BEFORE THE DEPARTMENT OF WATER RESOURCES

FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR TRANSFER NO. 71132 IN THE NAME OF TIMOTHY P. DEEG	))))	**PRELIMINARY ORDER**

On November 8, 2002, Timothy P. Deeg ("Deeg") filed application for transfer no. 71132 with the Idaho Department of Water Resources ("IDWR") Notice of the application for transfer was published. The application for transfer was protested by Warm Creek Irrigation Company and by William Isaak.

On March 31, 2005, IDWR conducted a hearing for the protested application in American Falls, Idaho. After considering the evidence, the hearing officer finds, concludes, and orders as follows:

FINDINGS OF FACT

1. Application for transfer no. 71132 proposes changes in the place of use and the points of diversion for water right nos. 41-7030, 41-7034, and 41-7071. The water rights are presently described in IDWR's records as follows:

a. Water Right No. 41-7030:

Source:	Ground water
Priority Date:	01/02/1978
Nature of Use:	Irrigation
Flow Rate:	1.40 cfs
Annual Volume:	441.0 acre-feet
Season of Use:	4/01 through 10/31
Point of Diversion:	T9S, R30E, Sec. 6, SWSWSE[1]
Place(s) of Use:	

Description:		Acres
T9S, R30E, Sec. 1	NENE	25
	NWNE	29
	SWNE	36
	SENE	36
	Total	126 acres

[1] In this decision, the public land survey numeric descriptor "1/4" is assumed to follow each two alpha character public land survey locator when the numeric descriptor is missing. For instance, in this example, the full description would be the NE1/4NE1/4, Section 1, Township 9 South, Range 30 East, Boise Meridian.

b. Water Right No. 41-7034:

Source:	Ground water
Priority Date:	04/07/1978
Nature of Use:	Irrigation
Flow Rate:	1.82 cfs
Annual Volume:	364 acre-feet
Season of Use:	4/01 through 10/31
Point of Diversion:	T9S, R31E, Sec. 6, SWSWSE
Place(s) of Use:	

Description:		Acres
T9S, R30E, Sec 12	NESW	22.8
	SESW	22.7
	NWSE	22.8
	SWSE	22.7
	Total	91.0 acres

c. Water Right No. 41-7071 (Two beneficial uses)

Source:	Ground water
Priority Date:	07/13/1983
Nature of Use:	Irrigation
Flow Rate:	0.12 cfs
Annual Volume:	44 acre-feet
Season of Use:	4/01 through 10/31
Point of Diversion:	T9S, R31E, Sec. 6, SWSE
Place of Use:	

Description:		Acres
T9S, R31E, Sec. 6	SWSE	11.0 acres

Nature of Use:	Domestic
Flow Rate:	0.04 cfs
Annual Volume:	1.2 acre-feet
Season of Use:	1/1 through 12/31
Place of Use:	T9S, R31E, Sec. 6, SWSE

2. Application for transfer no. 71132 proposes to: (1) Add a new well as a point of diversion for water right nos. 41-7030, 41-7034, and 41-7071; (2) Add the domestic well described by water right no. 41-7071 as a point of diversion for water right nos. 41-7030 and 41-7034; (3) Add the irrigation well described by water right nos. 41-7030 and 41-7034 as a point of diversion for water right no. 41-7071; and (4) Change the place of use for all of the water rights to a 1,011 acre permissible place of use. The following is a description of the points of diversion and place of use proposed by the application for transfer:

Point(s) of Diversion: T9S, R31E, Sec. 6, SWSE (All three wells)
Place(s) of Use:

Description:		Acres
T9S, R30E, Sec. 1	NE	160
	E1/2 SW	80
	N1/2 SE	80
	SWSE	40
	SESE	31
Sec. 12	W1/2 NE	80
	E1/2 NW	80
	E1/2 SW	80
	W1/2 SE	80
T9S, R31E, Sec. 6	NWNW	21
	SWNW	22
	NESW	36
	NWSW	22
	SWSW	18
	SESW	30
	NESE	40
	NWSE	38
	SWSE	33
	SESE	40
	Total	1,011

Note: The domestic place of use described by water right no. 41-7071 will remain unchanged.

3. A portion of the larger place of use sought by the application for transfer is also described as a place of use by permits to appropriate water nos. 41-7076 and 41-7081. The elements of the permits are described as follows:

a. Permit No. 41-7076

Source:	Ground water
Priority Date:	9/11/1985
Nature of Use:	Irrigation
Flow Rate:	4.80
Season of Use:	5/1 through 10/31
Point of Diversion	T9S, R31E, Sec. 6, SWSE

a. Permit No. 41-7076 (cont.)

Place(s) of Use:

Description		Acres
T9S, R30E, Sec 12	NWNE	33
	SWNE	33
	NENW	33
	SENW	33
T9S, R31E, Sec. 6	NESE	27
	NWSE	27
	SWSE	27
	SESE	27
	Total	240

Note: Deeg filed proof of beneficial use for permit no. 41-7076 on January 13, 1997.

b. Permit No. 41-7081:

Source	Ground water
Priority Date	2/28/1990
Nature of Use	Irrigation
Flow Rate	6.95 cfs
Season of Use	4/1 to 11/1
Point of Diversion	T9S, R31E, Sec. 6, SWSE

Place(s) of Use:

Description		Acres
T9S, R30E, Sec. 1	E1/2 SW	80
	N1/2 SE	80
	SWSE	40
	SESE	39
T9S, R30 E, Sec. 6	NESW	36
	Lot 6 (NWSW)	21
	Lot 7 (SWSW)	22
	SESW	30
	Total	348

Note: Deeg filed proof of beneficial use for permit no. 41-7081 on June 9, 1994

4. While the place of use described by permit nos. 41-7076 and 41-7081is within the larger place of use sought by the application for transfer, Deeg did not simultaneously attempt to amend the permits to describe a larger place of use for the permits in conjunction with the application for transfer.

5. IDWR issued water right license no. 41-7030 to Farold J. Nelson on December 13, 1991 Water right license no. 41-7030 authorized diversion of 1.40 cfs from ground water for irrigation of 126 acres near Rockland, ID.

6. In November 1993, Deeg leased water right no. 41-7030 for five years from the Estate of Farold J. Nelson and his wife, Lela. The lease document was accompanied by an "assignment of permit" of "Permit No. 41-7030."

7. On December 3, 1993, Deeg filed application for transfer no. 4268 proposing to move the point of diversion and place of use for water right no. 41-7030 to Deeg's property. The application for transfer was protested. On May 17 and May 24, 1994, IDWR held a hearing. Warm Creek Irrigation Co., Steve W. Isaak, and Roland Mayer and Sons participated in the hearing as protestants.

8. Evidence presented at the 1994 hearing described the beneficial use of water from the well authorized by permit no. 41-7081. On March 21, 1995, the Director of IDWR issued an Amended Final Order approving transfer no. 4268. The order authorized the beneficial use currently described by water right no. 41-7030. A portion of finding of fact no. 10 of the amended final order states:

> The applicant drilled the irrigation well authorized by Permit No. 41-07081 (Deeg well) during the summer of 1992 and diverted and used water on 348 acres during the 1993 irrigation season. The land is sprinkler irrigated with two (2) pivots, four (4) wheel lines and handpipe.

9. The 1995 amended final order found that water had been and was being beneficially used under permit no. 41-7081 at the time the application for transfer of water right no. 41-7030 was being considered by IDWR.

10. Deeg filed proof of beneficial use for permit no. 41-7081 on June 9, 1994, approximately one month after the hearing for the application to transfer water right no. 41-7030. Because the beneficial use examination required by Idaho Code § 42-217 for permit no. 41-7081 had not been conducted before the hearing, and because permit no. 41-7081 was not a water right that Deeg was seeking to transfer, the statement of the number of acres irrigated (348) in the amended final order was not a final determination of the acres irrigated under water right no. 41-7081. IDWR was required to determine the acres irrigated during IDWR's subsequent beneficial use field examination.

11. On October 4, 1995 (following issuance of the Amended Final Order approving transfer no. 4268), IDWR received an application to amend permit to appropriate water no. 41-7076. The original permit holder, Lanny Permann, filed the application for amendment. The application sought to change the point of diversion and place of use for application for permit no. 41-7076 to lands farmed by Timothy Deeg. The amendment was approved on December 8, 1995.

12. In addition, the IDWR file for water right no. 41-7076 contains a contract for sale of water right no. 41-7076 by Permann to Deeg dated September 19, 1995. An assignment of permit no. 41-7076 was filed with IDWR confirming the change in ownership of the permit to Deeg.

13. Permit no 41-7076 originally authorized irrigation of 240 acres in Section 5, T9S, R30E. In January 1995, Permann submitted proof that he had expended significant resources for development of the permit in drilling a well but the well was unproductive. Permann stated that "because of the drought on the dry farm we have not been able to do any more construction." A well drillers report contained in the file for permit no. 41-7076 states that the Permann well was deepened in February and March of 1995. The file contains no further information about development.

14. When the amendment changing the point of diversion and place of use for permit no. 41-7076 was approved, permit no. 41-7081 and license no. 41-7030 already described the Deeg well as a point of diversion.

15. On January 13, 1997, Deeg filed proof of beneficial use for permit no. 41-7076.

16. On April 16, 1997, Deeg leased water right no. 41-7034 from Nelson.

17. On May 29, 1997, Deeg filed application for transfer no. 5120 proposing to move the point of diversion and place of use for water right no. 41-7034 to Deeg's property. Application for transfer no. 5120 was protested.

18. On August 27, 1997, and prior to the hearing for protested application for transfer no. 5120, Daniel Nelson (Nelson) of IDWR conducted a beneficial use field examination for permit nos. 41-7076 and 41-7081. During the field examination, Nelson measured a flow of 6.68 cubic feet per second (cfs) from the irrigation well described by permit nos. 41-7076 and 41-7081. Nelson also found 227.5 acres irrigated within the place of use described by permit no. 41-7076 and 338 acres irrigated as authorized by permit no. 41-7081.

19. The 227.5 acres irrigated within the place of use described by permit no. 41-7076 were two circular fields irrigated by a single, portable circular pivot sprinkler system. Deeg irrigated one circular field one time at the beginning of the irrigation season with the portable pivot sprinkler system. After one irrigation, Deeg moved the circular pivot system to the other circular field for the remainder of the irrigation season until a crop was grown and harvested on the second circular field. After harvest, Deeg moved the portable circular pivot system back to the first circular field and irrigated the first circular field in the fall.

20. Nelson measured a flow rate of 2.02 cfs for the portable pivot sprinkler system. Nelson recommended a flow rate of 2.02 cfs for the 227.5 acres under permit no. 41-7076 because the entire 227.5 acres could not be irrigated simultaneously.

21. The following is a summary of the water rights diverted from the Deeg well at the time of Nelson's examination:

Water Right	Flow Rate	Acres	Volume
Permit no. 41-7081	6.68 cfs	338	1,352 acre feet
License 41-7030	1.40 cfs	126	504 acre feet
Permit 41-7076	2.02 cfs	227.5	858 acre feet
Total flow rate =	6.68 cfs		Total = 2,714 acre feet

22. If the measured flow from the Deeg well were continuously diverted at a rate of 6.68 cfs for the entire irrigation season, 2,835 acre feet of water would be pumped from the well. The annual volume production capacity of the well exceeds the maximum volume of 2,714 acre feet that could be recognized under all three water rights combined.

23. On February 3, 1998, IDWR conducted a hearing for application for transfer no. 5120 for protests filed by Warm Springs Irrigation Company, Harold Isaak, and Steve Isaak. On May 15, 1998, the Director of IDWR issued a Final Order approving the transfer. The transfer authorized the beneficial use currently authorized by water right no. 41-7034.

24. Finding of fact no. 11 of the of May 15, 1998 final order summarized a portion of Tim Deeg's testimony at the hearing:

> The applicant stated that it is not his intent to increase the total diversion capacity from the Deeg well if transfer No. 5120 is approved.

25. As a result of Deeg's testimony and the beneficial use examination by Dan Nelson of IDWR establishing the capacity of the pumping system, the final decision for application for transfer no. 5120 contained the following condition:

> The maximum rate of diversion of water under this right when combined with water right Nos. 41-07030, 41-7071, 41-7076, and 41-7081 shall not exceed a total combined rate of 6.68 cfs nor more than 4.0 acre feet per acre at the well.

26. The well drilled by Deeg in 1992 was completed to a depth of 940 feet. The static water level is approximately 460 feet below ground surface.

27. The subsurface below or near the Deeg place of use contains three cold water aquifers: a shallow alluvial aquifer, an intermediate aquifer to a depth of about 400 feet comprised of conglomerates and some limestone, and a deeper aquifer from approximately 450 feet and deeper residing in the limestone formations. Tim Deeg's well is completed primarily within the deeper limestone formation.

28. The nearest well to the Deeg irrigation well is a domestic well owned by Deeg. The domestic well is completed in the intermediate aquifer. Water levels in the Deeg domestic well have not been affected by pumping from the Deeg irrigation well.

29. In addition, wells previously owned by Roland Mayer and Sons, now owned by William Isaak, are completed in the intermediate zone.

30. Springs at the headwaters of Cold Creek and Little Creek express themselves from the zone in between the shallow and intermediate aquifers. The deeper limestone aquifer does not contribute water directly to the surface water sources.

31. Warm Creek derives its flows from hot springs emitting from the ground surface. The hot springs flow from a low temperature geothermal aquifer residing at a deeper depth than the three cold water aquifers previously described. The temperature in the Deeg well is warmer than water in the intermediate or shallow aquifers suggesting some connection to the deeper, warmer aquifer. Nevertheless, the water in the Deeg well is cold water, and any relationship between water in the Deeg well and a low temperature geothermal aquifer is remote.

32. Pumping from the Deeg well does not affect water levels in wells completed in the intermediate aquifer.

33. Application for Transfer no. 71132 proposes to increase the total diversion from 6.68 to 9.95 cfs.

34. The chronology of development of the ground water on the Deeg property is important for determining what water rights can be recognized for diversion from the Deeg well or wells proposed by this application for transfer.

35. Permit no. 41-7081 should be licensed to recognize the acreage and flow rate determined by the beneficial use examination

36. The transfer of water right nos. 41-7030 and 41-7034 authorized diversion of water under water right nos. 41-7030 and 41-7034 from the point of diversion described by permit no. 41-7081. No additional rate of flow of water was diverted from the well after the transfers were approved, however, than the original flow of 6.68 cfs diverted under permit no. 41-7081.

37. Proof of beneficial use for water right no. 41-7076 was filed on January 13, 1997. Because the filing of proof of beneficial for permit no. 41-7076 preceded the beneficial use field exam conducted on August 27, 1997, no additional water capacity had been developed, and the capacity of the Deeg well was no more than 6.68 cfs.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 states, in pertinent part:

> The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve

reasonably anticipated future needs as provided in this chapter The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

2. The applicant bears the burden of proof for all of the factors listed in Idaho Code § 42-222.

3. This decision must determine the validity of some of the components of permit nos. 41-7076 and 41-7081 because development and beneficial use of water under permit nos. 41-7076 and 41-7081 is inextricably linked in time to the earlier transfer of water rights 41-7030 and 41-7034 to the Deeg property and well.

4. To the extent this decision determines issues related to permit nos. 41-7076 and 41-7081 that are objectionable to Deeg, he may request a hearing under Idaho Code § 42-1701A regarding those issues. Because of the linkage between this application for transfer and the determination of beneficial use under permit nos. 41-7076 and 41-7081, a request for hearing will automatically stay the proceedings for this application for transfer until all contested issues are resolved.

5. Beneficial use authorized by permit no. 41-7081 was completed prior to consideration of the application for transfer moving water right no. 41-7030 in 1994. As a result the full 6.68 cfs and 338 acres of beneficial use found by the examiner during the beneficial use field examination should be credited to permit no. 41-7081.

6. Approval of transfers moving the point of diversion and places of use for water right nos. 41-7030 and 41-7034 did not result in any additional water flow rate being diverted. Additional lands were irrigated after the transfer, however.

7. After the transfer approvals, water right nos. 41-7030 and 41-7034 were not fully exercised for a period of time exceeding five years. This partial use of water raises an issue of whether the water rights were partially forfeited as a result of nonuse.

8. During the period of partial use, the adjudication claims for water right nos. 41-7030 and 41-7034 were pending before the SRBA and will remain unresolved until determination of this contested application for transfer. The running of the five (5) year forfeiture period is tolled while adjudication claims are pending before the SRBA Court.

9. Despite partial use of water right nos. 41-7030 and 41-7034 following transfer of the water rights to the Deeg property and well, water right nos. 41-7030 and 41-7034 are valid water rights and may again be transferred by Deeg.

10. Deeg's testimony in the hearing for the previous transfer of water right no. 41-7034 stating that he would not divert more than the existing capacity of the Deeg well does not

prevent Deeg from seeking to divert more water in a subsequent application for transfer of water right nos. 41-7030 and 41-7034.

11. No additional flow rate was developed under permit no. 41-7076. The total combined diversion rate authorized by permit nos. 41-7076 and 41-7081 must be limited to 6.68 cfs.

12. The total annual volume of water diverted under water right no. 41-7081 is 1,352 acre-feet.

13. The total combined annual volume of water diverted under water right nos. 41-7076 and 41-7081 is limited to 2,210 aacre-feet

14. The total annual volume of water diverted under water right nos. 41-7030, 41-7076 and 41-7081 is 2,714 aacre-feet

15. The total annual volume of water diverted under water right nos. 41-7030, 41-7034, 41-7076 and 41-7081 is 3,078 acre feet.

16. In total, water right nos. 41-7030, 41-7034, and 41-7071 authorize the diversion of 3.34 cfs and the irrigation of 228 acres.

17. The total flow rate authorized by water right nos. 41-7030, 31-7034, 41-7071, 41-7076, and 41-7081 is 10.02 cfs.

18. The total number of acres authorized for irrigation by water right nos. 41-7030, 41-7034, 41-7071, 41-7076, and 41-7081 is 793.5 acres.

19. Approval of this transfer will not injure other water rights.

20. Approval of this transfer will not enlarge the water rights sought to be transferred.

21. Approval of this transfer is in the public interest.

22. Approval of this transfer is consistent with conservation of the water resources of the state of Idaho.

ORDER

IT IS HEREBY ORDERED that application for transfer no. 71132 is **APPROVED** subject to the following conditions:

1. Right 41-7030 is limited to the irrigation of 126.0 acres within the place of use described above in a single irrigation season.

2. Right 41-7034 is limited to the irrigation of 91.0 acres within the place of use described above in a single irrigation season.

3. Right 41-7071 is limited to the irrigation of 11.0 acres within the place of use described above in a single irrigation season.

4. Right 41-7081 shall not exceed a total annual maximum diversion volume of 1,352.0 af at the field headgate.

5. Rights 41-7076 and 41-7081 when combined shall not exceed a total diversion rate of 6.68 cfs, and a total annual maximum diversion volume of 2,210.0 af at the field headgate.

6. Rights 41-7030, 41-7034 and 41-7071 when combined shall not exceed a total diversion rate of 3.34 cfs from all points of diversion, a total annual maximum diversion volume of 850.2 af at the field headgate, and the irrigation of 228.0 acres.

7. Rights 41-7030, 41-7076 and 41-7081 when combined shall not exceed a total annual maximum diversion volume of 2,714.0 af at the field headgate.

8. Rights 41-7030, 41-7034, 41-7076 and 41-7081 when combined shall not exceed a total annual maximum diversion volume of 3,078.0 af at the field headgate.

9. Rights 41-7030, 41-7034, 41-7071, 41-7076 and 41-7081 when combined shall not exceed a total diversion rate of 10.02 cfs, and the irrigation of 793.5 acres.

10. The use of water under water right no. 41-7071 shall not give rise to any claim against the holder of a senior water right based upon the theories of forfeiture, abandonment, adverse possession, waiver, equitable estoppel, estoppel by laches or customary preference.

11. Prior to diversion of water under this approval, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion.

12. After specific notification by the Department, the right holder shall record the quantity of water diverted or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.

13. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code, and applicable Well Construction Rules of the Department.

14. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.0 afa per acre at the field headgate for irrigation of the lands above.

15. The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

16. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

17. Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

IT IS FURTHER ORDERED that, to the extent this order determines elements of water right permit nos. 41-7076 and 41-7081, the permit holder may request a hearing under Idaho Code § 1701A. The request for hearing must be physically filed within fifteen days of the date this order was mailed to the parties, as stated in the certificate of mailing. A request for a hearing will automatically stay the proceedings for this application for transfer until after all contested issues are resolved.

DATED this 17th day of June, 2005.

GARY SPACKMAN
Hearing Officer