



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

July 16, 2001

Gem Valley Farms
C/O Chad Neibaur
1550 Central Rd.
Bancroft, ID 83217

Re: Notice of Violation and Cease and Desist Order; Diversion of Water not in
Conformance with a Valid Water Right

Dear Mr. Neibaur,

Enclosed is a Notice of Violation and Cease and Desist Order regarding your diversion of ground water to an unauthorized place of use. Please note all civil penalties and compliance dates stipulated in the attached order. Please also note your opportunity to request a compliance conference concerning this matter as well as the time frame and manner in which such a request must be made.

Respectfully,

A handwritten signature in black ink that reads "Tim Luke".

Tim Luke
Water Distribution Section

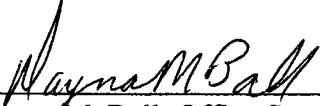
Cc: Craig Shuler, Watermaster
Harold Jones, Eastern Region

Attachment A

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 16th day of July, 2001, the attached Notice of Violation and Cease and Desist Order was served upon the following individuals by placing a copy of the same in the United States Mail, postage prepaid, certified with a return receipt and properly addressed as follows:

Gem Valley Farms
C/O Chad Neibaur
1550 Central Rd.
Bancroft, Id 83217



Dayna M. Ball, Office Specialist II
Water Distribution Section

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF DIVERSION)
OF WATER BY GEM VALLEY FARMS) NOTICE OF VIOLATION
NOT IN CONFORMANCE WITH) AND CEASE AND DESIST
VALID WATER RIGHTS) ORDER

The Director of the Department of Water Resources (department), being charged with the duty of protecting vested water rights, 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, has investigated the use of water by Gem Valley Farms (herein referred as Gem Valley).

Based on the department's investigation and understanding of the law, the Director finds, concludes and orders as follows:

FINDINGS OF FACT

1. Gem Valley owns decreed water right nos. 13-02259, 13-07198C, 13-07165, 13-07261 and 13-07198B authorizing the combined diversion of 8.88 cfs of ground water from three wells located in T9S, R40E, Section 20, NENW and SWSW (two wells located in the NENW). These rights when combined authorize irrigation of 573 acres in any one year out of a total permissible place of use of 799 acres. In addition, rights 13-07165, 13-07261 and 13-07198B authorize a combined annual irrigation of 309 acres out of the total 799-acre permissible place of use. Also, rights 13-02259 and 13-07198C authorize a combined annual irrigation of 264 acres out of the total 799-acre permissible place of use.

2. The maximum combined use and irrigated acreage authorized under the above rights is subject to conditions of approval as set forth by water right transfer no. 5545, approved on May 4, 2000. Several neighboring water users protested this transfer. The protests were withdrawn based on a written agreement between Gem Valley and the protestants dated January 12, 2000. Under the agreement, Gem Valley agreed to physically disconnect the well in the SWSW of Section 20 from the two wells in the NENW of Section 20. This particular item of the agreement was reached in part because previous water right transfers involving rights 13-07165, 13-07261 and 13-07198B limited the total number of acres that could be irrigated from the well in the SWSW of Section 20 to no more than 309 acres (see Transfer Nos. 4703, 4704 and 4705).

3. The agreement reached between the protestants and Gem Valley under Transfer No. 5545 also provides that Gem Valley must identify each year at the annual water district meeting the specific 573 acre place of use that is to be irrigated for the ensuing crop year under the water rights. The agreement further provides that each year the water district watermaster will be informed of the defined place of use and is empowered to enforce the issue of proper place of use with possible financial penalty.
4. During the 2000 irrigation season, the department received confirmation that the well in the SWSW of Section 20 was disconnected from the two wells in the NENW of Section 20.
5. On July 3, 2001, Gem Valley submitted to the department a Temporary Change Application, identified as Temporary Change Application No. TC-13-02, for water rights 13-02259 and 13-07198C. The application proposed adding the well located in the SWSW of Section 20 to these two rights and thereby connecting this well with the wells in the NENW of Section 20 and increasing the number of acres irrigated from the well in the SWSW to more than 309 acres. The temporary change was proposed because the wells in the NENW allegedly were not providing an adequate amount of water to the 264 acres under water rights 13-02259 and 13-07198C.
6. On July 6, 2001, the department denied Temporary Change Application No. TC-13-02. On this same date, the department sent a copy of the denied application directly to Gem Valley via facsimile along with a cover letter and certain explanatory information.
7. On July 10, 2001, department staff inspected the wells in the SWSW and NENW of Section 20 and observed that the well in the SWSW of Section 20 was connected to mainlines from the two wells in the NENW of Section 20. All three wells were running at the time and being used to irrigate all but one of the pivots under the entire 573-acre permissible place of use authorized under Transfer No. 5545.
8. On July 11, 2001, the department staff member who inspected the wells on July 10 met with Gem Valley owner and representative Chad Neibaur. Mr. Neibaur acknowledged that the wells in Section 20 had recently been connected because he had assumed that Temporary Change Application TC-13-02 would be approved. Neibaur further explained that he had not received the facsimile sent by the department on July 6 but had learned of the denied application on July 9 via a phone discussion he had with a regional department representative from Idaho Falls.
9. During the July 11 meeting between Gem Valley and the department representative, the department advised Gem Valley that it was in violation of its water rights and the conditions of Transfer No. 5545. The department advised Gem Valley to take action to disconnect the wells. Gem Valley responded that the recommended action could not be implemented because crops would be lost.

CONCLUSIONS OF LAW

1. Idaho Code 42-1701B(6)(a) states, in pertinent part:

...that persons determined to be in violation of section 42-351, Idaho Code, shall be liable for a civil penalty not to exceed:
(ii) For irrigation uses, three hundred dollars (\$300) annually for each acre irrigated, in whole or in part, by the illegal use or diversion.
2. Water right Transfer No. 5545 is affected by an agreement dated January 12, 2000 between Gem Valley and certain transfer protestants. The agreement requires Gem Valley to physically disconnect the well that it owns located in the SWSW of Section 20, T9S R40E with two wells that it owns located in the NENW of Section 20, T9S, R40E. Gem Valley had disconnected these wells following the approval of the transfer but reconnected the wells in July, 2001 under the assumption that the department would approve a Temporary Change Application allowing the wells to again be reconnected.
3. The department denied Temporary Change Application No. TC-13-02 which sought to connect the wells in Section 20. Gem Valley has continued to keep the wells interconnected and irrigate more than 309 acres from the well in the SWSW of Section 20.
4. Based on investigation by the department and subsequent acknowledgement by Gem Valley, Gem Valley is found to have violated the conditions of approval under water right Transfer No. 5545 and water right nos. 13-02259, 13-07198C, 13-07165, 13-07261 and 13-07198B.
5. The director should issue a Notice of Violation instructing Gem Valley to cease and desist diverting water that is not in conformance with conditions and agreements of Transfer No. 5545 or should rescind approval of Transfer No. 5545.

ORDER

IT IS HEREBY ORDERED as follows:


1. Gem Valley shall immediately disconnect the well in the SWSW of Section 20 from the mainlines of the two wells in the NENW of Section 20 and shall cease and desist diverting water not in accordance with the conditions and agreements established by water right transfer no. 5545 and water right nos. 13-02259, 13-07198C, 13-07165, 13-07261 and 13-07198B.
2. For failure to comply with the law and authorized water rights, Gem Valley shall pay a civil penalty in the amount of ten thousand-dollars (\$10,000.00) to the department. The penalty shall be paid by August 1, 2001.

3. For any future diversion of water or application of water to lands not authorized by the water rights, or by subsequent order and decision by the department, Gem Valley shall pay a civil penalty of three hundred dollars (\$300) annually per acre for each acre that is irrigated and that is not in conformance with the water rights, the final order, or subsequent decision by the department.

4. Gem Valley is entitled to a **Compliance Conference** with department staff if Gem Valley submits a written request for a conference to the department within fourteen (14) days of receipt of the Notice of Violation. The written request must describe how Gem Valley will comply with the law.

5. Gem Valley shall have the opportunity to enter into a **Consent Agreement** with the Department to remedy the violation and to assure future compliance with the laws of the State of Idaho.

DATED this 13th day of July, 2001.


NORMAN C. YOUNG
Administrator
Water Management Division

**EXPLANATORY INFORMATION
TO ACCOMPANY A
PRELIMINARY ORDER**

The accompanying order or approved document is a "**Preliminary Order**" issued by the department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department of Water Resources (department) unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the department or the Idaho Water Resource Board (Board) is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the

Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.