

WD BT - 2001

MEMORANDUM

TO: FILE TRANSFER 5545, GEM VALLEY NOV

FROM: RON CARLSON

RE: COMPLIANCE CONFERENCE

Chad Neibauer dba Gem Valley Farms was issued a Notice of Violation for diverting water without valid water rights, or for diverting water in a manner that was inconsistent with existing water rights. A civil penalty in the amount of \$10,000 was assessed pursuant to Idaho Code §42-1701B(6)(a). Idaho Code § 42-1701B(3 & 4) provides an opportunity for the recipient of a notice of violation to request a compliance conference with the department within fourteen (14) days of the receipt of the notice. Gem Valley requested a compliance conference and it was held in Idaho Falls Idaho on August 5, 2001. Based upon information received during the compliance conference, review of the Department's files, and based upon the Regional Manager of the Eastern Region of the Idaho Department of Water Resources understanding of the law, the Regional Manager, took the administrative action set forth in this memo.

FINDINGS OF FACT

1. Gem Valley owns six water rights decreed in the Bancroft-Lund Adjudication totaling 8.88 cfs from a ground water source. Water to fill these six water rights is produced from three wells located in the NENW, SWSW and NENW Section 20, T 9 S R 40 E B.M. The limits of the use of water rights held by Gem Valley is set forth in water right transfer no. 5545. One of the issues leading to the notice of violation arises from an agreement with protestants of transfer 5545, under which the protests against approval of this transfer were withdrawn. Under this 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. The agreement between Gem Valley and the protestants stipulate that Gem Valley will identify and specify the 573 acres of a 799 acre permissible place of use at the annual water district meeting.
2. Idaho Code 42-222A provides for the temporary changes in water rights when the director of the IDWR has declared a county of the state to be in an area where a drought emergency. The director has declared Caribou County to have a drought emergency. The above referenced section of the Idaho Code provides that *"A temporary change may be approved upon completion of the application form, payment of the filing fee and a determination by the director of the department of water resources that the proposed change can be properly administered and there is no information that the change will injure any other water rights. If the water right to be changed is administered by a watermaster . . . , the director of the department of water resources shall obtain and consider the recommendations of the watermaster before approving the temporary change application"*.

3. Today farmers, to be competitive in national and world markets, must maintain soil moisture within specific ranges during specific periods of the crop growth cycle of potatoes. At critical times the inability to maintain proper soil moisture for even a few hours can cause devastating changes in quality and in yield. Gem Valley farms applied for a temporary transfer because the production from two of their wells supplying (part of) their potato crop had declined to the point that they could no longer maintain the water pressure necessary to operate their pivots and consequently, proper soil moisture. The application for an emergency transfer was made on July 3 and in anticipation of approval of Gem Valley's the mainlines from the two wells in the NENW of Section 20 were connected to the mainline for the well in the SWSW of Section 20.
4. The Eastern Region of the IDWR received 34 applications for emergency transfers during 2001. Thirty three of these were approved. The application of Gem Valley was the only application for an emergency transfer that was denied this year.
5. When, on July 10, the department inspected the wells and observed all three wells pumping no additional water was being pumped, all three wells legally had the right to be pumping. One pivot was not being operated on that day. No additional water was being pumped because of the interconnected mainlines but the interconnection did allow the system shortage to be shared and equalized by allowing a higher, yet inadequate, system pumping pressure to be maintained.
6. After denial of the transfer the nozzles on the pivots of Gem Valley were changed to allow each pivot to operate at 500 gpm rather than the 800 gpm normally required.

CONCLUSIONS

1. Gem Valley did not have authorization from the department to interconnect mainlines. However, because of the drought and the department's actions on requests for temporary transfers other places in the region it was not unreasonable to interconnect mainlines in anticipation of department approval.
2. The operation of three wells after they were connected did not result in more water being pumped from any of the three. The co-mingling of water from the three wells was, in form, a violation; in substance, nothing changed.
3. Every water right has an authorized point of diversion and place of use. Many have conditions. The emergency temporary transfer process allows temporary changes to be made which in effect changes the conditions on the water right.

4. Every water user is entitled to the due process outlined in the law. The Idaho Code does provide for the director to impose civil penalties. However, the process of collection is through a court action. Generally the department attempts to get a party to agree to sign a consent decree in which he agrees to pay a negotiated penalty. This penalty ultimately is a penalty of convenience which allows all parties to avoid the cost of going to court. However, in a case where a review of the facts indicate the department may not be successful in pursuing any penalty the compliance conference provides an opportunity to reassess previous actions.

ADMINISTRATIVE ACTION

Based upon Gem Valley's need to have the physical changes in place for the anticipated approval of their emergency transfer, and in view of the fact that there is no evidence that additional water diverted, and in view of the fact that Gem Valley replaced all of the nozzles and did not use the interconnected system after their application was denied, the \$10,000 penalty did not appear to be appropriate. I suspended the penalty with the recommendation that the money would be better used for a groundwater study in the area to collect hydrologic information about the local groundwater system.

With more complete data for this basin it might be appropriate for the department to re-evaluate some of the conditions that have been imposed on the Gem Valley water rights. Should Gem Valley fail to comply with its water rights in the future the department shall have cause to reinstate the penalty or impose and attempt to collect the maximum penalty authorized by law.

Signed this 7th day of September, 2001.



Ronald D. Carlson
Regional Manager