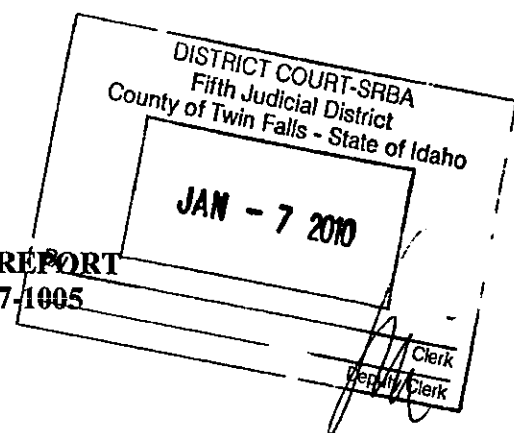


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**SUPPLEMENTAL DIRECTOR'S REPORT
REGARDING SUBCASE NO. 37-1005**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Gary Spackman, Interim Director
Donald V. Shaff, Adjudication Bureau Chief

January 6, 2010

I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, the Director of the Idaho Department of Water Resources ("Department") submits this amended Supplemental Director's Report ("Report") regarding subcase number 37-1005. The Report was prepared under the supervision of Gary Spackman, Interim Director, and Donald V. Shaff, Adjudication Bureau Chief. This report supersedes the report filed by the Department on or about June 22, 2009.

The following Department employee has knowledge of the information contained in the Report: Carter Fritschle, Manager, Adjudication Technical Section.

II. SUMMARY OF THE ISSUE

At issue is the Department's recommendation for 37-1005, more particularly, the Department's recommendation of Muldoon Creek and Spring Creek as sources for the right. The Department's recommendation of Muldoon Creek and Spring Creek as sources for 37-1005 has been objected to by Anita and Terry Clark ("Clark"). Water right no. 37-1005 was recommended by the Department to Muldoon Ranch Co., LLC ("Muldoon Ranch").

III. DISCUSSION

Water right no. 37-1005 was decreed by the district court in *Woodworth et al. v. Anthony et al.* (Blaine County, November 10, 1903).¹ As with all water rights in the *Woodworth* decree, no source was listed for the individual rights; instead, the court stated that the source for all rights in the decree was the "Little Wood River and its tributaries" *Woodworth* at 1. The holder of 37-1005, H.H. Butler, was awarded 70 inches of water (1.40 cfs) with a priority date of April 1, 1886. On November 18, 1908, an *Order Amending and Correcting Findings* was issued

¹ Attached hereto as Exhibit A is a copy of the *Woodworth* decree.

by the *Woodworth* court that described Butler's place of use as "Southwest quarter of Section 8, in Township 2, N. R. 21 East, Boise Meridian"² No point of diversion or source was described for 37-1005.

On or about October 28, 1988, a claim for 37-1005 was filed in the SRBA by Grant Ellsworth. The source claimed for 37-1005 was Spring Creek and Muldoon Creek. The claim for 37-1005 was amended by Muldoon Ranch on or about April 27, 2006. The amendments added acres and quarter-quarter descriptions to the claimed place of use as well as a point of diversion for Spring Creek in Section 8. On February 20, 2007, the Department recommended 37-1005 with sources of Muldoon Creek and Spring Creek.³ Water right no. 37-1005 is one of 13 rights that service a 1,419-acre permissible place of use held by Muldoon Ranch.⁴

Prior to issuance of the Director's Report for 37-1005, information was submitted to the Department by Brockway Engineering, PLLC, on behalf of Muldoon Ranch ("Brockway Report").⁵ In the Brockway Report, it was stated that Muldoon Ranch was originally two ranches, held by Laidlaw and Peterson. The Brockway Report stated that 37-1005 was originally appurtenant to the Peterson Ranch and diverted from Muldoon Creek and Spring Creek.

On November 14, 2007, an objection to 37-1005 was filed on behalf of Clark contesting the source for the right and that the point of diversion and place of use should be as previously

² Attached hereto as Exhibit B is a copy of the *Order Amending and Correcting Findings*.

³ Attached hereto as Exhibit C is a copy of the Department's recommendation; attached hereto as Exhibit D is a map of the decreed and recommended places of use.

⁴ Attached hereto as Exhibit E is a map of the Muldoon Ranch place of use and its decreed and licensed water rights. Exhibit E does not include three beneficial use water rights that were recommended by the Department and are unobjected: 37-22012 (de minimis stockwater), 37-22014 (irrigation enlargement), and 37-22015 (irrigation).

⁵ Attached hereto as Exhibit F is a copy of the Brockway Report.

decreed. Additionally, Clark stated that it was unlawful for the Department to recommend an accomplished change in source pursuant to Idaho Code § 42-1425.⁶

In order for water from Muldoon Creek to service parts of the Peterson Ranch, it was necessary to construct a ditch across the northern edge of the property. The Brockway Report refers to this diversion as Muldoon Ditch, with the point of diversion located in Section 3.⁷ In the Brockway Report, it was stated that Muldoon Ditch “was installed on the property in approximately 1919. . . .” *Brockway Report* at 2. The Brockway Report examined the history of Muldoon Ditch to support a priority date of June 1, 1919 for a beneficial use right “that intersects many small drainages along its length, including the Spring Creek and Brown Creek drainages.”⁸ *Id.*

As shown on the map contained in Exhibit G, Muldoon Ditch carries water from Muldoon Creek and intercepts Spring Creek in the NESW of Section 8. It appears from the Department’s investigation of previously decreed and licensed rights that divert from Muldoon Ditch in Section 3 that the ditch was likely completed in phases from approximately 1885 (*see* 37-1046) to approximately 1919 (*see* 37-1139). It therefore seems likely that the Muldoon Ditch was in use as early as 1885, but not fully completed until at least 1919. It is possible, but not known, if Muldoon Ditch replaced an earlier ditch.

⁶ The Department agrees with Clark that the recommendation should not have denoted an accomplished change in source, as this is not permitted under Idaho Code § 42-1425. The reference to accomplished change in source should be stricken from the Department’s recommendation. As will be discussed below, the ambiguity of the *Woodworth* decree is what led the Department to originally recommend Muldoon Creek and Spring Creek as sources for the right, not an accomplished transfer. *See* Idaho Code § 42-1427(2).

⁷ Attached hereto as Exhibit G is a map depicting water rights held by Muldoon Ranch that divert from Muldoon Ditch in Section 3.

⁸ The beneficial use claim was recommended by the Department as water right no. 37-22015 (12.50 cfs) with a priority date of February 16, 1927 and sources of Brown Creek, Spring Creek, and Unnamed Stream. February 16, 1927 was recommended as the priority date because that date is one day after the decree for water right no. 37-1139. Water right no. 37-1139 is the most junior water right decreed to the Muldoon Ranch lands. Water right no. 37-22015 is unobjected.

Because the *Woodworth* decree did not describe particular sources, the Department could not determine which source or sources were decreed to 37-1005, or make a reasoned interpretation as to whether the right, as originally decreed, was supplied only by Muldoon Creek, only by Spring Creek, or a combination thereof. Due to the ambiguities of the *Woodworth* decree, the Department used Idaho Code § 42-1427(2) to support its recommendation. Idaho Code § 42-1427(2) states: "If a licensed or decreed water right does not describe all of the elements of a water right . . . the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication."

On or about June 22, 2009, the Department filed its original supplemental Director's report in this subcase, stating that, based on the available information, the source for 37-1005 should be described as Muldoon Creek. The basis for this determination was the claim. Since the filing of the original report, Clark and Muldoon Ranch have filed four affidavits with the Department for consideration.

On October 6, 2009, Clark filed the affidavit of James Peterson ("Peterson"), former watermaster for Water District 37-O (Muldoon Creek) ("Peterson Affidavit").⁹ In the affidavit, Peterson stated that he was the area's watermaster from 1965 through 2006, and that he succeeded his father as watermaster. *Peterson Affidavit* at 2, ¶ 3. Peterson's affidavit confirms the Department's understanding of the relationship between Muldoon Ditch and how it carries water from Muldoon Creek and intercepts water from Spring Creek. *Id.* at 2, ¶ 4. Peterson disagreed, however, with the Department's conclusion that the source for 37-1005 is Muldoon

⁹ Attached hereto as Exhibit H is a copy of the Peterson Affidavit.

Creek. *Id.* Based on his experience as watermaster, Peterson stated as follows: “Water right no. 37-1005 has never been diverted and delivered from Muldoon Creek to my knowledge, and certainly not during my tenure as Watermaster of Water District 37-O. Instead, water right no. 37-1005 has historically been diverted and delivered from Spring Creek, a natural stream that is intercepted by an irrigation ditch known as Muldoon Ditch.” *Id.* Additionally, Peterson stated that “it is common knowledge amongst the resident and long time water users in the Muldoon Creek drainage that Spring Creek, and not Muldoon Creek, is the true and only source of water right no. 37-1005.” *Id.* at 2-3, ¶ 5.

On December 15, 2009, Muldoon Ranch filed three affidavits in support of its position that the historic source for 37-1005 is Muldoon Creek and Spring Creek: (1) Gary D. Slette (“Slette”), counsel for Muldoon Ranch (“Slette Affidavit”);¹⁰ (2) Arlen B. Crouch (“Crouch”), member of Muldoon Ranch Co., LLC (“Crouch Affidavit”);¹¹ and (3) Grant Ellsworth (“Ellsworth”), original claimant of 37-1005 (“Ellsworth Affidavit”).¹²

Attached to the Slette Affidavit is a copy of a document that was sent to Slette “by James Peterson, Sr., the former water master, represented by him to be the basis upon which he administered water rights in the Muldoon Creek area.” The document attached to the Slette Affidavit is information from an old Department database that reflected how claims were filed in the SRBA. Because the original claim for 37-1005 claimed both Muldoon Creek and Spring Creek as sources, the attachment does not present the Department with new information upon which to determine the historic source for 37-1005.

¹⁰ Attached hereto as Exhibit I is a copy of the Slette Affidavit.

¹¹ Attached hereto as Exhibit J is a copy of the Crouch Affidavit.

¹² Attached hereto as Exhibit K is a copy of the Ellsworth Affidavit.

In his affidavit, Crouch asserted that the statements made by Peterson are biased. Crouch—a member of Muldoon Ranch Co., LLC, which is a successor-in-interest to Ellsworth—stated that “at one time, [Peterson] informed me that he would not deliver all my water rights according to the decrees or rights because ‘other people needed it worse than me.’” Muldoon Ranch holds 13 water rights that are appurtenant to a 1,419-acre permissible place of use. The Crouch Affidavit does not specify which water right(s) Peterson allegedly would not deliver and therefore does not provide the Department with information upon which to determine the historic source for 37-1005.

Finally, the Ellsworth Affidavit provided the following reason for filing 37-1005 with two sources: “*When insufficient flows were available from Spring Creek to fulfill the water right, the balance was diverted from Muldoon Creek* at the diversion dam referenced in paragraph 5 of the Claim.” Emphasis added. The Ellsworth Affidavit provides the Department with information that should be considered in determining the historic source for 37-1005.

As stated in the Brockway Report, Muldoon Ditch was completed in 1919, which means that the completion date of Muldoon Ditch post-dates the 1903 *Woodworth* decree. If Muldoon Ditch was not completed until 1919, it seems reasonable to conclude that Muldoon Creek was not the historically decreed source for 37-1005. This conclusion is supported by the Peterson Affidavit, which asserts that 37-1005 was historically administered as a right solely from Spring Creek. The Ellsworth Affidavit supports the Peterson Affidavit, in that Ellsworth states that Spring Creek is the primary source for 37-1005: “When insufficient flows were available from Spring Creek . . . the balance was diverted from Muldoon Creek” Because Muldoon Ditch was completed by 1919, Ellsworth would have personally utilized Muldoon Ditch, but may not have known which source was historically decreed to 37-1005. This is reasonable to conclude

because there are other decreed and licensed rights that were held by Ellsworth that divert from Muldoon Creek at “the diversion dam referenced in paragraph 5 of the Claim.” *Ellsworth Affidavit*.¹³ As stated previously, the Department cannot recommend an accomplished change in source. Idaho Code § 42-1425.

It is the Department’s position, based upon consideration of the information presented, together with reasonable conclusions drawn therein, that the historic source for 37-1005 is Spring Creek. The Department does not rely upon Idaho Code § 42-1427(2) because it can reasonably conclude that Spring Creek was the originally decreed source for 37-1005. Attached hereto as Exhibit L is a recommendation of how the Department intends to recommend 37-1005. Changes to the original recommendation (*see* Exhibit C) are shown in underline and strikeout. (For purposes of convenience, Exhibit L also contains a version of the recommendation without underline and strikeout.) In Exhibit L, Spring Creek is now the only source listed for 37-1005; the point of diversion for Muldoon Creek, located in Section 3, has been removed; the total number of acres of the permissible place of use for this right has been reduced from 1,419 to 809; and, the number of irrigated acres within the permissible place of use has been reduced from 160 to 70. The reduction in acres has been done to account for the number of acres that currently can be irrigated below the point where Muldoon Ditch intersects Spring Creek, and could have been irrigated from Spring Creek in the originally decreed place of use. *See Exhibits B and E.*

¹³ Decreed and licensed water rights held by Ellsworth that divert from Muldoon Creek included: 37-1048 (2.00 cfs, 4/1/1884); 37-1051 (2.00 cfs, 4/1/1888); 37-2007 (0.80 cfs, 8/28/1904); 37-1139 (7.00 cfs, 6/1/1919); 37-7006 (2.18 cfs, 12/18/1967). Exhibit E depicts the historically decreed and licensed places of use for these and other rights held by Muldoon Ranch. With the exception of 37-7006, each of the above-listed water rights divert solely from the same point of diversion as 37-1005 and are conveyed through Muldoon Ditch. Exhibit G shows the places of use of all decreed and licensed rights held by Muldoon Ranch that divert from the same point of diversion as 37-1005.

IV. CONCLUSION

The Department's recommendation for water right no. 37-1005 is based on the information presented and reasonable conclusions drawn therein. The Department therefore respectfully requests that water right no. 37-1005, as described in Exhibit L, be recommended for partial decree. This Report supersedes the report filed by the Department on or about June 22, 2009.

Submitted this 6th day of January, 2010.


Carter Fritschle
Manager, Adjudication Technical Section

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by electronic mail and United States mail with the correct postage affixed thereto on this 6th day of January, 2010.

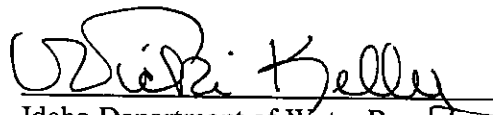
Document Served:

Amended Supplemental Director's Report Regarding Subcase No. 37-1005

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Idaho Department of Water Resources

EXHIBITS TO 706 REPORT

ON FILE WITH THE

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Clerk of the Court at 208-736-3011.