

**Cefalo, James**

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**From:** Cefalo, James  
**Sent:** Wednesday, December 22, 2021 1:30 PM  
**To:** Wilson, Frank S; tj@racineolson.com; hank.povey@gmail.com  
**Cc:** Ball, Gary; Esralew, Rachel; Jirak, Jeremy M; Wallis, Joanne V; Pilson, Stephen; Jeletic, Michael P  
**Subject:** Application 13-8081 (USFWS) - Draft Permit for Discussion  
**Attachments:** Draft Permit 13-8081.pdf; Water Rights on Deep Creek.pdf

Thank you for taking the time to meet on Monday afternoon. It was worthwhile to discuss the technical information and analysis prepared by the FWS hydrology group. I apologize for leaving the meeting early. I ended up with a last-minute scheduling conflict. As I have reflected on our discussion, I thought it might be helpful to prepare a draft permit approval for the parties to consider prior to our next meeting. In other contested cases, I have found that evaluating proposed permit conditions helps parties identify any unresolved issues. The attached draft permit incorporates the operations plan proposed in the technical report. The attached draft permit was created to facilitate settlement discussions and does not imply any pre-judgment of the contested case.

As I mentioned during our informal meeting, pursuant to the Bear River Compact there is a possibility that junior water rights in Idaho could be curtailed to satisfy downstream senior water rights in Utah. During the non-irrigation season (October 1 – April 19), the downstream senior rights are held by the Bear River Migratory Bird Refuge. As I have thought a little more about the facts of this application and the water available at the Oxford Refuge, the Bear River Refuge water rights might not have much of an impact on the storage at the Oxford Refuge. Jeremy noted that some water could be stored in the Oxford Refuge in the fall. During the fall, however, the Oxford Slough is disconnected from Deep Creek. If water cannot be delivered to downstream rights, then upstream juniors are not subject to curtailment. This situation is often referred to as a “futile call.” During the winter, the refuge freezes and no water leaves the refuge. During the early spring, the primary period of fill for Oxford Slough, there is generally enough flow from other tributaries in the larger Bear River basin to satisfy the Bear River Refuge rights. The conditions of the draft permit assume that the Oxford Refuge reservoir will be able to fill completely in most years.

Attached is a summary of the water rights of record on Deep Creek. Twin Lakes Canal Company (TLCC) holds water right 13-7481 which authorizes the company to divert 10 cfs from Deep Creek to fill Twin Lakes Reservoir. The company may only divert water to fill the reservoir between October 1 and April 30. TLCC also holds water right 13-946B which allows the company to divert 9.95 cfs from Deep Creek for direct irrigation use during the irrigation season (April 15 - October 15). TLCC primarily diverts water from Mink Creek to fill its reservoirs. The company only uses its Deep Creek pump diversion in years when the Mink Creek water supply is low. I am concerned that in low water years (when TLCC would operate the Deep Creek pump), water stored in the refuge could impact TLCC’s storage right.

TLCC did not protest Application 13-8081. Regardless of who protests an application, the Department of Water Resources must ensure that no existing water rights will be injured by a proposed project. Because TLCC holds the only other storage right on Deep Creek, TLCC should be given an opportunity to comment on any proposed conditions to prevent injury to the TLCC storage right. I have included Hank Povey, president of TLCC, on this email. If we are unable to find an informal resolution of BRWUA’s protest and end up going to hearing, TLCC is not a party and would not be allowed to participate in the administrative hearing.

If the refuge captures water in March and April that would have been available to and diverted by TLCC to fill Twin Lakes Reservoir, then the storage at the refuge would injure TLCC. If TLCC diverts its full water right from Deep Creek in March and April, it could divert a volume of water equivalent to the entire storage capacity of the Oxford Slough reservoir (61 days x 10 cfs x 1.9835 af/cfs-days = 1,200 af). There are a couple of ways to prevent injury to the TLCC storage right 13-7481. One way would be to restrict any storage in the refuge reservoir until Twin Lakes Reservoir is full. This is option is

not preferred. In most years, even good water years, Twin Lakes Reservoir does not fill until mid-April. By that time, a lot of water will have already passed out of the refuge. FWS will have missed an opportunity to capture and store water. The other way to prevent injury to TLCC is to have the refuge release any water stored adverse to TLCC's storage right. Releases could begin on May 1<sup>st</sup>. Because of the season of use limits of TLCC's storage water right 13-7481, TLCC could not divert the water released from the refuge under water right 13-7481. TLCC could divert the water for direct irrigation under water right 13-946B, however, and use its Mink Creek rights to continue to fill Twin Lakes Reservoir. The long condition on the draft permit includes language meant to prevent injury to downstream irrigators on Deep Creek and Bear River and language to prevent injury to TLCC's storage right.

Please review the draft permit conditions and be prepared to discuss any edits, comments, or additional concerns at the next status conference. Christina Henman will contact you soon to find available dates in January.



IDAHO DEPARTMENT OF  
**WATER RESOURCES**

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# Rights on Deep Creek

| Basin | Sequence | Suffix | Priority Date | Diversion Rate | Water Use List                                                    | Current Owner                         |
|-------|----------|--------|---------------|----------------|-------------------------------------------------------------------|---------------------------------------|
| 13    | 945      | B      | 6/1/1882      | 2.570          | IRRIGATION                                                        | BOSEN LAND & LIVESTOCK LLC            |
| 13    | 7800     |        | 6/1/1882      | 0.180          | IRRIGATION                                                        | CASPERSON, DIANNE; CASPERSON, QUENTIN |
| 13    | 7801     |        | 6/1/1882      | 0.700          | IRRIGATION                                                        | FULLER, EDNA; FULLER, GAYLIN          |
| 13    | 7802     |        | 6/1/1882      | 0.280          | IRRIGATION                                                        | COX FAMILY TRUST                      |
| 13    | 7859     |        | 6/1/1882      | 2.890          | IRRIGATION                                                        | MENDENHALL, WILLIS; PETERSON, JACOB   |
| 13    | 7860     |        | 6/1/1882      | 1.150          | IRRIGATION                                                        | NAYLOR, JOSEPH                        |
| 13    | 7930     |        | 6/1/1882      | 0.230          | IRRIGATION                                                        | STREADBECK, BRANDON                   |
| 13    | 946      | A      | 5/6/1911      | 15.050         | IRRIGATION                                                        | WEST CACHE IRRIGATION CO INC          |
| 13    | 946      | B      | 5/6/1911      | 9.950          | IRRIGATION                                                        | TWIN LAKES CANAL CO                   |
| 13    | 2138     |        | 5/3/1941      | 1.500          | IRRIGATION                                                        | GRIFFETH, MELVIN P                    |
| 13    | 7874     |        | 2/23/1965     | 0.420          | IRRIGATION                                                        | ALBERT SAYAD FAMILY TRUST             |
| 13    | 7875     |        | 2/23/1965     | 1.080          | IRRIGATION                                                        | BOSEN LAND & LIVESTOCK LLC            |
| 13    | 7033     |        | 1/19/1973     | 0.750          | IRRIGATION                                                        | BOSEN LAND & LIVESTOCK LLC            |
| 13    | 7481     |        | 12/6/1990     | 10.000         | DIVERSION TO STORAGE, IRRIGATION FROM STORAGE, IRRIGATION STORAGE | TWIN LAKES CANAL CO                   |

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DEC 23 2021

State of Idaho  
Department of Water Resources

## 12/22/21 Draft Permit to Appropriate Water

No. 13-8081

Priority: July 28, 2021

Maximum Diversion Volume: 1,200.0 AF

This is to certify that

US DEPT OF INTERIOR  
FISH & WILDLIFE SERVICE  
911 NE 11TH AVE  
PORTLAND OR 97232-4181

has applied for a permit to appropriate water from:

Source : OXFORD SLOUGH

Tributary: DEEP CREEK

and a permit is APPROVED for development of water as follows:

| <u>Beneficial Use</u> | <u>Period of Use</u> | <u>Rate of Diversion</u> | <u>Annual Volume</u> |
|-----------------------|----------------------|--------------------------|----------------------|
| WILDLIFE STORAGE      | 01/01 to 12/31       |                          | 1,200.0 AF           |

**Location of Point(s) of Diversion**

OXFORD SLOUGH L10 ( NE $\frac{1}{4}$  NW $\frac{1}{4}$ ), Sec. 2, Twp 14S, Rge 38E, B.M. FRANKLIN County

**Place of Use: WILDLIFE STORAGE**

| Twp | Rng | Sec | NE      |    |         |         | NW       |          |          |    | SW      |          |         |         | SE      |         |         |         |
|-----|-----|-----|---------|----|---------|---------|----------|----------|----------|----|---------|----------|---------|---------|---------|---------|---------|---------|
|     |     |     | NE      | NW | SW      | SE      | NE       | NW       | SW       | SE | NE      | NW       | SW      | SE      | NE      | NW      | SW      | SE      |
| 13S | 38E | 26  |         |    |         |         |          |          | X<br>L3  | X  | X<br>L2 | X<br>L2  | X       | X<br>L1 |         |         |         |         |
| 13S | 38E | 26  |         |    |         |         |          |          | X<br>L4  | X  | X<br>L2 | X<br>L4  |         | X<br>L5 |         |         |         |         |
| 13S | 38E | 26  |         |    |         |         |          |          |          |    | X<br>L4 |          |         | X<br>L1 |         |         |         |         |
| 13S | 38E | 26  |         |    |         |         |          |          |          |    |         |          |         | X<br>L5 |         |         |         |         |
| 13S | 38E | 27  |         |    | X<br>L2 | X<br>L1 |          |          |          | X  | X<br>L3 |          |         | X<br>L5 | X<br>L8 | X<br>L2 | X       | X       |
| 13S | 38E | 27  |         |    |         | X<br>L8 |          |          |          |    | X<br>L6 |          |         |         |         | X<br>L7 |         |         |
| 13S | 38E | 34  | X       | X  | X       | X       | X        |          | X<br>L11 | X  | X       | X<br>L10 | X<br>L9 | X<br>L8 | X       | X       | X<br>L7 | X<br>L7 |
| 13S | 38E | 35  |         |    |         |         | X        | X        | X        |    | X       | X        | X       | X       |         |         |         |         |
| 14S | 38E | 2   |         |    |         |         | X<br>L10 | X<br>L11 | X        |    |         |          |         |         |         |         |         |         |
| 14S | 38E | 3   | X<br>L9 |    |         |         |          |          |          |    |         |          |         |         |         |         |         |         |

**Conditions of Approval**

1. Proof of application of water to beneficial use shall be submitted on or before **March 01, 2024**.
2. Subject to all prior water rights.
3. The reservoir established by the storage of water under this right shall not exceed a total capacity of 1,200 acre-feet or a total surface area of 836 acres.

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**12/22/21 Draft Permit to Appropriate Water**

No. 13-8081

4. To prevent injury to downstream water rights, the right holder shall adhere to the following plan of operations: The right holder may capture and store water in the reservoir authorized by this right up to a maximum elevation of 4745.5 feet above sea level. Each year, at the time irrigation rights are curtailed on the Bear River in the state of Idaho or when a call for water is made by the holder of a senior irrigation right on Deep Creek, but not earlier than April 20th, the right holder shall remove a 4-foot by 6-inch pressure board from the dike, allowing the reservoir to empty slowly to an elevation of 4745.0 feet above sea level. The removal of the top pressure board is based solely on the first day of curtailment of irrigation rights on the Bear River or a call for irrigation water on Deep Creek and is not contingent on zero flow in the emergency spillway channel. There may be years when the top pressure board is removed at the same time water is flowing through the emergency spillway channel on the dike. Once the reservoir reaches equilibrium at an elevation of 4745.0 feet above sea level, the natural channel below the reservoir dike will dry up and the reservoir will eventually become disconnected from Deep Creek, thereby reflecting the natural hydrologic conditions in mid- to late-summer. In any year that Twin Lakes Reservoir does not fill by May 1st, the right holder shall remove the top 4-foot by 6-inch pressure board from the dike on May 1st, unless it has already been removed. The right holder shall remove an additional, lower 4-foot by 6-inch pressure board from the dike once every two weeks after May 1st, until Twin Lakes Reservoir fills or until all pressure boards have been removed from the dike (water level elevation = 4742.5 feet). All pressure boards may be reinstalled at the dike at the end of the irrigation season (October 1).
5. The right holder shall install and maintain a staff gage at the diversion dam which can be used to determine the water surface elevation of the water stored behind the dam.

This permit is issued pursuant to the provisions of Idaho Code § 42-204.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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JAMES CEFALO  
Regional Manager

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