

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR WATER RIGHT NO. 65-13925)	PRELIMINARY ORDER
IN THE NAME OF DONALD K.)	
WEILMUNSTER.)	
_____)	

A hearing was conducted for the above titled matter on May 8, 2001. After presentation of the evidence, the parties submitted written briefs. Based on the evidence and the arguments presented by the parties, the hearing officer proposes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Application for water right no. 65-13925 was filed by Donald K. Weilmunster (Weilmunster). The application proposes the following:

Flow rate:	4.62 cubic feet per second (cfs)			
Purpose of use:	Irrigation			
Source of water:	Ground water			
Point of Diversion:	T16N, R3E, B.M.	Section 5	SESE ¹	
			Lot 1 (NENE)	
			Lot 4 (NWNW)	
		Section 9	SWNW	
Place of Use	T16N, R3E, B.M.	Section 6	Lot 1 (NENE)	7 acres
		Section 5	Lot 1 (NENE)	38
			Lot 2 (NWNE)	39
			SWNE	40
			SENE	37
			Lot 3 (NENW)	39
			Lot 4 (NWNW)	39
			SWNW	22
			NESE	33

¹ The absence of a numerical subdivision fraction implies that the fraction "1/4" should be read into the land description.

	NWSE	40
	SESE	29
Section 4	Lot 4 (NWNW)	17
	SWNW	5
	NWSW	2
	SWSW	13
Section 9	NWNW	26
	SWNW	<u>36</u>
	Total acres	462

Proposed Priority: June 21, 2000

Proposed Season: April 15 – October 31

2. The proposed place of use is known as the Park Ranch. Weilmunster owns surface water right nos. 65-2267, 65-2502, 65-2668, and 65-3895 appurtenant to the Park Ranch. These water rights authorize diversion of 9.35 cfs from Mud Creek for irrigation of the same 462 acres proposed to be irrigated by application for permit no. 65-13925. Weilmunster irrigates summer pasture and grazes cattle on the Park Ranch.

3. According to the statements of Weilmunster's attorney at the beginning of the hearing and testimony presented at the hearing, Weilmunster only intends to use the groundwater when his decreed surface water rights are not available for use.

4. The diversion to the ditch delivering water to the Park Ranch is the next to the last diversion from Mud Creek before Mud Creek flows into Cascade Reservoir. Water for several other water rights is also diverted from Mud Creek at this location. A water user receiving water from the ditch at a location downstream from the Park Ranch owns a water right bearing a priority date earlier than Weilmunster's surface water rights.

5. In the past, some of the water flowing in lower Mud Creek during the summer months has been derived largely from runoff from upstream agricultural fields flood irrigated with surface water. Many of the upstream water users have recently converted their surface water irrigation delivery and application systems from flood irrigation to pressurized sprinklers. The conversion to pressurized pipelines and sprinklers has, and will, reduce return flows available for diversion by Weilmunster in Mud Creek.

6. The waters of Mud Creek have not been regulated by a water master for a water district as described by Chapter 6, Title 42, Idaho Code. If regulated, the waters would be administered by the watermaster of Water District no. 65, Payette River.

7. Citizens of Valley County (CVC) and Idaho Rivers United (Rivers United) protested the application, asserting that the application is filed for speculation, it is not filed in good faith, it is not in the local public interest, and it will not conserve the water resources of the state of Idaho.

8. Weilmunster is the corporate president of WestRock, Inc., a subsidiary corporation of WestRock Associates, L.L.C., a limited liability corporation. There is also a Delaware limited partnership named WestRock L.P. that holds an option to purchase the Park Ranch from Weilmunster. All of these corporations/partnerships are participating in proposing development of a year-round ski resort on West Mountain, located west and south of Donnelly, ID. Because the distinctions between these corporate and partnership entities is not clear, this decision will refer to the development and the entities together as “WestRock,” unless a specific reference is necessary.

9. The Park Ranch is located approximately six miles north of the proposed WestRock development.

10. Weilmunster has been a principal promoter of the WestRock development. The Park Ranch has been an active component of the proposed WestRock development, both as the location of proposed points of diversion to provide water to the development and also as a site for application of treated sewage.

11. In a letter sent to Valley County, Weilmunster stated:

A question was raised at the January 13, 2000 . . . public hearing regarding the application I filed with the Idaho Department of Water Resources at the Reuse Site on December 13, 1999. The application requests approval to drill up to four deep aquifer wells for use as supplemental irrigation water.

. . . The wells will be constructed to comply with standards for potable water supply and could be used to provide domestic supply to WestRock’s Reuse and Resort Sites. Therefore, WestRock will have the physical means to provide domestic water to the project’s private lands and the state lands, once the wells are constructed. Protestant’s Exhibit R, Don Weilmunster memo to Les Ankenman, P&Z Administrator for Valley County, January 18, 2000.

12. In a report to the Idaho State Department of Lands, WestRock stated:

The Park Ranch test-well was drilled in 1990 to explore for deep, better quality groundwater supplies under Long Valley. This well is located on property owned by Don Weilmunster, know as the Park Ranch, on which WestRock has an option to purchase and which lies approximately 6 miles north of the WestRock site The proven water supply beneath the Park Ranch provides a back-up water supply option for WestRock in the event on-site wells prove inadequate to meet total demand. Protestants’ Exhibit O, Refined Response to Request for Proposal to the Idaho Department of Lands, February 20, 2001.

13. In another report to the Idaho State Department of Lands, WestRock stated:

The applicant would initiate water rights transfers in accordance with state law to use existing irrigation water rights associated with the private property. Application to connect existing irrigation rights for use at the Resort Site will occur following State approval of the WestRock proposal for state land. Protestants' Exhibit T, Response to Request for Proposal to the Department of Lands, page 36, February 23, 2001.

14. WestRock L.P. a Delaware limited partnership, owns an option to purchase the Park Ranch. The option is documented by a *Second Amended and Restated Option Agreement*, executed August 15, 2000, and an *Amendment and Supplemental Agreement to Second Amended and Restated Option Agreement*, executed October 18, 2000. Copies of the agreements with much of the text removed (redacted) were received into evidence as Protestants' Exhibit V. Much of the exhibit is blank because of the redaction, and the parties agreed that the hearing officer could review full copies of the agreements *in camera*. Counsel for Weilmunster submitted full copies of the agreements to the hearing officer, and the documents were reviewed in confidence, sealed, and mailed back to counsel.

15. The hearing officer finds that all pertinent information contained in the agreements relevant to this decision, except the purchase price, the cost of the option, and the compensation for future improvements, including water rights, was contained in the redacted copy of the agreements. The *Second Amended and Restated Option Agreement* provides for payment of significant compensation to Weilmunster in addition to the purchase price for perfection and defense of any future water right describing the Park Ranch as a place of use.

16. During cross-examination, Weilmunster was asked if he would be pursuing a groundwater right for the Park Ranch if WestRock had a water right. Weilmunster stated that he "wouldn't be here." He later countered during redirect examination, however, that the primary purpose for the filing was to obtain a supplemental supply of water for irrigation of the Park Ranch. He testified that the Park Ranch remains the location for an optional supply of water for WestRock.

17. The hearing officer finds that one of Weilmunster's objectives for seeking to obtain a water right for supplemental irrigation is to secure a ground water right as security in case WestRock cannot obtain a water right in sufficient quantities on site for the development. The reasons for this conclusion are: (1) Weilmunster is the chief promoter of the WestRock development; (2) Weilmunster is the president of the corporation behind the development, (3) Weilmunster and WestRock have consistently referred to the Park Ranch as either the primary or backup location for obtaining water rights to supply water to the development, and (4) Weilmunster's statement that he "wouldn't be here."

18. The hearing officer also finds that the diminishing supply of water in Mud Creek is good reason for Weilmunster to seek additional water to irrigate the Park Ranch.

19. Weilmunster presented a plan for delivery and application of groundwater to the Park Ranch with pressurized sprinklers. An expert witness testified that application of water with sprinklers is a recognized method of efficient irrigation, and would conserve water.

20. Protestants submitted evidence that the surface water presently delivered to the Park Ranch is applied inefficiently by flood irrigation. Surface water delivered within the Park Ranch overtops the existing ditches. An existing flume that once delivered water to the east side of Mud Creek is either nonfunctional or has not delivered any significant water for several years.

21. The main delivery canal passes through the property of several upstream landowners. The canal is not well maintained. The ditch is unreasonably wide in places, and in other places the growth in the canal inhibits the flow, all preventing efficient delivery of surface water.

22. An eight-inch well was completed on the Park Ranch in 1990. The production zone for the well was completed in an aquifer at 350 – 400 feet below land surface. The only other well completed in this zone is a well owned by the City of Donnelly. Pump tests on the Park Ranch well and the city well both show that there is a significant source of water at the depth of the production zone.

23. Expert testimony established that all nearby domestic wells were completed in shallower aquifers separated from the deeper aquifer by layers of clay that significantly retard water communication between the aquifers. The City of Donnelly's well is far enough away that pumping from the proposed Weilmunster wells will not result in any significant direct well interference.

24. Applicant's Exhibit 17 is a compilation of letters from financial banks at which Weilmunster transacts business. The letters verify that Weilmunster has sufficient resources to construct the project.

25. Testimony at the hearing established that the additional water supplementing the surface water delivered to the Park Ranch will improve the production of the land and will result in greater economic benefit to the local area.

CONCLUSIONS OF LAW

1. Idaho Code § 42-203A states in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply is insufficient for the purpose for which

it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

2. The applicant bears the burden of proof for the factors IDWR must consider in Idaho Code § 42-203A.
3. Diversion as proposed by Weilmunster will not injure other water rights.
4. There is sufficient water in the deep aquifer from which Weilmunster proposes to complete the wells to supply water for the purpose sought.
5. Weilmunster has sufficient financial resources to complete the project.
6. The use of water proposed is in the local public interest.
7. Groundwater irrigation of the Park Ranch with sprinklers is an efficient use of water. Nonetheless, Weilmunster's application proposes the use of ground water to supplement surface water rights that are delivered and applied inefficiently. Weilmunster should not be allowed to substitute ground water for surface water if his surface water rights can be fully supplied.
8. Surface water from Mud Creek should be diverted and beneficially used as authorized by existing water rights before ground water is diverted under a new water right permit. Ground water diverted under any permit issued for this application should only be diverted in an amount that is not available from surface water delivered to the Park Ranch. Availability of water can only be determined if the waters of Mud Creek are administered by a watermaster. Headgates and measuring devices must be constructed/installed at the diversions from Mud Creek to insure that the users of water are receiving the amount to which they are entitled.
9. In addition, Weilmunster should insure that he is receiving the full measure of his surface water rights. Weilmunster should be responsible for constructing, installing, and maintaining the necessary headgates and measuring devices to measure and control delivery of his surface water rights, both at the point of diversion from Mud Creek and from the ditch delivering water from Mud Creek. Weilmunster should also be responsible for measuring and reporting diversions of both surface and ground water to IDWR.

10. There is good reason for Weilmunster to obtain a supplemental water right. Nonetheless, IDWR must protect against speculation because of: (1) the consistent connection of the Park Ranch to the WestRock development, including Weilmunster's testimony that he "would not be here" without the WestRock proposal, and (2) Weilmunster's central involvement in WestRock matters. IDWR should not consider any application for amendment of a permit or transfer of the water right issued to change the nature of use, place of use, or period of use until the full beneficial use is complete, the beneficial use is examined, and a license has been finally issued by IDWR.

ORDER

IT IS HEREBY ORDERED that application for water right no. 65-13925 is **APPROVED** subject to the following conditions:

1. Prior to issuance of a drilling permit under this permit, prior to any diversion of ground water from existing wells, and prior to any development authorized by this permit: (1) The watermaster (or a deputy watermaster) for Water District no. 65, Payette River, must be regulating the flows of Mud Creek; and (2) The permit holder shall submit a plan for measuring and reporting diversions and obtain approval of the plan by IDWR. The plan shall explain how instantaneous flow and annual volume delivered to the Park Ranch from both ground water and surface water will be measured, and how the measurements will be reported to IDWR. Plans and specification for measuring devices and controlling works at both the point of diversion from Mud Creek and the delivery of Mud Creek water from the delivery ditch shall be submitted with the plan.
2. Prior to diversion of ground water under this permit, the permit holder shall construct/install the controlling works and measuring devices described by the plan for measurement and reporting.
3. Surface water shall be fully used prior to any diversion of ground water. Instantaneous flow of 9.35 cfs and annual volume of 1,386 acre-feet from a combination of ground water and surface water shall not be exceeded.
4. The permit holder shall annually measure and report diversions of both surface water and ground water delivered to the place of use described by this permit to IDWR upon IDWR forms. The report shall be submitted on or before January 15 of each year.
5. Permit holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.
6. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be

released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

7. Applications for amendment or for transfer of this water right permit proposing to change the place of use, period of use, or nature of use shall not be accepted or considered by the department until the full beneficial use is complete, the beneficial use is examined, and a license has been finally issued by the department.

8. The well(s) will be constructed to take water only from water bearing zones located at least 300 feet below land surface.

Dated this _____ day of September, 2001.

Gary Spackman
Hearing Officer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this _____ day of September, 2001, the above and foregoing document was served upon 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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