

Cefalo, James

From: TJ Budge <tj@racineolson.com>
Sent: Monday, April 18, 2022 12:36 PM
To: Cefalo, James; Jirak, Jeremy M; Rob Harris; Wilson, Frank S
Cc: hank.povey@gmail.com; Ball, Gary; Esralew, Rachel; Pilson, Stephen; Jeletic, Michael P
Subject: RE: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

James,

BRWUA has agreed to accept the revised draft permit, and will withdraw its protest subject to that permit being issued.

Thanks,

T.J. Budge

RACINE OLSON

201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204

Office: (208) 232-6101 | Direct: (208) 478-3467 | Cell: (208) 705-0826 | racineolson.com

Assistant: Tessa Sparrow | Direct: (208) 478-3444 | tessa@racineolson.com

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From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Friday, March 18, 2022 10:03 AM
To: TJ Budge <tj@racineolson.com>; Jirak, Jeremy M <jeremy_jirak@fws.gov>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>
Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>
Subject: RE: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

T.J.,

Before I can issue a permit, I need an official withdrawal of protest from BRWUA. Therefore, you have time to visit with Trevor Nielsen when you get back in the office.

During the pre-hearing conference, Jeremy said that the Oxford Slough becomes physically disconnected from Deep Creek by mid-summer and remains disconnected until the spring runoff the following year. Jeremy's statements about the disconnect are supported by aerial imagery. The images taken during August or September show a dry channel between Oxford Slough and Deep Creek. It is my understanding that the Oxford Slough would remain disconnected from Deep Creek, even if there were significant rains in August or September. In other words, storage in the refuge during the last half of the irrigation season might not have an impact on the flows in the Bear River. In the last decade, there have been years with significant rain in August or September. Perhaps Jeremy can share what he has observed in those years with late season rain.



James Cefalo | Regional Manager
900 N Skyline Drive, Idaho Falls, ID 83402
(208) 525-7161 | www.idwr.idaho.gov

From: TJ Budge <tj@racineolson.com>

Sent: Wednesday, March 16, 2022 8:17 PM

To: Jirak, Jeremy M <jeremy_jirak@fws.gov>; Cefalo, James <James.Cefalo@idwr.idaho.gov>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>

Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>

Subject: RE: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

James,

Please hold off on issuing the permit. Trevor Nielsen raised a concern today with how a fall rain event would be handled under these conditions. In 2021 the Bear River irrigators were saved by Fall rains. If a Fall rain event occurs while the Bear River is on regulation, could inflows to the Slough be stored in the slough, out of priority? The way condition #5 currently reads, the USFWS need only remove flashboards to an elevation 6" below the maximum fill. This would seem to allow the USFWS to store water out of priority that, but for the new diversion structure, would have historically flowed into Deep Creek.

Trevor also noted that the irrigation season in Utah ends October 31. Therefore, his preference is that condition #5 define the irrigation season with an October 31 end date.

I'm on a family vacation and have not had an opportunity to discuss these concerns in detail with Trevor. I will do so when I return and get back to you then.

Thanks,

T.J. Budge

RACINE OLSON

201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204

Office: (208) 232-6101 | Direct: (208) 478-3467 | Cell: (208) 705-0826 | racineolson.com

Assistant: Tessa Sparrow | Direct: (208) 478-3444 | tessa@racineolson.com

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From: TJ Budge

Sent: Monday, March 14, 2022 6:24 PM

To: Jirak, Jeremy M <jeremy_jirak@fws.gov>; Cefalo, James <James.Cefalo@idwr.idaho.gov>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>

Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>

Subject: RE: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

Bear River Water Users Association is also comfortable with the revised permit.

T.J. Budge

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From: Jirak, Jeremy M <jeremy_jirak@fws.gov>

Sent: Monday, March 14, 2022 2:09 PM

To: Cefalo, James <James.Cefalo@idwr.idaho.gov>; TJ Budge <tj@racineolson.com>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>

Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>

Subject: Re: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

James,

Thanks for sending out the new draft for us to review. Our team discussed the changes and we find them acceptable and workable with our project. We look forward to the permit being issued.

Thanks,

Jeremy Jirak

Refuge Manager

Bear Lake National Wildlife Refuge

P.O. Box 9 Montpelier, ID 83254

208-847-1757

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>

Sent: Monday, March 7, 2022 10:43 AM

To: TJ Budge <tj@racineolson.com>; Jirak, Jeremy M <jeremy_jirak@fws.gov>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>

Cc: hank.povey@gmail.com <hank.povey@gmail.com>; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Wallis, Joanne V <joanne_wallis@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>

Subject: RE: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

Thank you again for your review and proposed edits. I think we are close. TJ offers an interesting idea. He suggests removing the dates associated with the irrigation season and non-irrigation season altogether. I think there are advantages to not defining the irrigation season at this point. There is a chance that the irrigation season will be re-defined or adjusted as part of the Bear River Basin Adjudication. The generally recognized irrigation season for the area is April 1 – October 31. The decreed season of use is April 20 – September 30. In the Snake River Basin Adjudication, the adjudication court created shoulder season remarks for the areas where the irrigation season did not match the old

decrees. By not defining the season of use in the conditions for Permit 13-8081, that makes the permit flexible enough to match whatever season of use is created in the BRBA. If the season of use dates are removed, I think it is important to note that FWS can begin storing water again in late summer, after the Oxford Slough becomes disconnected from Deep Creek. I have added a sentence to that effect at the end of Condition 5.

I apologize for creating another draft. Because the comments were all directed to the season of use question, and TJ's proposal is a big change, I think it is important to give one more opportunity for review. If we find that there are concerns with this draft, I may schedule another status conference to work through the changes real time, rather than through email. Please review the revised draft. Let me know if you have any edits or comments by Friday, March 18th.

James

 IDAHO DEPARTMENT OF
WATER RESOURCES
James Cefalo | Regional Manager
900 N Skyline Drive, Idaho Falls, ID 83402
(208) 525-7161 | www.idwr.idaho.gov

From: TJ Budge <tj@racineolson.com>
Sent: Friday, February 25, 2022 4:46 PM
To: Jirak, Jeremy M <jeremy_jirak@fws.gov>; Cefalo, James <James.Cefalo@idwr.idaho.gov>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>
Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Wallis, Joanne V <joanne_wallis@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>
Subject: RE: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

I have a few suggested edits, attached.

T.J. Budge
RACINE OLSON
201 E. Center St. | P.O. Box 1391 | Pocatello, Idaho 83204
Office: (208) 232-6101 | Direct: (208) 478-3467 | Cell: (208) 705-0826 | racineolson.com

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From: Jirak, Jeremy M <jeremy_jirak@fws.gov>
Sent: Friday, February 25, 2022 3:27 PM
To: Cefalo, James <James.Cefalo@idwr.idaho.gov>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>; TJ Budge <tj@racineolson.com>
Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Wallis, Joanne V <joanne_wallis@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>
Subject: Re: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

Hi,

The Service agrees with the language in the current draft permit that James sent on 2-14-2022. We think this provides us with a water right that allows for the protection and management of the public resources that the Oxford Slough WPA was established for, while protecting down stream water rights.

If James sees a need to add water right "progeny" or another term in Condition 4, to address Rob's item 1 concern, then we are amenable to that. We would just ask for a quick review of the final draft before it was made the official permit.

Thanks for everyone's work on this permit and the feedback that we received during the development of it.

*Jeremy Jirak
Refuge Manager
Bear Lake National Wildlife Refuge
P.O. Box 9 Montpelier, ID 83254
208-847-1757*

From: Cefalo, James <James.Cefalo@idwr.idaho.gov>
Sent: Friday, February 25, 2022 10:58 AM
To: Jirak, Jeremy M <jeremy_jirak@fws.gov>; Rob Harris <rharris@holdenlegal.com>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>; TJ Budge <tj@racineolson.com>
Cc: hank.povey@gmail.com <hank.povey@gmail.com>; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Wallis, Joanne V <joanne_wallis@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>
Subject: RE: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

I spent some time looking into the beginning and ending dates for the irrigation season of use. The 1920 Bear River Decree (commonly referred to as the Dietrich Decree) defined the irrigation season as April 20 – September 30. Outside of a few exceptions, most irrigation rights described in the 1920 Decree, or splits therefrom, bear a season of use of April 20 – September 30.

In Transfer 5115, approved in 1998, water right 13-946 was split into 13-946A and 13-946B. The portion identified as 13-946B was conveyed from West Cache Irrigation Company to Twin Lakes Canal Company and moved to the Deep Creek pumping station near Twin Lakes Reservoir. For some reason, the season of use for water right 13-946B was changed to April 15 to October 15 in the approval for Transfer 5115. It appears the Department changed the season of use on its own accord. Application 5115 did not propose to change the season of use. I think the season of use change was a bad decision because it makes the season of use for water right 13-946B inconsistent with the other water rights from the 1920 Decree.

The plan of operation described in Condition 5 is meant to prevent injury for irrigation rights on Deep Creek and the Bear River. Most of these rights carry an irrigation season of use of April 20 to September 30. Twin Lakes holds an irrigation right (13-946B) that is slightly out of sync with the rest of the water rights in the basin. I think the irrigation season set forth in the condition should reflect the season shared by most of the water rights. The difference in seasons of use is likely inconsequential. It would be a rare instance where Twin Lakes would be diverting water for direct irrigation between April 15 and April 20. Even if the company was delivering water for irrigation in this 5-day window, it is highly likely that the company would also be diverting water for storage at the same time. The Deep Creek storage water right held by TLCC matches the capacity of the Deep Creek pump station. Therefore, the company would be fully protected from injury through the operation of Condition 4. Further, the Oxford Slough becomes disconnected from Deep Creek in late summer, so any difference in the end date for the irrigation season would have no effect on TLCC.



IDAHO DEPARTMENT OF
WATER RESOURCES

James Cefalo | Regional Manager
900 N Skyline Drive, Idaho Falls, ID 83402
(208) 525-7161 | www.idwr.idaho.gov

From: Jirak, Jeremy M <jeremy_jirak@fws.gov>

Sent: Thursday, February 24, 2022 4:32 PM

To: Rob Harris <rharris@holdenlegal.com>; Cefalo, James <James.Cefalo@idwr.idaho.gov>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>; TJ Budge <tj@racineolson.com>

Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Wallis, Joanne V <joanne_wallis@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>

Subject: Re: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

Hi Rob,

I talked to James today on some clarifications regarding the latest draft permit. We don't take an issue with clarifying your concern in item 1, so language that James deems appropriate could work to address your concern. We would just want see it in a draft before it is finalized.

For items 2 and 3 you have listed, we would like James to chime in on the potential changes of dates in regarding the water right permits and dates you have listed before we comment.

Thanks,

*Jeremy Jirak
Refuge Manager
Bear Lake National Wildlife Refuge
P.O. Box 9 Montpelier, ID 83254
208-847-1757*

From: Rob Harris <rharris@holdenlegal.com>

Sent: Friday, February 18, 2022 4:43 PM

To: Cefalo, James <James.Cefalo@idwr.idaho.gov>; Wilson, Frank S <Frank.Wilson@sol.doi.gov>; TJ Budge <tj@racineolson.com>

Cc: hank.povey@gmail.com <hank.povey@gmail.com>; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel_Esralew@fws.gov>; Jirak, Jeremy M <jeremy_jirak@fws.gov>; Wallis, Joanne V <joanne_wallis@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>; Jeletic, Michael P <michael_jeletic@fws.gov>

Subject: [EXTERNAL] RE: Application for Permit 13-8081 (USFWS)

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James:

Thank you for circulating this new draft permit. We have reviewed it, and have a couple of comments.

1. Twin Lakes is OK with the specific reference to 13-7481 in Condition No. 4 instead of "downstream senior storage rights." The only issue that may come up with this change is if there is ever a split of this right (and we do not think that will ever happen, but it is possible), the split portion (the "child" right) will be assigned a new identification number. I believe at one time the Department included the phrase "or its progeny" after identification of a specific number in the event of a split. Is that IDWR's current language, and if so, I suggest we include it in the condition. I recognize that this adds new language, and I do not think this any sort of a dealbreaker, as I believe most water users and the Department would agree that reference to a specific water right number implicitly includes any splits of the right. I welcome your thoughts on this.
2. The non-irrigation season of use in Condition No. 4 describes October 1 through April 19. However, Twin Lakes' 13-7481 has a diversion to storage season of use of October 1 through April 30. Does April 19 need to be changed to April 30.
3. The irrigation season of use in Condition No. 5 describes April 20 through September 30. One of Twin Lakes' water rights in Deep Creek (13-9468) has a season of use of April 15 through October 15. Does this change also need to be made?

Let me know if you have any questions concerning our comments.

Thanks,



Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405-0130
Phone: (208) 523-0620
Fax: (208) 523-9518
E-Mail: rharris@holdenlegal.com

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From: Cefalo, James <James.Cefalo@idwr.idaho.gov>

Sent: Monday, February 14, 2022 1:50 PM

To: Wilson, Frank S <Frank.Wilson@sol.doi.gov>; TJ Budge <tj@racineolson.com>; Rob Harris <rharris@holdenlegal.com>

Cc: hank.povey@gmail.com; Ball, Gary <gary_ball@fws.gov>; Esralew, Rachel <Rachel.Esralew@fws.gov>; Jirak, Jeremy M <jeremy_jirak@fws.gov>; Wallis, Joanne V <joanne_wallis@fws.gov>; Pilson, Stephen <stephen_pilson@fws.gov>;

Jeletic, Michael P <michael_jeletic@fws.gov>

Subject: Application for Permit 13-8081 (USFWS)

Dear Parties:

Thank you for the comments and suggested changes. I have incorporated many of the changes proposed by FWS but have also included some of my own edits and simplifications. The changes proposed by FWS address the edits proposed by TJ Budge (changing "may" to "shall"). By creating an absolute mitigation of six inches, in any year that water is stored, there would be no requirement for FWS to reach the maximum elevation of 4745.5 feet. In other words, FWS has the option to store water up to an elevation of 4745.5 feet. There is a six-inch drawdown requirement, even if the max elevation achieved is less than 4745.5 feet. I also made specific reference to water right 13-7481 in Condition #4. The condition was too wordy trying to refer to "downstream senior storage rights." Because there is only one downstream senior storage right on Deep Creek, it is easier to refer to the right by number. I updated Condition #6 to allow measurement of the reservoir releases at any location. That way, if it is required in the future, FWS can measure water released from the reservoir at the pressure board structure.

Because I ended up changing a lot of the language in the mitigation conditions, I would like to go through one more round of review. Please review the second revised draft permit and respond to this email with questions, comments, or edits by February 25.

 IDAHO DEPARTMENT OF
WATER RESOURCES
James Cefalo | Regional Manager
900 N Skyline Drive, Idaho Falls, ID 83402
(208) 525-7161 | www.idwr.idaho.gov