



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. Box 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

July 9, 1999

Gem Valley Farms
C/o Chad Neibaur
1550 Bancroft Rd
Bancroft, ID 83217

RECEIVED

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

JUL 15 1999

Department of Water Resources
Eastern District Office

Re: Agreement and Consent Order

Dear Mr. Niebaur,

Enclosed is an Agreement and Consent Order drafted pursuant to the compliance conference held in Boise on June 28, 1999. I have reviewed the comments you submitted concerning the draft consent order that I faxed to you last week. You should be aware that I also faxed a copy to chairman of the water district advisory committee, Bart Christensen. Mr. Christensen sent a copy to several other advisory committee members for review. Mr. Christensen advised me on July 8, 1999 that the committee found the draft order to be acceptable

The attached order has been revised to incorporate most of the comments that you submitted. Please note provision 1 of the order concerning the configuration work for the well in Section 29. We have provided language that allows you to disrupt the power supply to the well until the system is reconfigured. If you should pursue this action, you will need to coordinate with both the watermaster and the department as to how and when this would be done. I believe the provision is worded such that the disruption of power supply does not alleviate you from reconfiguring the system as you have agreed to do.

Your letter suggested that the wording of provisions 10 through 12 in the draft agreement and consent order came across as too strong and condemning. Norm Young and I discussed this issue and felt that these provisions are really just a restatement of Idaho law with respect to violations and injury. They merely identify a course of action that can be pursued should any future determination be made concerning injury or violations. We do not view the provisions as a condemnation of past action. We have decided therefore to keep those provisions intact.

Please review the attached Agreement and Consent Order and then sign and return the document to the department as soon as you can. If you have further concerns or questions, please call Norm Young or me directly at 327-7900.

With respect to your question about filing transfers, we feel that it would be more efficient to file just one transfer that could take care of any existing problems for this year and accommodate reconfiguration for year 2000. We obviously can not process a transfer this year in time to formally correct any place of use problems. However, we

feel it is necessary to file the transfer by the date given in the order (July 30) and that this transfer at least correct any current place of use problems under your water rights, particularly the place of use problems in section 19 and 20. You can always request that our regional office delay advertisement for several weeks or 30 days to give you some additional time to plan and decide on the configuration that makes most sense.

Respectfully,



Tim Luke

Cc: Craig Shuler, Watermaster
Harold Jones, Eastern Region
Norman C. Young, IDWR

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF DIVERSION OF)
WATER BY GEM VALLEY FARMS)
AND/OR CHAD NIEBAUR NOT IN) AGREEMENT AND
CONFORMANCE WITH AGREEMENT) CONSENT ORDER
AND CONSENT ORDER OR NOT IN)
CONFORMANCE WITH VALID)
WATER RIGHTS)

The Director of the Department of Water Resources (department), being charged with the duty of enforcing certain statutes of the state of Idaho and the rules of the department, and being authorized to order the cessation of violations or attempted violations of the provisions of the law relating to appropriation and distribution of water, hereby enter into this Agreement and Consent Order with Chad Niebaur, acting on his own behalf and for Gem Valley Farms, Inc, (herein collectively termed "Gem Valley").

NOW, THEREFORE, following a compliance conference and before the taking of any testimony herein, and without hearing or contested administrative adjudication of any issue of fact or law, and upon consent of the parties, it is HEREBY STIPULATED AS FOLLOWS:

FINDINGS

1. That on June 22, 1999, the department issued a Notice of Violation and Cease and Desist Order, pursuant to the provisions of Section 42-351 and Section 42-1701B, Idaho Code, ordering Gem Valley to cease diverting water to certain lands by July 8, 1999 unless Gem Valley installed measuring devices and configured the diversion and conveyance facilities of certain wells as described in the Notice of Violation and Cease and Desist Order.
2. That the findings of fact and conclusions of law contained in the Notice of Violation and Cease and Desist Order are incorporated herein by reference.
3. That a compliance conference, pursuant to Section 42-1701B, Idaho Code, was held on June 28, 1999, at Boise, Idaho. Gem Valley provided information demonstrating how and where ground water is being used under water rights No.s 13-02259, 13-07165, 13-07261, and 13-07198 and on the system that carries canal water to commingle with ground water for the "south system" as described in Transfer No.s 4703, 4704, and 4705. Information was also provided regarding the diversion and use of water under the above rights with respect to proposed Transfer No. 5353 involving a change in place of use associated with land served by a point of diversion located in the NWNW of Section 20,

T9S, R40E, B.M. The information provided by Gem Valley indicated that due to the additional diversion of surface water, ground water diverted under all of the above rights and transfers is applied to fewer acres than historically used. However, some ground water has been applied to lands from wells other than those authorized under the water rights.

4. Gem Valley further provided information confirming that a measuring device has been installed on the surface water canal pump located in Section 29, T9S, R40E. This device was installed in June of 1999 and had been required by previous orders of the department.

5. Gem Valley further provided information showing that neither the department or the water district watermaster has found seasonal use of water from water rights 13-02259, 13-07165, 13-07261, and 13-07198 in excess of the volumes authorized by those rights. That in particular, during the past three years that IDWR has monitored water and power consumption use within the water district, the well located in the SENW of Section 29, T9S, R40E which involves the commingling of surface water and ground water, shows evidence of normal usage or less than normal usage for the acreage authorized to be irrigated by that well. Additionally, Gem Valley has specified that it never intended to exceed the amounts or acreage authorized to be diverted from the rights and well located in Section 29.

6. That Gem Valley had concluded that the department was employing power consumption records to measure wells in the area, including all of Gem Valley's wells, and that they had cooperated extensively with the water master during 1996 to acquire well measurements and power meter readings on all Gem Valley wells.

7. That both before and after approval of water right transfers 4703, 4704 and 4705, Gem Valley has been authorized to irrigate 309 acres from the well located in the SWSW Section 20, T9S, R40E. That since approval of the transfers in 1996, Gem Valley has irrigated fewer acres from this well than authorized by the water rights and transfers.

8. That Gem Valley's commingling of ground water rights and wells in Section 20 has taken place at times since 1990 due to water diversion shortages from the well located in the NWNW of Section 20, and that such shortages occurred mainly during drought years. That the water rights associated with this well are senior in priority to many of the other rights and wells in the area. Also, that Gem Valley has sought to correct these shortages with expenditures in excess of \$10,000 at that well site rather than pursue other remedies that may be available under Idaho water law, including the ability to file a call for water against junior priority right holders.

9. Gem Valley does not admit any of the violations. However, the department and Gem Valley desire to remedy the violations of Idaho water law alleged in the Notice of Violation through compliance with the terms and conditions of this Agreement and Consent Order which is entered into in accordance with the provisions of Section 42-1701B, Idaho Code.

AGREEMENT AND ORDER

Based upon the foregoing findings and pursuant to agreement of the parties, the department orders as follows:

1. That Gem Valley will, on or before July 30, 1999, configure its diversion and conveyance facilities in the SENW of Section 29, T9S, R40E, B.M., in a manner that is consistent with its water rights. Specifically, Gem Valley will configure its well in Section 29 so that ground water use from the well is limited to use on the pivot in the NE1/4 of Section 29, and on 68 acres within the NESW, NWSE and SENW of Section 29. This does not prohibit Gem Valley from using surface water on these pivots or pivots located in the NW1/4 of Section 29 and the SE1/4 of Section 20, T9S, R40E. If Gem Valley can not complete the configuration work by July 30, 1999, then Gem Valley agrees to lock the power supply to the well or disconnect the power supply to the well until such time as the configuration work is completed. If Gem Valley pursues this latter action, then it must contact the watermaster and the department prior to July 30, 1999 and advise how and when the power supply will be locked or disconnected. The watermaster must have reasonable assurances that the power supply will remain disconnected or locked until such time as the system is re-configured.
2. That although Gem Valley admits to no violation in spirit of the law, Gem Valley understands the difficulty of measuring a commingled system and therefore will submit to a reconfiguration of the ground water diversion facility in the SENW of Section 29, T9S, R40E. Gem Valley agrees to the reconfiguration in order to remove any doubt or difficulty the department or water district watermaster may have in determining the amount of use withdrawn from this well and the place of use served by the water rights that are diverted from this well
3. The department will recognize that Gem Valley's expenditure of costs and labor associated with configuring the diversion and conveyance facilities for the well in section 29 provides mitigation in lieu of the \$1000 civil penalty due under Provision 2 of the Notice of Violation. The department will suspend the \$1000 civil penalty provided Gem Valley completes the required configuration work by July 19, 1999. The department will require payment of the \$1000 civil penalty if Gem Valley fails to fully comply with the terms of the Agreement and Consent Order.
4. That Gem Valley will abide to the immediate installation of a lock and chain to a valve located on a mainline that connects the well located in the SWSW of Section 20, T9S, R40E, with the well located in the NENW of Section 20, T9S, R40E. That said installation will assure that water diverted from the well in the SWSW of Section 20 will not be used to irrigate land under pivot systems located in the N1/2 of Section 20, and in Section 16, T9S, R40E. The installation of the lock and chain will be made by the watermaster of Water District 13-T. The watermaster or staff from the department shall be the only individuals authorized to hold a key to the lock and have authority to remove

the lock and chain. The watermaster or department staff may remove the lock and chain either before or after the irrigation season so that Gem Valley may use the valve to drain irrigation mainlines.

5. That Gem Valley agrees that a water right transfer is needed in order to match the total water rights with actual irrigated acreage, particularly for the well that is located in the SWSW of Section 20, T9S, R40E. That Gem Valley will file a water right transfer application by July 30, 1999 to change the place of use so that approximately 7 acres currently irrigated in a corner of the SWSWNW of Section 20, T9S, R40E, and several other corners that are currently irrigated and located in Sections 19 and 20, T9S, R40E, are properly identified as places of use under those rights diverted from the well in the SWSW of Section 20. The department will authorize the continued irrigation of these 7 acres during 1999 provided that a transfer is filed by July 30, 1999 and IDWR does not determine that other rights are being injured by this use during 1999. Future irrigation of these 7 acres from the well in the SWSW of Section 20 will be subject to a final determination and/or conditions of approval under the transfer.

6. That Gem Valley will file a water right transfer application by July 30, 1999 to add a second point of diversion (a ground water well) in the NENW of Section 20, T9S, R40E. That these wells will be limited in 1999 to use for the large pivot in the NW1/4 of Section 20, the mini-pivot located in the center of Section 20, and the large pivot located in W1/2 of Section 16, all in T9S, R40E. That these wells will also be limited to the rates of diversion and annual volume authorized under the water rights that are diverted from this location. That Gem Valley will cooperate with the department and watermaster on determining a suitable method for measuring diversions from these wells. That if the department determines that other methods of measurement are not adequate, Gem Valley will install measuring devices on these wells or pivots in order to determine the diversion rate and total annual volume of water diverted from the two wells at this location.

7. The department will remove the measuring device requirement for the well located in the SENW of Section 29, T9S, R40E provided that Gem Valley completes the configuration work as required under Provision 1 of this order. The department will accept the use of power records and derivation of a Power Consumption Coefficient (PCC) to estimate annual water withdrawals. Department staff will make discharge measurements and derive all necessary PCCs for this well after Gem Valley has completed the configuration work.

8. The department will remove the measuring device requirement for the well located in the SWSW of Section 20, T9S, R40E and accept the use of power records and derivation of a Power Consumption Coefficient (PCC) to estimate annual water withdrawals.

9. This agreement and consent order shall be effective immediately for the 1999 irrigation season only upon signing by both parties. Compliance with the Agreement and Consent Order by Gem Valley shall preclude any civil enforcement action by the department for the violations alleged in the Notice of Violation.

10. That if Gem Valley fails to file the transfer application required under Provision 5 of this Order, then Gem Valley will pay a civil penalty of three hundred dollars (\$300) per acre, or a total of \$2100 for the 7 acres that are irrigated in the SWSWNW of Section 20.

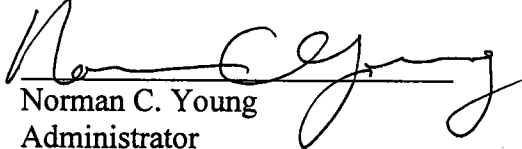
11. That if Gem Valley fails to complete the diversion facility configuration work or provide for the interim disruption of power supply required under Provision 1 of this Order, and applies ground water to the pivot systems in the NW1/4 of Section 29 and the SE1/4 of Section 20, T9S, R40E, then Gem Valley will pay a total civil penalty of ten thousand dollars (\$10,000).

12. If Gem Valley does not comply with the terms of this Agreement and Consent Order, the department may seek and obtain in an appropriate court specific performance of the Agreement and Consent Order and such other relief as authorized by law.

13. Upon a determination by the director of the department that unauthorized use of ground water by Gem Valley is injuring the use of another water right, the department may take action in accordance with applicable law to prevent continued unauthorized use.

DATED this 9th day of July, 1999.

KARL J. DREHER
Director


Norman C. Young
Administrator
Water Management Division

CONSENT

Gem Valley acknowledges in general the facts set forth but does not admit to any wrong doing or liability and accepts fully terms and conditions of this Agreement and Consent Order. These terms shall become effective upon execution by the parties. Gem Valley waives any right to contest this Agreement and Consent Order and consents to the issue hereof.

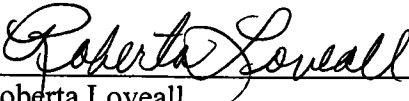
SIGNED this _____ day of July, 1999

CHAD NEIBAUR
Gem Valley Farms, Inc.

Mailing Certificate

I hereby certify that I mailed a true and correct copy, postage prepaid, certified mail of Agreement and Consent Order to the following on July 12, 1999.

Gem Valley Farms
Chad Neibaur
1550 Bancroft Rd
Bancroft Idaho 83217



Roberta Loveall
Water Distribution