

AUG 20 2008

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

By

Clerk

Deputy Clerk

In Re SRBA Case No. 39576 DKJ Farms, C/O Dallan Jeppesen, RESPONDERS, George Brown, M.D. OBJECTOR.	Subcase Nos: 22-00265E, 22-04195, 22-13479, 22-00594 Brigette Bilyeu, Special Master, Snake River Basin Adjudication, Presiding. OBJECTOR'S AMENDED ~~CLAIM~~ <i>Objections</i>
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August 11, 2008

DKJ Farms asks the Snake River Basin Adjudication to finalize Transfer Right 22-00265E, Transfer Right 22-00594, Right 22-04195, and Right 22-13479 illegally approved by the Idaho Department of Water Resources, hereafter referred to as IDWR. Approval of these rights came after 1977. These rights should not exist because a past IDWR intentionally breached a duty to enforce existing laws expressed in the Stream Channel Protection Act and in Idaho Codes 42-222, 42-202B, and 42-1425 as originally written and to protect property owned by the State of Idaho.

Exercising rights approved by IDWR caused Moody Creek to dewater in an eight-mile segment of the stream starting in 2001. Fish died, wildlife suffered, and legal water users lacked water. Restoring an adequate flow in this segment of the creek makes common sense and obeys the law. Furthermore, continued enforcement of existing laws should prevail.

Moody Creek arises and terminates in Madison County. It was once an outstanding spawning and residual habitat to cutthroat trout. Usage of the above rights destroyed this fishery! Past IDWR has created an outrageous, intolerable, ongoing public situation that needs a Court remedy!

In 1980 personnel of the Department of Fish and Game and interested people attended public meetings to protest proposed water rights in upper Moody Creek. Protestors stated that other owners would be injured and that a productive cutthroat fishery would be destroyed, contrary to local public interest. IDWR recorded this information for future reference. No mention of the Stream Channel Protection Act of 1971 came from anyone at that time.

Despite knowing about oral and written protests, Rights 22-13479 and 22-04195 dated 1980 were approved by IDWR in upper Moody Creek, while Transfer 3002 was rejected in 1980 at the same point of diversion.

IDWR holds the primary duty to protect fish and streams owned by the State of Idaho. By approval of rights that adversely affect both fish and stream, IDWR breaches enforcement of fundamental, primary duties. DKJ's rights should not exist because the property of the State of Idaho has not been protected by IDWR as required by law.

IDAHO STATUTES
TITLE 42
IRRIGATION AND DRAINAGE---WATER
RIGHTS AND RECLAMATION
CHAPTER 38
ALTERATION OF CHANNELS OF STREAMS

Idaho Code 42-3801 LEGISLATIVE INTENT---STREAM CHANNELS---ALTERATIONS. The legislature of the state of Idaho hereby declares that the public health, safety and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of any stream channel shall hereafter be made unless approval therefor has been given as provided in this act.

The Legislature defines "stream channel" as a watercourse. Webster defines watercourse as stream of water and a natural or made channel through which water flows and defines channel as the deeper portion of a stream.

Idaho Code 42-3806 states in part, "EXISTING RIGHTS UNAFFECTED---WHERE PERMIT NOT REQUIRED.. This act shall not operate or be so construed as to impair, diminish, control or divest any existing or vested water rights acquired under the laws of the state of Idaho or the United States, nor to interfere with the diversion of water from streams under existing or vested water right or water right permit for irrigation---"

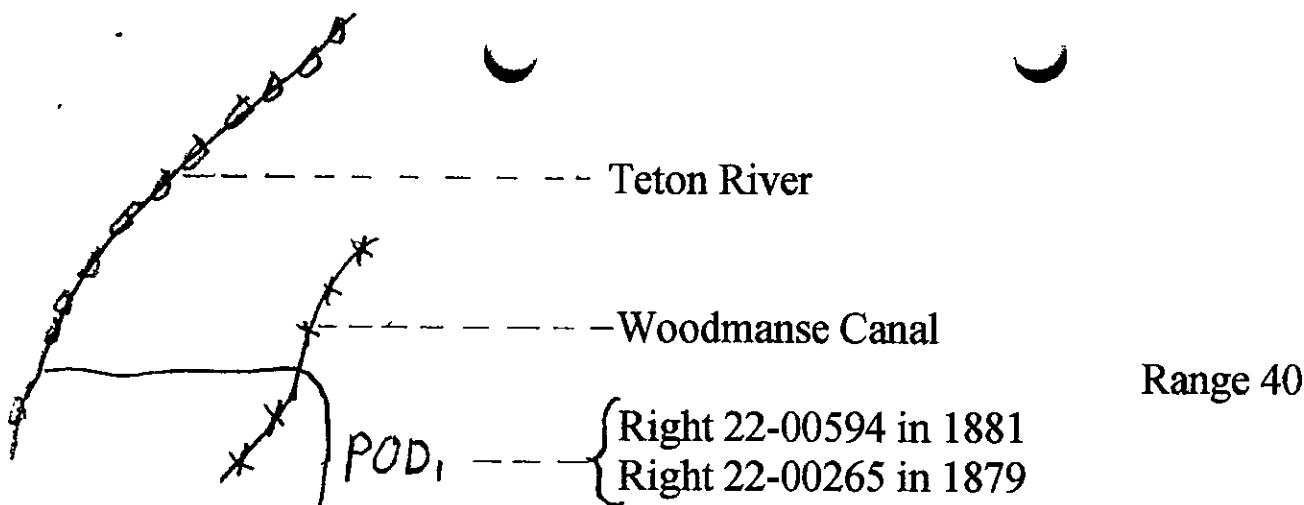
The uniqueness of this law is that no protests or meetings from the public must exist before implementation or enforcement.

THE STREAM CHANNEL PROTECTION ACT OF 1971

The IDWR states, “ The Idaho Stream Channel Protection Act requires that the stream channels of the state and their environment be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. This means IDWR must approve in advance any work being done within the beds and banks of a continuously flowing stream.

The Act requires that you first get a stream channel alteration permit from IDWR before you begin any work that will alter the stream channel.

A stream channel alteration is defined as any activity that will obstruct, diminish, destroy, alter, modify, relocate or change the natural existing shape or direction of water flow of any stream channel. This includes taking material out of the channel or placing material or structures in or across the channel where the potential exists to affect flow in the channel.”



TRANSFER NOT GUARANTEED
BY EXISTING RIGHT

8 mile segment of Moody Creek

Stream Protection Act of 1971
MOODY CREEK BECAME PROTECTED

ILLEGAL

POD₂ — { Transfer 22-00265E approved in 1985.
Transfer 2034 approved in 1977.
Transfer 3002 approved in 1985.
Range 41
Right 22-13479 approved in 1980.
Right 22-04195 approved in 1980.
Transfer 22-00594 approved in 1980 exists on
paper only presently and not delivered recently.

*CREEK PUMPED DRY IN 8 MILE
SEGMENT STARTING IN 2001.*

Moody Creek

Rights 22-00265 and 22-00594 in Range 40 EBM that existed before 1971 are protected.

But Rights 22-00265E, 22-00594, 22-04105, and 22-13479 in Range 41 EBM in upstream Moody Creek were illegally approved by IDWR after 1979, breaching the intent of the Legislature to protect fish and wildlife. Rights 22-00594, 22-04195, and 22-13479 should not exist because neither past nor present IDWR has issued stream channel alteration permits for these rights to diminish the creek.

Outrageously, the present IDWR continues to allow DKJ Farms to diminish Moody Creek without a valid stream channel alteration permit! This is a continued breach of duty to enforce this law. Right now Jeppesens and DKJ Farms should be cited and penalized to the full extent of the law for crimes committed for over 23 years and should be declared a public nuisance, as Idaho Code 42-3809 directs.

The Legislature directed IDWR to enforce the water rights given by the Stream Channel Protection Act of 1971 to Idahoans, fish, and wildlife. So far this law has been ignored and not enforced. Nevertheless, this law remains more understandable than most. Hopefully, the people at IDWR will reevaluate this law. To glean even at this late date that idwr must protect fish in a protected stream channel would restore flow in Moody Creek!

Two letters from Director Tuthill are inserted.



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

July 3, 2007

Mr. George Brown, M.D.
1439 Cambridge Drive
Idaho Falls, ID 83401-4209

Dear Mr. Brown:

Thank you for your email dated June 30, 2007. As director of the Idaho Department of Water Resources (IDWR), it is my duty to administer a variety of different laws that affect Idaho's water. Regulation and oversight over water rights is a large part of our duties, but we also administer other regulatory programs such as Idaho's *Stream Protection Act (Act)* I.C. § 42-3801 et seq.

The *Act* was passed by the Idaho Legislature in 1971 and provides some level of protection to non-intermittent streams in Idaho. The *Act* certainly was a landmark improvement for the state in the area of stream channel protection. However, the *Act* did include some significant limitations and protections for existing or vested water rights.

I.C. § 42-3806 provides in part: EXISTING RIGHTS UNAFFECTED -- WHERE PERMIT NOT REQUIRED. This act shall not operate or be so construed as to impair, diminish, control or divest any existing or vested water rights acquired under the laws of the state of Idaho or the United States, nor to interfere with the diversion of water from streams under existing or vested water right or water right permit for irrigation, domestic, commercial or other uses as recognized and provided for by Idaho water laws...

The Stream Protection Act was not implicated in the exchange process because DKJ Farms' diversion was authorized under existing Idaho water rights. Your concerns about the fishery and the wildlife along this reach of the Moody Creek are well stated and your email will be included in the DKJ Exchange file with IDWR.

Sincerely,

David R. Tuthill
Director

C: Governor's Office



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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

July 9, 2007

Mr. George Brown, M.D.
1439 Cambridge Drive
Idaho Falls, ID 83401-4209

Mr. Brown:

Thank you for your email dated July 8, 2007. I am sorry you are unhappy with the status of the water right diversions from Moody Creek. I acknowledge and can appreciate why you would like to maintain a sufficient minimum flow in Moody Creek to sustain the native fishery.

Water right no. 22-265 is a vested property right. Although it that can be regulated by the state, it cannot be taken away or diminished by state action without just compensation. The Idaho Department of Water Resources (Department) did not issue water right no. 22-265. It was decreed by a court with a priority date of March 15, 1879 during a time when most of the state was concerned about irrigation and not the fish. As the public awareness grew, the Idaho Legislature responded with passage of the Stream Protection Act (Act) in 1971 with provisions to protect those existing water rights and vested property rights. The legislative intent language in I.C. § 42-3801 must be read with the rest of the language in the Act including the savings provision in I.C. § 42-3806 to fully appreciate the limitations facing the Department when it administers the Act.

Finally, although the Department does maintain some enhanced flexibility to address certain matters in transfer or exchange proceedings when an owner wants to do something different with its water rights, the Department cannot use that proceeding to unilaterally take away or diminish the water right. I trust that this response is sufficient to address the issues raised in your last email.

Sincerely,

David R. Tuthill
Director

FAILURE OF PRIOR IDWR TO IMPLICATE THE STREAM CHANNEL PROTECTION ACT IN DECISION MAKING

In the last paragraph of the first letter, Director Tuthill states, "The Stream Protection Act was not implicated in the exchange process because DKJ Farms' diversion was authorized under existing Idaho water rights."

This Act existed before IDWR approved any rights at the upstream point of diversion of DKJ Farms and needed to be considered with all other existing water right laws in decision making. Apparently, this failed to transpire.

The second paragraph of the second letter states that vested property right no. 22-265, being an existing right, comes under the savings provisions of Idaho Code 42-3806. I fully agree! In addition, Right 22-00594 near the termination of Moody Creek is protected.

Therefore, Woodmansee-Johnson Canal should receive adequate water through vested Right 22-00594 to November. Presently, Woodmansee-Johnson Canal receives no water from Moody Creek after June 20th.

The last paragraph of the second letter states, "Finally, -- the Department does maintain some enhanced flexibility to address certain matters in transfer or exchange proceedings when an owner wants to do something different with its water rights".

This amounts to an understatement. In fact, all rights being contested here are creations of the prior IDWR with dates of approval after 1977.

Moreover, ownership of a right doesn't guarantee an owner that a right might be transferred. The Director of IDWR approves appropriate transfers.

RIGHT 22-00265

The source of water for Transfer Right 22-00265E is Right 22-00265. Transfer 2034 approved by the Director in 1977 and Transfer 3002 approved by the Director in 1985 merged into Right 22-00265E.

On August 11, 2008 Brent Barrus, representing Woodmansee-Johnson Canal Right 22-00594 in the terminal portion of Moody Creek, stated that an insufficient amount of water exists to irrigate past June 20th. Right 22-00265 claimed a point of diversion in the same region in Range 40 EBM. That the creek usually became dry after June 20th even before DKJ removed water from its upstream point of diversion was the reason Mr. Barrus gave to not protest any of DKJ's rights. Mr. Barrus's home phone is 208-356-4346 and work phone is 208-656-1056.

I frequently observed a dry creek from 1950 forward in the terminal portion of the creek during August, September, and October.

I asked Nate Arave, of the Idaho Falls office of the IDWR to search the records of the IDWR from 1879 to now to determine the actual amount of water removed at the point of diversion for Right 22-00265 in Range 40 EBM. No measurement was found. In fact, Mr. Arave stated no measurement is usually made presently unless someone complains.

If Right 22-00265 lacked water to transfer, Right 22-00265E should not exist and raises the question of fraud.

IDAHO CODE 42-1425

This code requires that transfers not injure other owners or enlarge original water rights. That the past Director of IDWR breached his duty to enforce both aspects of this law when he approved the transfers follows.

IDAHO CODE 42-222

TRANSFERS

Idaho Code 42-222 states in part, "The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code."

Ownership of a right does not guarantee that the right will be transferred.

INJURED WATER OWNERS

The following own prior rights downstream from DJK POD in Moody Creek that are adversely affected by DJK Farms' Rights:

- Domestic Decree 22-10005 owned by George Brown
- Stock water claim 22-13686 owned by R. Scott Wood
- Domestic rights held by Trent Wood under the Constitution
- Stock water rights 22-13557 & 11-13558 held by James Wood.
- Domestic right 22-4094 owned by David Wood
- Stock water right 22-10908 held by Leila Lewis.
- Decreed Right 22-594 held by Woodmansee-Johnson Canal

Rights granted to Idahoans by the Legislature through the Stream Canal Protection Act of 1971 to provide a flow of water in the stream sufficient to insure fish survival and administered by the Idaho Department of Water Resources.

The Stream Channel Protection Act of 1971 extended a water right for fish to thrive. This requires all the natural flow in the creek. Even the high run-off in the spring entices Teton River cutthroat trout to swim upstream to spawn.

ENLARGEMENT

Idaho Code 42-202B. Transfer Right 22-00265E and Transfer Right 22-00594 constitute a consumptive use enlargement. "Consumptive use means that portion of the annual volume of water diverted under a water right that---otherwise does not return to the waters of the state." The portion of the annual volume of water diverted by Right 22-00265E and Transfer Right 22-00594 does no return to the waters of the state as did the original rights. The transfers now dewater an eight-mile segment of Moody Creek while Rights 22-00265 and 22-00594 influenced less than a mile segment in the terminal portion of the creek. More than eight folds increase occurred! The prior Director's error to not implicate this law during transfer decision making becomes sufficient alone to revoke transfers in this case.

Transfer Rights 22-00265E and 22-00594 upstream take water that belongs to vested Right 22-00594 downstream, having a priority date of 1881. This means Transfer Rights 22-00265E and 22-00594 should not exist.

The amount of water available for use by Right 22-00265 near the termination of a creek is less than that available eight-miles upstream by Right 22-00265E. Streams lose water due to

seepage as the water flows downstream. This is observable in Moody Creek. Since Transfer Right 22-00265E removes most of the water in the creek, an enlargement of Right 22-00265 exists. When more water is available, human nature tends to increase duration, acres, and rate of water irrigated.

Going strictly on acres irrigated, a record from IDWR showed Right 22-00265 watered 148 acres of potatoes while Right 22-00265E waters 200 acres of potatoes. These numbers prove enlargement transpired.

IDWR illegally approved rights at DKJ Farms upstream point of diversion in Range 41 EBM by 1985. Until 1987 flow was adequate and fishing remained excellent. But starting in 2001 the creek was pumped dry. An enlargement occurred not only against approved rights but also against original rights. And this condition exists without Right 22-00594 being delivered to DKJ Farms upstream point of delivery in Range 41 over recent years.

LOCAL PUBLIC INTEREST

The number of fish in the dewatered segment of Moody Creek serves as an extremely accurate measurement of the flow of water in the creek. Fishing did not deteriorate until after 1987. I have not seen or caught a fish in this eight-mile segment over four inches in length since then. Pumping caused a progressive decline in the flow of Moody Creek. When pumping ceased, an adequate, full flow returned in October and later.

Most observers didn't note a major decline in the creek until 2001 onward. Last year, for example, the creek completely ceased to flow for the latter two weeks of July. Pumping has depleted Moody Creek to the point fish died. Barely a trickle of water flows in this segment now.

According to the Supreme Court in *Chisholm v. Idaho Dept. of Water Resources*, 2005, 125 P.3d 515, 142 Idaho 159, the term "local public interest" should be read broadly in transferred rights. Loss of trout in an eight-mile segment of a creek AND the segment of creek should be contrary to local public interest.

Enforcement of the Stream Channel Protection Act of 1971 protects fish and wildlife, which is in the local public interest.

DIVERSIONS

Ernie Carlson, of the Idaho Falls office of the Department of Water Resources, informed me IDWR doesn't know the flow of upper or lower Moody Creek.

No one has accurately measured the performance of these rights in Range 41 EBM. The pumps connect to a common irrigation system without a reliable measuring device attached. For example, Right 22-04195 might never have used any water or might have pumped water to the entire farm. Without adequate measuring devices, these rights should not exist.

Transfer Right 22-00594 has not been delivered to DKJ Farms over the last several years. However, the past Director apparently approved the transfer by ignoring existing state laws, as discussed previously.

SUMMARY

The Legislature protected Moody Creek from future diminishment by water rights after 1971 unless a valid stream channel alteration permit was issued. None has been issued.

DKJ Rights 22-13479, 22-04195, 22-00265E and 22-00594 approved by IDWR after 1977 should not exist because of the Stream Channel Protection Act. This law protects the stream, including the fish, after 1971.

An admission by Director Tuthill of IDWR's failure to implicate the Stream Channel Protection Act of 1971 in decision making concerning rights. Moreover, failure to implicate Idaho Code 42-202B in enlargement considerations represents two flaws sufficient to overturn prior IDWR illegal approvals.

Rights 22-00265E, 22-13479, 22-04195, and 22-00594 at DKJ Farms' upstream point of diversion should not exist because Right 22-00594 downstream is deprived of water.

Right 22-00265 lacked water after June 20th to transfer to Right 22-00265E, which means Right 22-00265E should not exist.

Transfer Rights 22-00265E and 22-0594 should not exist because a past Director of IDWR breached Idaho Code 42-1425, Idaho Code 42-222, and Idaho Code 22-202B to illegally approve these rights. Injury to other water owners, enlargement, and loss of a creek and fishery, contrary to local public interest, all exist.

Moreover, Transfer Right 22-00594 has not been delivered upstream in Moody Creek for several years.

None of DKJ Farm's rights should exist because no pumps employ reliable measuring devices.

Rights 22-00265E, 22-04195, 22-13479, and 22-00594 at DKJ's upstream point of diversion should not exist because a stream and fish owned by the State of Idaho have not been protected by IDWR as required by law. Approval of these rights by IDWR resulted in destruction of State of Idaho property. IDWR holds the duty to protect this property first before approval of any water rights to anyone or entity under the law!

George Brown, M.D.

Exhibits Follow