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Department of Water Resources
Southern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR PERMIT NO. 36-16125 IN THE NAME OF DELIS FARMS, INC.	))))	**RECOMMENDED ORDER RE PETITION FOR DECLARATORY RULING AND MOTION FOR STAY**

This matter came before the Idaho Department of Water Resources ("IDWR") on the application of Delis Farms, Inc. ("Delis Farms" or "Applicant") to appropriate ground water in the Eastern Snake Plain Aquifer. Delis Farms filed its application for a ground water right permit on January 27, 2003. That application was assigned number 36-16125 (the "Application"). The proposed water use was described as follows:

Source of Water:	Ground water.
Point(s) of Diversion:	#1 NE¼SE¼NW¼, Sec. 14, T8S, R22E, B.M. #2 NW¼SW¼SE¼, Sec. 15, T8S, R22E, B.M. #3 NE¼SE¼NW¼, Sec. 22, T8S, R22E, B.M. All in Minidoka County, Idaho.
Use(s):	Irrigation of 160 acres.
Total Quantity:	2.35 cfs.
Period of Use:	March 15 – November 15.
Place of Use:	SW¼, Sec. 14, T8S, R22E, B.M., Minidoka County, Idaho.

In the remarks section of the Application, Delis Farms stated that:

> This application covers land that has been farmed since around 1965 or 1966 without a recorded water right. An SRBA expansion claim was filed but has been disallowed. We are hoping to get the claim reinstated, but are filing the application in case that does not happen....

Notice of the Application was published in the South Idaho Press, a daily newspaper published at Burley Idaho, for two weeks commencing on March 6, 2003, and ending on March 13, 2003. Timely protests were received by IDWR from:

A & B Irrigation District ("A & B").
United States Department of the Interior, Bureau of Reclamation ("Bureau of Reclamation").
Twin Falls Canal Company ("TFCC").
North Side Canal Company ("NSCC").

On June 1, 2004, TFCC and NSCC filed a *Petition for Declaratory Ruling and Motion to Stay* with the *Affidavit of Amy D. Chestnut* with exhibits (together, the "Petition"). The Petition requested that IDWR stay processing of the Application pursuant to an *Amended Moratorium Order* issued by IDWR on April 30, 1993 (the " ESPA Moratorium"). A & B and the Bureau of Reclamation joined in the Petition. The issue raised by the Petition is whether processing of the Application should be stayed pursuant to the ESPA Moratorium or may proceed pursuant to a Memorandum dated July 1, 1992 from the Director to IDWR staff.

In response to the Petition IDWR sent a letters to a number of water right applicants within the area covered by the ESPA Moratorium. Those applicants also had water right applications pending to cover water uses that commenced prior to November 1987 without benefit of water right permits. The letter invited such applicants to intervene in this matter. Velia De Giulio, Clear Lakes Country Club, and Calvary Baptist Church petitioned to intervene.

A prehearing conference was held on the Application on February 4, 2005. Following the prehearing conference a *Prehearing Order and Notice of Hearing* issued on February 10, 2005. Velia De Giulio, Clear Lakes Country Club, and Calvary Baptist Church were allowed to intervene and aligned with the Applicant. A schedule was established for resolution of the Petition. Also on February 10, 2005, the Hearing Officer invited IDWR staff to file by April 1, 2005 a staff memorandum evaluating the Petition.

Pursuant to the schedule established in the *Prehearing Order and Notice of Hearing* the *Bureau of Reclamation's Filing in Support of Declaratory Judgment and Motion to Stay* was filed in support of the Petition. Neither the Applicant nor any of the parties granted intervention filed briefing in opposition to the Petition. On April 2, 2005, the *IDWR Staff Memorandum* was filed in this matter, although it was not served until April 8, 2005. In response TFCC and NSCC filed a *Reply Brief in Support of Petition for Declaratory Ruling / List of Witnesses.*

A hearing on the Petition was held on May 13, 2005. Velia De Giulio and Clear Lakes Country Club did not attend the hearing. Delis Farms arrived late. At the hearing a proposed decision was stated orally by the Hearing Officer. Discussion focused on that proposed decision.

MORATORIUMS

On May 15,1992, the Director of IDWR issued a *Moratorium Order* prohibiting water right processing in the Snake River Basin upstream of the Weiser gauging station. The order granted blanket exceptions to the moratorium prohibition for the following uses:

1. Nonconsumptive uses.

2. Domestic purposes as defined by Idaho Code § 42-111. The order stated that this exception includes "applications for ground water permits seeking water for multiple ownership subdivisions or mobile home parks ... provided each unit satisfies the definition for the exception of requirement to file an application for permit" under Section 42-111.

3. Use of ground water supplementing a surface water right that normally provides a full supply of water.

On July 1, 1992, the Director of IDWR issued a memorandum to IDWR staff discussing the "intent" of the May 15, 1992, moratorium ("Application Processing Memo #54"). Application Processing Memo #54 concludes:

> Therefore, the purpose of this memo is to advise that it is the intent of the moratorium order issued on May 15, 1992 to hold up the issuance of permits authorizing new or expanded uses of water within the Snake River Basin. The moratorium may be interpreted to allow the continued processing and approval of applications proposing to cover an existing use. Such existing use must predate the start of the Snake River Basin Adjudication.

(Emphasis added.) This interpretation of the "intent" of the May 15, 1992, moratorium, allowing applications for existing uses to proceed, appears to directly pertain to conclusion of law 5:

> A moratorium on issuance of permits to divert and use water from the Snake River Basin upstream from the USGS gauging station on the Snake River near Weiser for new consumptive uses should be established to protect existing water rights and established minimum stream flows."

(Emphasis added.)

On January 6, 1993, the Director issued two orders that effectively split the previous moratorium area into two parts. One part was the area of the Snake River Basin tributary to the Snake River above Milner Dam, referred to as the non-trust water area. The second part was the area of the Snake River Basin upstream from the Weiser gauge, excluding the non-trust water area. The first order, entitled *Order Amending Moratorium Order Dated May 15, 1992*, amended portions of the original moratorium to exclude the non-trust water area. The original conditions of the May 15, 1992 *Moratorium Order* were retained for the area remaining under this moratorium. The second order was a wholly new *Moratorium Order* for the non-trust water area. Both of these orders maintained the language adverting to "new consumptive uses" that was the apparent basis for Application Processing Memo #54.

Finally, on April 30, 1993, the Director issued the *Amended Moratorium Order,* the ESPA Moratorium, affecting only the downstream area tributary to the Snake River between the Weiser gauge and Milner Dam labeled the "Eastern Snake Plain Area." A map attached to the April 30, 1993 order depicts the Eastern Snake Plain Area. The ESPA Moratorium specifically stated that:

> IT IS, THEREFORE HEREBY ORDERED that prior order of the department dated May 15, 1992 and amended January 6, 1993 in connection with the Snake River Basin upstream from the USGS gaging station at Weiser, Idaho is superceded by this Amended Moratorium Order.

The ESPA Moratorium stayed new appropriations, but included several blanket exceptions similar or identical to the previous orders. The ESPA Moratorium also included a new case-by-case exception to the prohibition of processing. Condition no. 9 of the Amended Moratorium Order states:

> The moratorium does not prevent the Director from reviewing for approval on a case-by-case basis an application which otherwise would not be approved under terms of this moratorium if,
>
> a) Protection and furtherance of the public interest as determined by the Director, requires consideration and approval of the application irrespective of the general drought related moratorium; or
>
> b) The Director determines that the development and use of the water pursuant to an application will have no effect on prior surface and ground water rights because of its location, insignificant consumption of water or mitigation provided by the applicant to offset injury to other rights.

The ESPA Moratorium did not retain the Conclusion of Law that stated that a moratorium should be placed on the issuance of permits for "new consumptive uses" that was the apparent basis for Application Processing Memo #54.

The ground water wells in the Application will withdraw water in Sections 14, 15 and 22, T. 8 S., R. 22 E., B.M., which is designated hydrologic basin 36 in IDWR records. This area is covered by the ESPA Moratorium. Thus, processing of the Application should be stayed pursuant to the ESPA Moratorium, unless an exception is applicable.

APPLICATION PROCESSING MEMO #54

There is some indication in the record that IDWR can process the Delis Farms Application pursuant to the exception stated in Application Processing Memo #54. *See* Ex. 12, Affidavit of Amy Chestnut. For the reasons stated below, Application Processing Memo #54 does not provide such an exception.

In the first place, as emphasized above, Application Processing Memo #54 specifically interpreted the *Moratorium Order* dated May 15, 1992, not the ESPA Moratorium. The ESPA Moratorium "superceded" the May 15, 1992 order. "Supercede"[1] means: "[o]bliterate, set aside, annul, replace, make void, inefficacious or useless, repeal. To set aside, render unnecessary, suspend or stay." Blacks Law Dictionary, 5th ed. at 1289 (1979). The ESPA Moratorium is not simply a revised version of the May 15, 1992 order, it completely replaced that order. Application Processing Memo #54 cannot act as an interpretation of the intent of the subsequent ESPA Moratorium.

Further, Application Processing Memo #54, if applicable, would be a substantive change to the ESPA Moratorium. The ESPA Moratorium on its face provides no blanket exception for

[1] Supercede is a variant of the term supersede.

the processing of applications for permits to legitimize pre-November 1987 water uses. While the ESPA Moratorium does provide for case-by-case exceptions Application Processing Memo #54 by its very nature is not a case-by-case exception. It would create a new blanket exception for applications that were filed to legitimize pre-November 1987 water rights.

Application Processing Memo #54 did not comply with proper notice and hearing procedures necessary to make such a substantive change to the ESPA Moratorium. The ESPA Moratorium was put in place pursuant to I.C. § 42-1805 which provides:

> In addition to other duties prescribed by law, the director of the department of water resources shall have the following powers and duties:
>
> * * *
>
> (7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code, or to prevent violation of minimum flow provisions of the state water plan.

The notice and hearing rules for applicaton moratoria were contained in Rule 7 of IDWR's water appropriation rules in 1992 and 1993:

> 7,1,2. Notice of the director's action to cease application approval will be by:
>
> 7,1,2,1. Summary Order served by certified mail upon the then existing affected applicants; and
>
> 7,1,2,2. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected.
>
> 7,1,3. Objections to the director's action shall be considered under the department's adopted Rules of Practice and Procedure and applicable law.

Application Processing Memo #54 apparently was distributed primarily to IDWR staff and only incidentally came to the attention of the public. This is an improper and invalid means to substantively amend a moratorium order.

The deficiencies of this improper procedure are evident in the present case. To challenge Application Processing Memo #54 TFCC and NSCC were forced in the context of a single application for permit to "request the Director to stay the processing of all new applications based upon the pre-1987 development policy as well as continued processing of pending applications that have not received final approval from the Department." Petition at 15. However, none of the persons with such new or pending applications, other than the Applicant, were parties to the present contested case and none of them legitimately could be said to have notice of the Petition's potential effect on their applications. Recognizing this deficiency, IDWR

staff sent letters to hundreds of potentially affected applicants pursuant to IDAPA 37.01.01.401, urging them to intervene in this matter. Only three such parties intervened and no one, including the Applicant, filed briefing opposing the Petition. No mailing was made to persons with prior applications stayed by the ESPA Moratorium who might have a direct interest in supporting the Petition.

Following the proper procedure to amend the ESPA Moratorium would allow for full consideration of problematic aspects of Application Processing Memo #54, such as:

- Does it improperly allow out-of-priority approval of water right applications?
- Does it improperly reward illegal water use?
- Is the decision to process applications to legitimize only pre-November 1987 water uses arbitrary?
- Is its only basis the so-called "Presumption Statutes," Idaho Code §§42-1416, 1416A, which were held to be unconstitutional by the Snake River Basin Adjudication District Court and subsequently repealed?
- Who has standing to challenge a decision to process applications to legitimize pre-November 1987 water uses—only other applicants or current water right holders[2] as well?

None of these issues need be addressed in this Order because Application Processing Memo #54 provides no exception to the ESPA Moratorium for the Application.

ESPA MORATORIUM EXCEPTIONS

The ESPA Moratorium contains both blanket and case-by-case exceptions. Because the Applicant may have been relying on Application Processing Memo #54 to proceed contrary to the ESPA Moratorium it may not have asserted other exceptions it felt were applicable to the Application. Upon issuance of a final order regarding the Petition the Applicant should be given a reasonable amount of time to assert any exceptions to the ESPA Moratorium it feels are applicable to the Application.

[2] If IDWR approves water right applications out-of-priority it may be making a finding that there is not only sufficient water for the out-of-priority application but also for all prior applications. This implicates the scope of the water supply for all existing water rights. Idaho Code § 42-203A(5).

RECOMMENDED ORDER

Base upon the foregoing it is hereby ORDERED that:

1. The Petition by the Twin Falls Canal Company and North Side Canal Company is GRANTED as follows:

    a. Processing of the Application is STAYED by the ESPA Moratorium.

    b. It is DECLARED that Application Processing Memo #54 does not apply to the ESPA Moratorium.

2. This is a final order on the Petition for Declaratory Ruling and Motion to Stay.

3. Delis Farms Inc. may assert any other exception to the ESPA Moratorium it feels are applicable to the Application within four (4) week of the issuance of the final order on the Petition.

PROCEDURAL RIGHTS

This is the Recommended Order of the Hearing Officer. It will not become final without action of the Director of the Idaho Department of Water Resources. Any party may file a petition for reconsideration of this recommended order with the Hearing Officer within fourteen (14) days of the service date of this order. The Hearing Officer will dispose of any 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.

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of this recommended order and file briefs in support of the party's position with the Director or Director's designee on any issue in the proceeding. If no party files exceptions to the recommended order with the Director or Director's designee, the Director or Director's designee will issue a final order within fifty-six (56) days after:

i. The last day a timely petition for reconsideration could have been filed with the hearing officer;

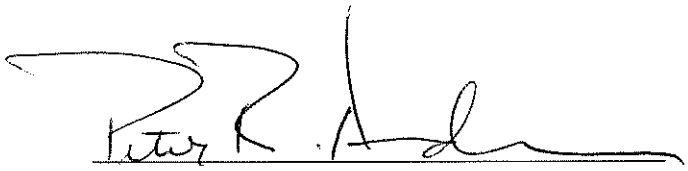
ii. The service date of a denial of a petition for reconsideration by the hearing officer; or

iii. The failure within twenty-one (21) days to grant or deny a petition for reconsideration by the hearing officer.

Written briefs in support of or taking exceptions to this recommended order shall be filed with the Director or Director's designee. Opposing parties shall have fourteen (14) days to respond. The Director or Director's designee may schedule oral argument in the matter before

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

DATED this 2nd day of June 2005.



PETER R. ANDERSON
HEARING OFFICER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2005, the above and foregoing document was served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

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