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.	))))	**FINAL DECLARATORY RULING RE PRE-1987 PROCESSING AND INTERLOCUTORY ORDER DENYING MOTION FOR STAY**

PROCEDURAL HISTORY

On January 27, 2003, Delis Farms filed application for permit to appropriate water no. 36-16125 ("Application") with the Idaho Department of Water Resources ("Department"). The proposed water use was described as follows:

Source of Water:	Ground water
Point(s) of Diversion:	#1 NESENW, Sec. 14, T8S, R22E[1] #2 NWSWSE, Sec. 15, T8S, R22E #3 NESENW, Sec. 22, T8S, R22E 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:	SW of Sec. 14, T8S, R22E, Minidoka County, Idaho.

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

> 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. Timely protests were filed by:

[1] Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are implicitly followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Minidoka County.

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

On June 1, 2004, TFCC and NSCC filed a *Petition for Declaratory Ruling and Motion to Stay* accompanied by the *Affidavit of Amy D. Chestnut* with exhibits (together, the "Petition"). The Petition requested that the Department stay processing of the Application and declare that the Department's pre-1987 development processing policy is invalid and violates the moratorium. A & B and Reclamation joined in the Petition.

In response to the Petition, the Department sent letters to a number of water right permit applicants whose pending applications describe water uses that commenced prior to November of 1987 without benefit of water right permits. The letter invited the 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 February 4, 2005. Following the prehearing conference, a *Prehearing Order and Notice of Hearing* was 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 Department 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 briefs in opposition to the Petition. On April 2, 2005, the *IDWR Staff Memorandum* was filed in this matter. In response, TFCC and NSCC filed a *Reply Brief in Support of Petition for Declaratory Ruling / List of Witnesses*.

A hearing was held on May 13, 2005. Velia De Giulio and Clear Lakes Country Club did not attend the hearing. The hearing officer issued a *Recommended Order re Petition for Declaratory Ruling and Motion for Stay*, dated June 2, 2005.

ANALYSIS

In the prayer for relief of the petition for declaratory ruling, *Petition* at 15, "the Canal Companies seek a declaratory ruling that the pre-1987 development processing policy is invalid and violates the moratorium." The singular phrase "the moratorium" in the prayer for relief implies that TFCC and NSCC seek an order declaring the "pre-1987 development processing policy invalid" for only a single moratorium. In contrast, the text of the petition discusses the history of the moratoriums prohibiting appropriations of water within the boundaries of the Snake River Basin, and discusses details about the presently effective "Non-Trust Water Moratorium," designated by a *Moratorium Order* dated January 6, 1993, and the "Eastern Snake

Plain Area" (referred to hereafter as the "Trust Water Moratorium"), designated by the *Amended Moratorium Order* dated April 30, 1993. The petition argues against "the pre-1987 development processing policy" within both moratorium areas.

In the *Recommended Order re Petition for Declaratory Ruling and Motion for Stay*, dated June 2, 2005, the hearing officer declares that "Application Processing Memo [N]o. 54 does not apply to the ESPA Moratorium [Trust Water Moratorium]." Application Processing Memo No. 54 was a memorandum from the former director of the Department, R. Keith Higginson, instructing staff that a *Moratorium Order* dated May 15, 1992, "may be interpreted to allow the continued processing and approval of applications proposing to cover an existing use ... [predating] ... the start of the Snake River Basin Adjudication." In determining whether processing of applications for use predating the start of the Snake River Basin Adjudication should continue under the Non-Trust Water Moratorium, or Trust Water Moratorium, the hearing officer focused on Conclusion of Law No. 5 of the original *Moratorium Order* of May 15, 1992, that was not included in the *Amended Moratorium Order* of April 30, 1993. The conclusion of law stated:

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

The hearing officer determined the above conclusion of law, concluding that the moratorium would apply to new consumptive uses, was "the apparent basis" for Application Processing Memo No. 54. The hearing officer also determined the *Amended Moratorium Order* of April 30, 1993, "completely replaced" the *Moratorium Order* of May 15, 1992, and that "Application Processing Memo No. 54 cannot act as an interpretation of the intent of the subsequent ESPA [Trust Water] Moratorium."

In his decision, the hearing officer observed that the "wholly new *Moratorium Order* for the non-trust water area ... maintained the language adverting to 'new consumptive uses' that was the apparent basis for Application Processing Memo # 54."

If the Non-Trust Water Moratorium Order and the Trust Water Moratorium Order were distinguished because of inclusion of the above quoted conclusion of law in one and exclusion in the other, respectively, the implication would be that the Department might continue processing applications for pre-1987 development in the Non-Trust Water Area, and discontinue processing of applications for pre-1987 development in the Trust Water Area. This would result in disparity of processing in the two areas without reasonable justification. While the hearing officer's analysis is thorough, a statement in a conclusion of law that " a moratorium on permits ... for new consumptive uses should be established" without related order language excepting existing consumptive uses is not sufficient justification in the order to support the processing of applications proposing appropriation of water for pre-1987 development.

For purposes of consistency, this order holds that processing of applications for permits proposing appropriations for pre-1987 development without accompanying mitigation will be

discontinued in both the Non-Trust Water Moratorium Area and in the Trust Water Moratorium Area.

FINDINGS OF FACT

Moratoriums

1. On May 15,1992, the Director of the Department issued a *Moratorium Order* prohibiting water right processing in the Snake River Basin upstream of the U. S. Geological Survey ("USGS") gaging station near Weiser, Idaho. The order granted blanket exceptions to the moratorium prohibition for the following uses:

(a) Nonconsumptive uses.

(b) 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 Idaho Code § 42-111.

(c) Use of ground water supplementing a surface water right that normally provides a full supply of water.

2. On July 1, 1992, the Director of the Department issued a memorandum to Department staff discussing the "intent" of the moratorium order of May 15, 1992 ("Application Processing Memo No. 54"). Application Processing Memo No. 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

3. 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 USGS gaging station near Weiser, Idaho, excluding the Non-Trust Water Area. The first order, titled *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 the amended moratorium order. The second order was a new *Moratorium Order* for the Non-Trust Water Area only.

4. Finally, on April 30, 1993, the Director issued the *Amended Moratorium Order,* which reduced the area under the moratorium upstream of the USGS gaging station near Weiser, Idaho, to include only the area tributary to the Snake River between the USGS gaging station near King Hill, Idaho and Milner Dam, designated the "Eastern Snake Plain Area."

5. The Trust Water Moratorium stayed new appropriations, but included several blanket exceptions similar or identical to the previous orders. The Trust Water Moratorium also included a new case-by-case exception to the prohibition on 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

6. The points of diversion proposed in the Application would withdraw ground water from wells in Sections 14, 15, and 22, T8S, R22E., B.M., which is designated administrative Basin No. 36 in Department records. This area is within the Trust Water Moratorium Area.

Application Processing Memo No. 54

7. Application Processing Memo No. 54 specifically interpreted the *Moratorium Order* dated May 15, 1992, not the Trust Water Moratorium or the Non-Trust Water Moratorium.

8. Application Processing Memo No. 54, if applicable, would be a substantive change to the Trust Water Moratorium. The Trust Water Moratorium on its face provides no blanket exception for the processing of applications for permits to legitimize pre-November 1987 water uses. While the Trust Water Moratorium does provide for case-by-case exceptions Application Processing Memo No. 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 uses.

9. Application Processing Memo No. 54 did not comply with proper notice and hearing procedures necessary to make such a substantive change to the Trust Water Moratorium and the Non-Trust Water Moratorium. The moratoriums were established pursuant to Idaho Code § 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.

10. The notice and hearing rules for moratoriums on applications for permits to appropriate water are contained in Rule 55 of the Department's Water Appropriation Rules (IDAPA 37.03.08.055.):

01.b. Notice of the director's action to cease application approval will be by:

i. Summary Order served by certified mail upon the then existing affected applicants; and

ii. Publication of the order for three (3) consecutive weeks in a newspaper or newspapers of general circulation in the area affected.

01.c. Objections to the director's action shall be considered under the department's adopted Rules of Practice and Procedure and applicable law.

11. Application Processing Memo No. 54 apparently was distributed primarily to Department staff and only incidentally came to the attention of the public. This is an improper and invalid means to substantively amend a moratorium order.

ORDER

Based upon and consistent with the foregoing, IT IS HEREBY ORDERED that the Motion to Stay filed by the Twin Falls Canal Company and the North Side Canal Company is DENIED. The denial of the Motion to Stay is an interlocutory order related to the continued processing of application for permit to appropriate water no. 36-16125.

IT IS FURTHER ORDERED that the Department will continue to process application for permit to appropriate water no. 36-16125 in the name of Delis Farms, Inc. and other applications to appropriate ground water underlying the Non-Trust Water Moratorium Area and Trust Water Moratorium Area.

IT IS FURTHER ORDERED that within fifty six (56) days of this Order, Delis Farms, Inc. must submit a plan to mitigate for depletions to the Snake River and tributary springs that will be caused by its proposed appropriation of water. The plan of mitigation must comply with accepted Department standards for determining reach gains and losses to the Snake River and tributary springs. Should Delis Farms, Inc. fail to file the plan of mitigation within fifty six

(56) days, application for permit to appropriate water no. 36-16125 will be voided without prejudice.

IT IS FURTHER ORDERED that, alternatively, Delis Farms, Inc. may request that application for permit to appropriate water no. 36-16125 be held by the Department as a pending application in the moratorium area.

IT IS FURTHER ORDERED that until a valid water right establishes the point of diversion and place of use described by application for permit to appropriate water no. 36-16125, Delis Farms shall not irrigate the proposed place of use. Irrigation of the place of use described by application for permit to appropriate water no. 36-16125 without a valid water right is an illegal use of water for which the Department will issue a notice of violation and cease and desist order.

IT IS FURTHER ORDERED AND DECLARED that there is no existing valid exception from the processing prohibition of the Non-Trust Water Moratorium or the Trust Water Moratorium for applications for permits that propose appropriation of water for beneficial uses completed on or before November 19, 1987. Any applicants proposing appropriation of water from ground water in the Non-Trust Water Moratorium or Trust Water Moratorium areas for beneficial uses of water completed on or before November 19, 1987, must mitigate for the predicted depletions to the Snake River and tributary springs that will be caused by the proposed diversion and use of ground water. This portion of the Order granting declaratory relief is a final order. The parties to this matter may pursue any of the procedural remedies of petitioning for reconsideration or appealing to the courts of the State of Idaho, as set forth in the instructions enclosed with this order.

Dated this 19th day of November, 2005.

KARL J. DREHER
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of November, 2005, a true and correct copy of the above and foregoing documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Delaratory Ruling Re Pre-1987 Processing and Interlocatory Order Denying Motion for Stay; and

Statement of Available Procedures and Applicable Time Limits When a Hearing Has Been Held.

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