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Jeff Fereday
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*Re: Water Right No. 37-8252 (Dowers); 37-494, 37-495, 37-577BV, 37-657B,
37-833K, 37-2623 (Valley Club)*

Gentleman:

The individuals making up the Concerned Water Users filed objections to the water rights held by your clients identified above on the grounds that rights for aesthetic, wildlife or recreation uses are not appropriate rights to be held by a private party without due authorization from the legislature, which has not been given in any of the water right statutes. We understand that you may have a different view of the Department's ability to grant or your client's authority to obtain an aesthetic, recreation or wildlife right in the absence of legislative authorization. I am not writing here to debate that issue. Instead, I am proposing a method for resolution of all of the objections by the Concerned Water Users to the rights for aesthetic, wildlife and recreation uses.

My clients are more concerned about the practical effects of impounding water in the upper portions of the basin than in debating the fine points of constitutional law or the authority of the Department of Water Resources. Accordingly, my clients are willing to withdraw their objections to aesthetic, wildlife, and recreation uses on the following conditions dealing with elements of the water right, rather than whether the water right can exist in the first place. The elements which concern my clients, along with a proposal of how to deal with those concerns, are set forth below.

1. Diversion Rate. The diversion rate would be set at the same diversion rate as an irrigation right: one inch per acre for every acre of surface area of the aesthetic recreation or wildlife purpose. Studies have been done over the years suggesting that the seepage and evaporation from ponds and other aesthetic amenities are approximately the same as that of an

irrigated field. The Department has acknowledged pond use to be roughly equivalent consumptive use to irrigated fields in a number of decisions over the years. If the aesthetic, wildlife, or recreational use was transferred from a preexisting water right, the diversion rate cannot exceed the diversion rate on a per acre basis of the preexisting right.

2. Volume. As with the diversion rate, the consumptive use from the pond or other aesthetic recreational wildlife use should be limited to the irrigation annual total volume of 3.5 feet per acre, not to exceed the right from which the aesthetic, recreational, and wildlife use is derived. We would also believe that a provision to ensure that this consumptive use requirement would not be exceeded should be handled by inclusion of the following remark, which has been used by the Department in some rights in the Basin.

“At the end of each irrigation season, the right holder shall measure the remaining volume in the storage pond. Any year that the storage volume drops below ____ acre feet [the storage volume of the pond] irrigation the following year shall be reduced by 1.0 acre for every 2.5 acre feet required to increase the volume to the storage volume of the pond.

3. Measurement. Many of the water rights in the basin have a generic measurement requirement which typically states something like the following:

“The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the water master suitable control of the diversion.”

With aesthetic, recreation, and wildlife uses, a single measuring device is not sufficient for the water master to adequately measure the usage by the ponds and other aesthetic streamlets. Therefore, the following remark regarding measuring devices for the ponds and other aesthetic uses would be necessary. The Department has recognized this need in a number of water rights in the Basin. This remark should be carried forward into all of these rights. The following language would be acceptable.

“Prior to diversion of water, flow measuring devices specified by the Department and/or water master shall be installed by the right holder at the point of diversion [from the stream/or to storage] and the point of discharge back to the stream. The flow measuring devices shall provide a means of measurement and lockable controlling works which will provide suitable control of the diversions.”

4. Administration. There have been instances in the Big Wood where individual water right holders have attempted to lock out the water master from performing his duties. In order to prevent recurrence of those instances, to the extent this remark is not contained in the recommendation for your clients' rights, the following remark shall be included:

“Use of the water under this water right will be regulated by the water master of State Water District No. 37.”

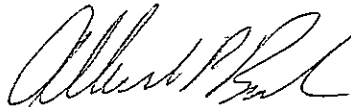
5. Water Quality. The Big Wood River is a water quality limited segment. Ponds increase water temperature and nutrients which are returned to the Big Wood River. The Department has included water quality provisions in other water rights. To protect the Big Wood River, the following remark shall be included:

“Water used under this right when discharged back to a natural channel shall comply with Idaho Water Quality Standards. Monitoring may be conducted by the Idaho Department of Water Resources and/or the Idaho Department of Environmental Quality.”

The individuals making up the Concerned Water Users believe that these conditions are both reasonable and consistent with requirements of Idaho Water Law. If your clients are willing to accept these conditions on the use of water in the ponds and other aesthetic, recreation and wildlife rights, the Concerned Water Users will withdraw their objections to the existence of this right. We have consulted with Big Wood Canal Company and they agree to withdraw their objections to these rights, on the same conditions. I think you will agree that this is a significant proposal from the objectors and we hope that it will result in resolution of these objections. It will mean that a large scale legal battle can be averted. If this proposal does not meet with your clients approval, the Concerned Water Users will amend their objections to raise these conditions as to the use of the water under these rights.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP



Albert P. Barker

APB/jcm

cc: Concerned Water Users
Craig Hobdey
Chris Bromley (IDWR)