<u>No.</u>	<u>Priority</u>	<u>Amount</u>	<u>Acreage</u>
41-07030	1/2/1978	1.4 CFS	126
41-07034	4/7/1978	1.82 CFS	91
41-07071	7/13/1983	.12 CFS	11
41-07076	9/11/1985	4.8 CFS	240
41-07081	2/28/1990	6.95 CFS	348
Total		15.09 CFS	816

Because of the increased concern when Tim received the preliminary recommendations in the SRBA, he had us file Notices of Error Correction and an Application for Extension of Time to Avoid Forfeiture of Right No. 41-07030. When we filed the Notices and Application with the Boise office in July of 1999, we again raised the question about the status of the amounts of 1.4 and 1.82 CFS under the two rights. We have now filed Objections to the final recommendations and have received the Approved Application for Extension, but no response to our inquiry and request for clarification.

Because Tim is now financially able to increase the capacity of his well, we need to raise the question again. When I spoke with Alan Merritt in the Twin Falls office, he seemed to think the amounts, 1.4 CFS under 41-07030 and 41-07034, had been irrevocably lost. When I inquired what he thought the legal theory would be, he just said they were lost by virtue of the conditions of approval in the transfers. As I probed further about whether he

Phillip Rassier
August 24, 2000
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thought they were permanently lost, or just temporarily suspended, and whether by forfeiture, abandonment, waiver or some other doctrine recognized by courts, he suggested we talk to a lawyer, but to tell Tim not to buy the pump yet.

I know transfers and the issues they raise are becoming more complex. It doesn't seem that the questions here are directly answered in the statute, published regulations, or case law of which I am aware. Since water rights are real property rights and of significant value, I assume those rights, including such important elements as the amount or rate of diversion thereof, don't just automatically disappear because of a condition included in an approved transfer. That would seem like a "taking". Presumably there would need to be something like a finding of clear and convincing evidence to support forfeiture or abandonment or waiver. With the recent decision affirming partial forfeitures, perhaps the amount or rate of diversion under a water right could be forfeited without the rest of the elements being forfeited, but I don't know. From what I know about the law of forfeiture, I doubt that has happened yet with respect to either of these two rights. I also doubt that the requisite intent exists for abandonment or waiver, and so, I'm wondering if you can give me some idea of whether IDWR believes these rights can be transferred elsewhere (such as back to the original point of diversion and place of use) with the stated amounts or rates of diversion without affecting the amount Tim is authorized to divert from his well. If not, the potential consequences and resulting litigation seem fairly ominous. If the leased rights could be transferred back or to some other place without a loss of the amount or rate of diversion element, is there some procedure Tim could employ to utilize those amounts or rates of diversion to increase the capacity of his well? We would think there should be notice and opportunity for protest, but would he file another Application for Transfer, or an Amended Application, or something else?

We will appreciate your thoughts on this matter and would be happy to discuss it further or to provide any additional information that may be available. Thank you for your kind attention to this matter.

Very truly yours,



Kent W. Foster