

74-W



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

September 8, 2003

Tex Kauer
McFarland Livestock Co., Inc
PO Box 50
Leadore, ID 83465

RECEIVED
SEP 15 2003

Department of Water Resources
Eastern Region

CERTIFIED MAIL

Re: Consent Order and Agreement
Notice of Violation Dated August 4, 2003

Dear Mr. Kauer,

Pursuant to our meeting on September 4, 2003, please find enclosed a Consent Order and Agreement regarding the Notice of Violation dated August 4, 2003 that the Idaho Department of Water Resources sent to you. Note the terms of the agreement and all compliance dates and fees or civil penalties stipulated in the attached order.

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

Cc: Dan Smith, Watermaster, **Water District 74-W**
Bob Foster, IDWR Salmon Field Office
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 August 4, 2003, issued to McFarland Livestock Co. Inc. pursuant to Section 42-1701B, Idaho Code.

Findings of Fact

- 1) McFarland Livestock Co. Inc., (McFarland) is the owner of property situated in Sections 10, 11, 14 and 15, T15N, R27E. McFarland is authorized to divert water from Hawley Creek to irrigate a total of 521.7 acres of land within these sections under water right no.s 74-11, 74-12, 74-16, 74-29 and 74-30. McFarland is also authorized to divert water from Bull Creek under water right no.s 74-332 and 74-333 for irrigation of an additional 235 acres in Sections 14 and 23, T15N, R27E. In particular, water right 74-333 is appurtenant to 160 acres in the SW1/4, Section 14, T15N, R27E, and water right 74-332 is appurtenant to 35 acres in the SESE, Section 14, and 40 acres in the NENE of Section 23, T15N, R27E.
- 2) It has been documented by the Idaho Department of Water Resources (Department), that McFarland has been irrigating approximately 780 acres in Sections 10, 11, 14 and 15, T15N, R27E. The Department has also documented that these 780 acres are irrigated by McFarland's diversion from Hawley Creek. The water supply from Bull Creek was not adequate in 2003 to irrigate those lands authorized by water rights 74-332 and 74-333. McFarland's irrigated place of use under the Hawley Creek water rights therefore exceeds the authorized place of use by approximately 258 acres. This enlarged place of use occurs specifically within portions of Sections 10, 11 and 14, T15N, R27E.
- 3) There are no water rights of record authorizing irrigation of the 258-acre enlargement from Hawley Creek within Sections 10, 11 and 14, T15N, R27E. Pursuant to a compliance conference that the Department held with McFarland on September 4, 2003, McFarland explained that the practice of diverting water from Hawley Creek for irrigation of the additional acreage was initiated by the preceding landowners and prior to McFarland acquiring the land in 1996. McFarland assumed that valid water rights existed that permitted the diversion and use of water from Hawley Creek for irrigation of the enlarged development at the time McFarland acquired the land.
- 4) McFarland filed a temporary change application pursuant to Section 42-222A, Idaho Code, with the Department on July 29, 2003 that proposed moving several water rights from other lands owned by McFarland to the lands in Sections 10, 11 and 14, T15N, R27E. The Department approved the temporary change application on July 30, 2003.

The Department held a compliance conference with McFarland on September 4, 2003. It is hereby ordered and agreed that:

Terms of Agreement

- 1) McFarland may continue to irrigate the enlarged development this year pursuant to the Order Authorizing Temporary Change TC-74-1 approved by the Department. The temporary change approval expires on November 15, 2003.
- 2) McFarland agrees to cease and desist from further diversion of water from Hawley Creek in 2004 for irrigation of the 258-acre expansion until valid water rights are obtained for this land and upon receiving authorization from the Department.
- 3) Payment of an agreed civil penalty in the amount of \$500 is payable to the Idaho Department of Water Resources within ten (10) days of the execution of this agreement, for the violation identified in the Notice of Violation dated August 4, 2003.
- 4) The Department suspends payment of \$76,900 of the originally proposed civil penalty. This penalty or any portion may be re-imposed for McFarland's failure to fully comply with this agreement, including continuing unauthorized irrigation of the 258-acre expansion located within Sections 10, 11 and 14, T15N, R27E, prior to the acquisition of valid water rights.
- 5) This agreement does not limit the Department or the Watermaster of Water District 74-W 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 _____, 2003.

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

CONSENT

Respondent McFarland 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 _____, 2003.

Tex Kauer, President
McFarland Livestock Co., Inc.