

BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO

IN THE MATTER OF PETITION )  
FOR CONJUNCTIVE MANAGEMENT )  
OF GROUND WATER IN WATER )  
DISTRICT NO. 13-I IN THE NAME )  
OF WARREN LLOYD )  
\_\_\_\_\_ )

**ORDER DENYING  
PETITION FOR  
RECONSIDERATION**

On January 31, 2005, the Idaho Department of Water Resources (IDWR) issued a preliminary Order denying a Petition for Conjunctive Management filed by Warren Lloyd (“Lloyd”). A copy of the preliminary order was mailed on February 1, 2005.

On February 14, 2005, IDWR received a Petition for Reconsideration from Lloyd. The Petition for Reconsideration was timely filed.

In the Petition for Reconsideration, Lloyd generally objects to the decision on the basis that there was not sufficient evidence for the hearing officer to determine that Lloyd was not being injured. In so arguing, Lloyd disregards the burden of proof standard established prior to the hearing and also set forth in the preliminary order. In the notice of hearing and prehearing order dated May 26, 2004, paragraph number 3 stated:

IT IS FURTHER ORDERED that Warren Lloyd bears the burden of proof at the hearing regarding the following issues:

1. Whether the water rights describe points of diversion within an area “having a common ground water supply under Rule 31 of the Conjunctive Management Rules. This issue may already have been determined at the time the water district was formed and the ground water management area designated.
2. Whether diversion by junior ground water right holders is causing material injury.
3. Whether the diversion of ground water by Warren Lloyd is a reasonable diversion.

Proof of some of the above issues may be offered with the submittal of the IDWR staff memorandum.

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The Staff Memorandum written by Shane Bendixsen, submitted after the notice of hearing and prehearing order, was not supportive of Lloyd's assertions that he was being injured and that his diversion was reasonable.

The preliminary order issued on January 31, 2005, reiterated that Lloyd bore the burden of proving, by the preponderance of evidence, that diversion by the junior right holders were injuring his water rights, and that his diversion was reasonable. The hearing officer concluded that Lloyd did not come forward with sufficient evidence to carry his burden of proof.

If the respondent had borne the burden of proof, Lloyd's arguments might be meritorious. Applying the responsibility for proof to Lloyd, however, results in the following analysis of his arguments. Lloyd's assertions are listed numerically, and a response is written after each numbered assertion.

1. Lloyd argues that data pertaining to volume of water flowing in small ditches and canals and percolation into ditches and canals was not presented at the hearing.

Response: Evidence was presented at the hearing establishing a correlation between problems with ground water pumping and discontinuation of surface water deliveries. As the bearer of the burden of proof, Lloyd did not adequately rebut this evidence.

2. Lloyd argues the absence of evidence about percolation into ditches and canals leads to an obvious conclusion that junior water right users are "interfering directly with water that should be flowing to the Lloyd farm."

Response: The assumption by Lloyd that absence of proof by the respondents, establishes injury incorrectly attempts to reassign the burden of proof. Lloyd bore of proving there is direct interference resulting in injury.

3. Lloyd states: "If there is a correlation between discontinuation of surface water delivery to the Welch property and the reduced production of the original Lloyd well in 1979 then there must also be a correlation between the two wells on the Welch property and ten other new wells that started pumping that year all located within 1 ½ miles of the Welch property."

Response: Evidence was not presented at the hearing regarding correlation of the "ten other new wells that started pumping that year all located within 1 ½ miles of the Welch property." The hearing officer assumes the reference to "that year" is to the year 1979. There was insufficient evidence in the record to show a relationship between Welch property wells and other wells in the area.

4. Lloyd asserts that discontinued delivery of surface water by Welch and Holsten does not relate to difficulties in diverting water from the Lloyd well in 1979 and after.

Response: Discontinuation of delivery of surface water to the Lloyd property, the Welch property, and the Holsten property was presented as a pattern of reduced surface water deliveries resulting in reduced percolation to the ground water underlying Lloyd's property. Again, Lloyd's argument wrongly assumes the respondents bore the burden of proving that discontinued delivery of surface water was the cause of the difficulties in Lloyd's ability to divert water

5. Lloyd argues Shane Bendixsen's memorandum contradicts itself by stating that Lloyd's well is a good producing well and then stating that "if Mr Lloyd has a problem meeting his irrigation demands, it is a problem with his well, not the aquifer."

Response: Bendixsen's memorandum analyzed the geologic formations within which the Lloyd well was constructed. Bendixsen concluded that Lloyd's well was a good producing well. Bendixsen's conclusion was not based on a specific analysis of the condition of Lloyd's

well. There may be specific problems with the construction or condition of Lloyd's well. The preliminary order discusses some of the possible problems with the well resulting from the construction methods described in the evidence. The staff memorandum written by Shane Bendixsen does not contradict itself.

Finally, Lloyd argues that there was much evidence he was unable to submit. The hearing officer refused to allow Lloyd to present technical information himself because Lloyd was not qualified as an expert witness. The hearing officer, however, agreed to review past reports Lloyd referred to. The hearing officer reviewed the Higginson-Barnett report offered by Lloyd, and received into evidence. Some of the technical information in the Higginson-Barnett report was incorporated into the decision. Other information offered by Lloyd was not allowed into evidence because it was irrelevant or the foundational evidence was insufficient.

As a result of the foregoing discussion of the burden of proof borne by Lloyd, and his failure to establish injury and reasonableness of diversion by preponderance of evidence, the petition for reconsideration should be denied.

#### **ORDER**

IT IS HEREBY ORDERED that the Petition for Reconsideration filed by Warren Lloyd is **Denied**.

Dated this 3<sup>rd</sup> day of March, 2005



\_\_\_\_\_  
Gary Spackman  
Hearing Officer

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4/4 day of March, 2005, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

### WATER USER PARTIES

JOSEPH K & STACEY R CAMPBELL  
1528 CENTRAL RD  
BANCROFT ID 83217

GRANT H GIBSON  
3599 BANNOCK HWY #A  
POCAHELLO ID 83204-4411

DEAN S & BARBARA GILBERT  
PO BOX 151  
BANCROFT ID 83217

J HARRIS GILBERT  
PO BOX 93  
BANCROFT ID 83217

MILTON L GILBERT  
PO BOX 28  
BANCROFT ID 83217

DC MAUDE & VERGE HANSEN  
3543 S 100 W  
BOUNTIFUL UT 84010

JAY DELL JENKINS  
1802 LUND RD  
BANCROFT ID 83217

NEWELL R JENKINS  
PO BOX 218  
BANCROFT ID 83217

CALVIN G LLOYD  
HC 72 BOX 2305  
BANCROFT ID 83217

THOMAS R MOORE  
PO BOX 147  
BANCROFT ID 83217

MAX D & BONNIE K RIGBY  
PO BOX 12  
BANCROFT ID 83217

DAVID M RUPP  
PO BOX 189  
GRACE ID 83241

JOSEPH GLEN & BEVERLY WIGHT  
685 HWY 34  
GRACE ID 83241

RAOUL WISTISEN  
WISTISEN LIVESTOCK CO  
PO BOX 157  
BANCROFT ID 83217

STANLEY & KATHLEEN  
WISTISEN  
PO BOX 116  
BANCROFT ID 83217

DAIE E YOST  
1846 LUND RD  
BANCROFT ID 83217

DAIE G YOST  
HC 72 BOX 2070  
BANCROFT ID 83217

GORDON RAY & SHERRY YOST  
1681 LUND RD  
BANCROFT ID 83217

MONIE & SHAUNA YOST  
PO BOX 171  
BANCROFT ID 83217

DIAMOND G FARMS INC  
PO BOX 186  
BANCROFT ID 83277

US DEPT OF AGRICULTURE  
FARMERS HOME ADMIN  
159 E 2ND S #3  
SODA SPRINGS ID 83276

PARLEY L SCHENK & SONS FARMS  
1803 LUND RD  
BANCROFT ID 83217

DAIE E YOST  
1780 RICH RD  
GRACE ID 83241-5041

DATE G YOST  
1780 RICH RD  
GRACE ID 83241-5041

**PETITIONER:**

WARREN LLOYD  
1475 MOUNTAIN ROAD  
BANCROFT ID 83217

**OTHER INDIVIDUALS AND ENTITIES**

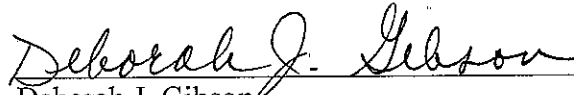
RANDALL C BUDGE  
RACINE OLSON  
PO BOX 1391  
POCATELLO ID 83204-1391

A BRUCE LARSEN  
HORIZON PLAZA - STE 225  
1070 HILINE RD  
POCATELLO ID 83201

PAUL N CHRISTENSEN  
1551 CENTRAL RD  
BANCROFT ID 83217

DUWAYNE I LECHIENBERG  
1648 LUND ROAD  
BANCROFT ID 83217

JODY L WILLIAMS  
HOLME ROBERTS & OWEN LLP IDWR - EASTERN REGION  
200 S MAIN S STE 1800 900 N SKYLINE DR STE A  
SALT LAKE CITY UT 84111- IDAHO FALLS ID 83402-1718  
2263



Deborah J. Gibson  
Administrative Assistant

**ADDITIONAL INDIVIDUALS AND ENTITIES  
REPRESENTED BY COUNSEL  
IN THIS MATTER  
(IDWR has accomplished service by serving counsel.)**

**C/O RANDALL BUDGE**

BART O CHRISTENSEN, STODDARD  
FARMS OF GRACE  
PHIL J & LISA J YOST  
TERRY & MARJEAN RINDLISBAKER  
VON N SIMONSON  
KIM WELCH  
DALE R & NUELENE WISTISEN,  
WISTISEN LIVESTOCK CORP  
GEM VALLEY FARMS, C/O CHAD NEIBAUR

**C/O BRUCE LARSEN**

JORGENSEN BROTHERS,  
TERRY C JORGENSEN ET UX  
CARL B & PATRICIA JORGENSEN  
KEITH C JORGENSEN,  
KEITH C JORGENSEN ET UX  
DON C & VIRGINIA E RIGBY