



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

March 15, 2004

Guardian LTD Partnership No 2
PO Box 927
Salmon, Idaho 83467

CERTIFIED MAIL

**Re: Pending Notice of Violation
Potential Unauthorized Use of Water from Hayden Creek and/or tributaries**

Gentlemen,

The Idaho Department of Water Resources (IDWR) has learned through investigation of Snake River Basin Adjudication (SRBA) claims filed by the Guardian LTD Partnership No. 2. (Guardian) that Guardian has potentially enlarged the irrigation place of use authorized by certain water rights from Hayden Creek and/or tributaries near Lemhi, Idaho. The water rights in question are identified as water right nos. 74-1067, 74-1072, 74-1073, and 74-1074. The enlarged place of use in question is located in portions of Section 7, T17N, R24E and Section 12, T17N, R23E. The attached map shows the water right place of use and enlargement locations. IDWR has no record of any other water rights being appurtenant to the enlarged development.

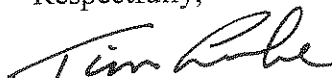
Since no water rights appear to provide for the continued irrigation of the above referenced enlargement, IDWR asks for your cooperation in:

- Identifying water rights that may cover your development if our records or understanding of facts is incorrect.
- Cease further diversion of water from Hayden Creek and/or tributaries to the enlarged development, if you do not have a right to do so.
- And/or obtain a valid water right for the enlargement.

Please respond to this office as soon as possible, but no later than ten (10) days from the date of this letter to discuss scheduling a conference and/or resolution of this matter. Please note that the diversion of water in Idaho without a valid water right is illegal pursuant to Section 42-351, Idaho Code, and may be subject to civil penalties of up to \$300 per irrigated acre, pursuant to Section 42-1701B, Idaho Code.

You may contact me directly at 208-327-7864, or Bob Foster, IDWR Salmon Field Office, regarding questions and/or resolution of this matter.

Respectfully,



Tim Luke
Manager, Water Distribution Section

Attachment

Cc: Bob Foster, IDWR Salmon Field Office
IDWR Eastern Region
Roxanne Brown, IDWR, Adjudication Bureau
Rick Sager, Water District 74 Watermaster

D:\data\MS Word 97\Enforce\McFarland-PendNOV.doc



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

August 4, 2004

Guardian Limited partnership No. 2
PO Box 927
Salmon, ID 83467

CERTIFIED MAIL

Re: Consent Order and Agreement
Notice of Violation Dated April 16, 2004

RECEIVED

AUG 11 2004

Department of Water Resources
Eastern Region

Dear Gentlemen,

Pursuant to the phone conference that I held on July 1, 2004 with Hal Hawkins and Kent Foster, please find enclosed a Consent Order and Agreement regarding the Notice of Violation dated April 16, 2004 that the Idaho Department of Water Resources ("Department") sent to you ("Guardian"). Note the terms of the agreement and all compliance dates and fees or civil penalties stipulated in the attached order.

I have called both Mr. Hawkins and the Guardian office in Idaho Falls several times over the past few weeks to obtain verification regarding the date or dates that Guardian took ownership of the land and water rights that are subject to the Notice of Violation. My messages have not been returned. Mr. Hawkins had explained to me in our conference that he believed the illegal irrigation expansion took place prior to Guardian's ownership of the water rights and land. However, information that I have reviewed subsequent to our meeting shows that Guardian took ownership of the land and water rights in early 1999 and that much of the unauthorized expansion occurred during the 1999 irrigation season. Although I believe Mr. Hawkins did not honestly know the dates that Guardian took ownership of the land and exactly when the expansion occurred, I must assume that Guardian initiated the expansion itself and is thus solely responsible for the unauthorized use. I have therefore included payment of a civil penalty by Guardian in the amount of \$10,000 instead of the \$1,000 penalty that was discussed in our conference call on July 1, 2004.

Please carefully review and consider the terms and conditions of this proposed order and agreement. If you agree with the terms and conditions, please sign the document and return it directly to me as soon as possible. If you have concerns or questions about the proposed order and agreement, or if you wish to propose revisions or provide other input, call me directly or submit written comments to me at the office listed on this letterhead.

I look forward to your prompt reply and a final resolution of this matter.

Respectfully,



Tim Luke
Water Distribution Section

Enclosure: Guardian Consent Order and Agreement, 08/05/04

Cc: Kent Foster, Attorney for Guardian
Bob Foster, IDWR Salmon Field Office
Rick Sager, Watermaster, Water District 74
IDWR Eastern Region
John Homan, Idaho Attorney General's Office
Roxanne McCarthy, IDWR Adjudication Bureau

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO
CONSENT ORDER AND AGREEMENT

In the matter of Notice of Violation and Cease and Desist Order dated April 26, 2004, issued to Guardian Limited Partnership No. 2, pursuant to Section 42-1701B, Idaho Code.

Findings of Fact

- 1) Guardian Limited Partnership No. 2 (Guardian) is the owner of property situated in portions of Sections 6 and 12, Township 17N, R23 East; portions of Sections 6, 7 and 8, T17N, R24E, and portions of Sections 31 and 32, T17N R24E, Lemhi County. Guardian owns the following water rights that are appurtenant to portions of these lands: ~~74-373~~, 74-374, 74-985, 74-1066A, 74-1066B, 74-1067, 74-1068, 74-1072, 74-1073, 74-1074 and 74-10005. The Idaho Department of Water Resources (Department) issued a Notice of Violation to Guardian on April 26, 2004 for irrigating approximately 250 acres within the above-described tracts of land without a valid water right.
- 2) Hal Hawkins, representative for Guardian, requested a compliance conference with the Department pursuant to the April 26, 2004 Notice of Violation. A compliance conference was held on July 1, 2004, between the Department, and Guardian's representatives, including Hal Hawkins, and Kent Foster, attorney for Guardian. During the conference, there was admission by Guardian's representatives that approximately 250 acres may have been irrigated in 2003 without valid water rights. Mr. Hawkins stated that Guardian had purchased the land in question described above, as well as the other adjacent irrigated lands and appurtenant, valid water rights in 1999. Mr. Hawkins also stated that he believed that the expansion had occurred prior to Guardian's purchase of the land in 1999, or at least prior to Mr. Hawkins initial employment with Guardian, which was in 2000.
- 3) Upon additional review of its records, the Department found that Guardian filed a Notice of Change of Water Right Ownership with the Department in February of 1999. The Department also has documented, through review of satellite images that much of the 250 acres described above irrigated without valid water rights were initially irrigated in 1999, or shortly after Guardian acquired ownership of the land and water rights. In particular, a pivot covering about 143 acres in the NE1/4 of Section 7, T17N, R24E, known as the Sawmill pivot, was added in 1999. This pivot involves an irrigation expansion of about 113 acres without a valid water right.
- 4) Guardian filed a Temporary Change application pursuant to Section 42-222A with the Department on May 12, 2004 in order to correct certain changes in the place of use of its water rights for the 2004 irrigation season. Guardian also filed the Temporary

Change application to change the point of diversion of several of its water rights from the East Fork of Hayden Creek to its existing diversion on Hayden Creek because use of Guardian's East Fork diversion ditch in 2004 may have resulted in serious erosion problems as a result of a severe forest fire that occurred in the area in 2003. Guardian cooperated with federal and state agencies in making this point of diversion change in 2004 to assure protection to the local watershed and fish habitat, including the habitat of endangered anadromous fish species. The Department approved the Temporary Change application on May 13, 2004.

- 5) Guardian has reduced the number of irrigated acres in 2004 by more than 250 acres in order to comply with the acreage limits of its water rights. Review of a June 30, 2004 satellite image on file with IDWR confirms that Guardian is not using water on certain pivots in 2004, including the Sawmill pivot.

The Department held a compliance conference with Guardian on July 1, 2004. It is hereby ordered and agreed that:

Terms of Agreement

- 1) Guardian agrees to cease and desist from further diversion of water for irrigation of the approximate 250 acres located in portions of Sections 6 and 12, Township 17N, R23 East; portions of Sections 6, 7 and 8, T17N, R24E, and portions of Sections 31 and 32, T17N R24E, Lemhi County, until valid water rights are obtained for this land and upon receiving authorization from the Department. Guardian may file a water right transfer application or rent water from the water supply bank in subsequent years in order to irrigate the additional lands. Pending applications for transfers or applications for leases of water from the water supply bank that have not been formally approved by the Department do not constitute approval of valid water rights for irrigation of this land.
- 2) Payment of an agreed civil penalty in the amount of ten thousand dollars (\$10,000) is payable to the Idaho Department of Water Resources within thirty days (30) days of the execution of this agreement for the violation identified in the Notice of Violation dated April 16, 2004.
- 3) The Department suspends payment of sixty-five thousand dollars (\$65,000) of the civil penalty proposed by the Notice of Violation dated April 16, 2004. This penalty or any portion may be re-imposed for Guardian's failure to fully comply with this agreement, including continuing unauthorized irrigation of portions of Sections 6 and 12, Township 17N, R23 East; portions of Sections 6, 7 and 8, T17N, R24E, and portions of Sections 31 and 32, T17N R24E, Lemhi County.

- 4) This agreement does not limit the Department or the Watermaster of Water District No. 74 to seek future compliance or regulation of said water use for other issues not directly related to the unauthorized uses that occurred this year.

Dated this _____ day of _____, 2004.

Tim Luke, Manager
Water Distribution Section
Idaho Department of Water Resources

CONSENT

Respondent Guardian acknowledges, in general, the facts set forth during the conference and accepts fully the terms and conditions of this Order. These terms shall become effective upon execution by the parties. Respondent waives any right to contest this Order and consents to the issue hereof.

Signed this _____ day of _____, 2004.

Roger Ball, _____
(Title)
Guardian Limited Partnership No. 2



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov.

please file

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

November 17, 2004

Guardian Limited Partnership No. 2
PO Box 927
Salmon, ID 83467

RECEIVED

NOV 22 2004

Department of Water Resources
Eastern Region

Re: Consent Order and Agreement
Notice of Violation Dated April 26, 2004

Dear Gentlemen:

I am in receipt of the Consent Agreement that you executed on November 9, 2004, as well as the civil penalties that you paid regarding the Notice of Violation dated April 26, 2004, and the Notice of Violation dated October 17, 2003. Please find attached a copy of the agreement that I have executed on behalf of the Idaho Department of Water Resources. The Department appreciates your continued cooperation in this matter.

Please contact me directly at (208) 287-4959 if you have further concerns or questions regarding this matter.

Respectfully,

Handwritten signature of Tim Luke

Tim Luke
Water Distribution Section

TL/cld

Attachment: Consent Order and Agreement

- Cc: IDWR Eastern Region
Rick Sager, Water District 74 Watermaster
Bob Foster, IDWR Salmon Field Office
John Homan, Idaho Deputy Attorney General
Harriet Hensley, Idaho Deputy Attorney General
Guy Paul, IDWR Resource Protection Bureau Chief
Erv Ballou, IDWR Stream Channel Unit

COPY

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

NOV 15 2004

DEPARTMENT OF
WATER RESOURCES

CONSENT ORDER AND AGREEMENT

In the matter of Notice of Violation issued October 17, 2003 and the Notice of Violation and Cease and Desist Order dated April 26, 2004, issued to Guardian Limited Partnership No. 2, pursuant to Section 42-1701B, Idaho Code.

Findings of Fact

- 1) Guardian Limited Partnership No. 2 (Guardian) is the owner of property situated in portions of Sections 6 and 12, Township 17N, R23 East; portions of Sections 6, 7 and 8, T17N, R24E, and portions of Sections 31 and 32, T17N R24E, Lemhi County. Guardian owns the following water rights that are appurtenant to portions of these lands: 74-373, 74-374, 74-985, 74-1066A, 74-1066B, 74-1067, 74-1068, 74-1072, 74-1073, 74-1074 and 74-10005. The Idaho Department of Water Resources (Department) issued a Notice of Violation to Guardian on October 17, 2003 for violations of the Stream Protection Act and Idaho's Safety of Dams Act. Additionally, the Department issued a Notice of Violation to Guardian on April 26, 2004 for irrigating approximately 250 acres within the above-described tracts of land without a valid water right.
- 2) Hal Hawkins, representative for Guardian, requested a compliance conference with the Department pursuant to the April 26, 2004 Notice of Violation. A compliance conference was held on July 1, 2004, between the Department, and Guardian's representatives, including Hal Hawkins, and Kent Foster, attorney for Guardian. During the conference, there was admission by Guardian's representatives that approximately 250 acres may have been irrigated in 2003 without valid water rights. Mr. Hawkins stated that Guardian had purchased the land in question described above, as well as the other adjacent irrigated lands and appurtenant, valid water rights in 1999. Mr. Hawkins also stated that he believed that the expansion had occurred prior to Guardian's purchase of the land in 1999, or at least prior to Mr. Hawkins initial employment with Guardian, which was in 2000.
- 3) Upon additional review of its records, the Department found that Guardian filed a Notice of Change of Water Right Ownership with the Department in February of 1999. The Department also has documented, through review of satellite images that much of the 250 acres described above irrigated without valid water rights were initially irrigated in 1999, or shortly after Guardian acquired ownership of the land and water rights. In particular, a pivot covering about 143 acres in the NE1/4 of Section 7, T17N, R24E, known as the Sawmill pivot, was added in 1999. This pivot involves an irrigation expansion of about 113 acres without a valid water right.

- 4) Guardian filed a Temporary Change application pursuant to Section 42-222A with the Department on May 12, 2004 in order to correct certain changes in the place of use of its water rights for the 2004 irrigation season. Guardian also filed the Temporary Change application to change the point of diversion of several of its water rights from the East Fork of Hayden Creek to its existing diversion on Hayden Creek because use of Guardian's East Fork diversion ditch in 2004 may have resulted in serious erosion problems as a result of a severe forest fire that occurred in the area in 2003. Guardian cooperated with federal and state agencies in making this point of diversion change in 2004 to assure protection to the local watershed and fish habitat, including the habitat of endangered anadromous fish species. The Department approved the Temporary Change application on May 13, 2004.
- 5) Guardian has reduced the number of irrigated acres in 2004 by more than 250 acres in order to comply with the acreage limits of its water rights. Review of a June 30, 2004 satellite image on file with IDWR confirms that Guardian is not using water on certain pivots in 2004, including the Sawmill pivot. Prior to constructing the subject dams on the Little Sawmill Creek, Guardian requested that a representative of IDWR meet on site to discuss the requirements for construction. Guardian contends that the IDWR official outlined the requirements for construction and that Guardian attempted to comply with those requirements. Nonetheless, Guardian has removed the dams and other obstructions from the stream channel of Little Sawmill Creek to achieve compliance with the terms of the NOV issued October 17, 2003.

Conclusions of Law

- 1) Section 42-351 of the Idaho Code provides that if the director finds, on the basis of available information, that a person is diverting water or has diverted water from a natural water course or from a ground water source without having obtained a valid water right to do so, or is applying water or has applied water not in conformance with a valid water right, then the director of the department of water resources shall have the discretion to issue a notice of violation to the person in accordance with the provisions of section 42-1701B, Idaho Code, for the illegal diversion or use of water.
- 2) Section 42-1717 of the Idaho Code, vests jurisdiction over supervision of the operation of dams and reservoirs to the director of the department of water resources. If in the opinion of the director, a dam poses a threat to life or property, he shall give written notice to the owner and order that the dam be made safe.
- 3) Section 42-3803 of the Idaho Code requires that no person shall engage in any activity to alter a stream channel without receiving a permit from the director.
- 4) Section 42-1701B of the Idaho Code provides that the director and the recipient of a notice of violation may enter into a consent order in accordance with the provisions therein to remedy an unresolved violation as an alternative to the director prosecuting a civil enforcement action.

Order

The Department held a compliance conference with Guardian on July 1, 2004. It is hereby ordered and agreed that:

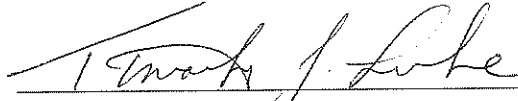
Based on the foregoing FINDINGS OF FACT and pursuant to the authority of Title 42, Chapter 3, Chapter 17 and Chapter 38 of the Idaho Code,

IT IS HEREBY ORDERED as follows:

- 1) Guardian agrees to cease and desist from further diversion of water for irrigation of the approximate 250 acres located in portions of Sections 6 and 12, Township 17N, R23 East; portions of Sections 6, 7 and 8, T17N, R24E, and portions of Sections 31 and 32, T17N R24E, Lemhi County, until valid water rights are obtained for this land and upon receiving authorization from the Department. Guardian acknowledges that the temporary transfer approved by the Department on May 13, 2004 only authorized irrigation for the 2004 season. Guardian may file an application to permanently transfer the water right or rent water from the water supply bank to irrigate the additional lands in future years. Pending applications for transfers or applications for leases of water from the water supply bank that have not been formally approved by the Department do not constitute approval of valid water rights for irrigation of this land.
- 2) Payment of an agreed civil penalty in the amount of three thousand seven hundred dollars (\$3,700) is payable to the Idaho Department of Water Resources within thirty days (30) days of the execution of this agreement for the violation identified in the Notice of Violation dated April 16, 2004. Additionally Guardian agrees to pay the sum of five thousand dollars (\$5,000) to the Lemhi Soil and Water Conservation District, 31 Highway 95 N. Suite D, Salmon, ID 83467 as mitigation to resolve outstanding resource protection issues under NOV# 74-S-249.
- 3) The Department suspends payment of seventy-one thousand three hundred dollars (\$71,300) of the civil penalty proposed by the Notice of Violation dated April 16, 2004. This penalty or any portion may be re-imposed for Guardian's failure to fully comply with this agreement, including continuing unauthorized irrigation of portions of Sections 6 and 12, Township 17N, R23 East; portions of Sections 6, 7 and 8, T17N, R24E, and portions of Sections 31 and 32, T17N R24E, Lemhi County.

- 4) This agreement does not limit the Department or the Watermaster of Water District No. 74 to seek future compliance or regulation of said water use for other issues not directly related to the unauthorized uses that occurred this year.

Dated this 17 day of November, 2004.

A handwritten signature in cursive script, appearing to read "Tim Luke", is written over a horizontal line.

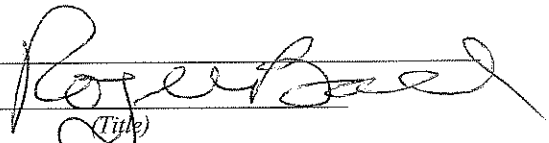
Tim Luke, Manager
Water Distribution Section
Idaho Department of Water Resources

CONSENT

Guardian makes no admission that it has violated any provision of law, but acknowledges in general the facts set forth in the Consent Order and Agreement and accepts fully the terms and conditions of the Order contained herein. Guardian consents to the issuance of the Consent Order and Agreement and waives any right it otherwise possessed to contest any provision of the Order. Upon compliance with Consent Order and Agreement, the Department agrees not to seek civil penalties for the violations identified herein.

Signed this 9 day of November, 2004.

Roger Ball,



(Title)
Guardian Limited Partnership No. 2

RECEIVED
NOV 15 2004
DEPARTMENT OF
WATER RESOURCES

November 9, 2004

John Homan
Office of Attorney General
322 E. Front ST
P.O. Box 83720
Boise, Id. 83720-0098

Dear Mr. Homan,

Enclosed please find the Consent Order and Agreement for Guardian #2
(Lemhi Ranches).

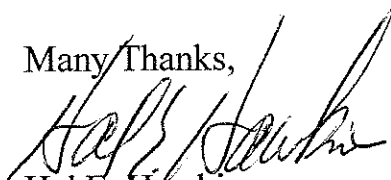
With the changes that Derek Ence requested and Mr. Ball being out of State
I was unable to get this signed and to you last week.

I have enclosed a photo copy of both checks, the one to IDWR and Lemhi
Soil & Water Cons. Dist.

I appreciate your help and understanding of this situation. You have been
most helpful and kind.

If you have any questions or comments please feel free to give me a call.

Many Thanks,



Hal E. Hawkins
Lemhi Ranches

001365

LEMHI RANCHES, LLC
737 S. CAPITAL AVENUE
IDAHO FALLS, ID. 83402

THE BANK OF COMMERCE
ADMINISTRATIVE OFFICE
P.O. BOX 1887
IDAHO FALLS, IDAHO 83403
92-41/1241
710

RECEIVED
NOV 15 2004

Memo:

DEPARTMENT OF
WATER RESOURCES

Nov 1, 2004

*****\$3,700.00

PAY

Three Thousand Seven Hundred and 00/100 Dollars

DATE

AMOUNT

TO THE
ORDER
OF:

IDAHO DEPT OF WATER RESOURCES


AUTHORIZED SIGNATURE

⑈001365⑈ ⑆124100417⑆ 17 1001867 9⑈

001366

LEMHI RANCHES, LLC
737 S. CAPITAL AVENUE
IDAHO FALLS, ID. 83402

THE BANK OF COMMERCE
ADMINISTRATIVE OFFICE
P.O. BOX 1887
IDAHO FALLS, IDAHO 83403
92-41/1241
710

Memo:

Nov 1, 2004

*****\$5,000.00

PAY


Five Thousand and 00/100 Dollars

DATE

AMOUNT

TO THE
ORDER
OF:

LEMHI SOIL & WATER CONSERVATION DISTRICT
31 HIGHWAY 93 N, SUITE D
SALMON, ID 83467


AUTHORIZED SIGNATURE

⑈001366⑈ ⑆124100417⑆ 17 1001867 9⑈