

MEMORANDUM

DATE: 3/11/22

TO: Amy Cassel, Rental Agreement No. 582

FROM: Phill Hummer, Water Rights Supervisor

RE: Response to Request for Review and Amendment

Amy Cassel's (Program Manager, Water Transaction Program) February 11, 2022 Memo received with the signed Agreement No. 582. The memo details some of the procedural history that occurred during the review and analysis of the Idaho Water Resource Board's ("IWRB") rental application proposing to dedicate water right 75-14927 to non-use for the purpose of providing water to maintain the Panther Creek minimum stream flow reach. This procedural history is a recounting of a common occurrence in water right application and water supply bank application review processing. Water rights and water supply bank transactions are complicated and involve consideration of numerous statutory and agency obligations that can lead to different variations of draft approval documents before a final decision has been reached. The IWRB's application for Panther Creek underwent such a progression of review, decision, and revision of approval documents.

The final version of Agreement 582, the version that is signed and executed, is a result of careful consideration of all available facts. Amy Cassel asserts in the Memo that injury or a reduction in the quantity of water available under existing rights does not seem likely if the rental application was approved as requested on the application form. Similarly, it is argued in the Memo that the proposed rental application would not be an enlargement of the water right. Amy Cassel requests an amendment to Agreement 582 to reflect the proposed rental and initial review documents. I disagree with the assertion that the proposed rental of water right 75-14927 described on the application form and reflected by the initial review documents would not cause injury and that it would not cause an enlargement. Consideration of the facts is necessary to determine the appropriate decision, the Memo does not provide additional data, facts, or other information that has not been previously considered. The potential injury and enlargement under the proposed rental are discussed in detail in Angela Hansen's 12/23/21 email and Phill Hummer's 11/24/21 Injury and Enlargement Concerns Supplemental Memo (located in the water right file for 75-14927). The conclusions of these documents remain valid. In addition, the signed and executed version of Agreement 582 does not reflect a change or deviation from evaluation standards or existing policy. This idea is also discussed at length in Angela Hansen's 12/23/21 email. For convenience I offer the following brief summary of the email and supplemental memo.

Idaho Code § 42-1763 provides the statutory criteria for rejecting, approving, and partially approving rental applications. The criteria are similar to the statutory criteria for transfer applications such that IDWR staff rely on administrative processing memos written for transfer applications to review water supply bank rental applications. Transfer Memo No. 24 directs staff to consider the timing and location of return flows and to consider the historic use of water under the right when evaluation the potential impacts (injury and enlargement in particular) of a proposed change to a water right. The IWRB's application proposes a change to the nature of use

of an irrigation water right on Panther Creek, which is a system without storage facilities to control the flow of water (or if existing those facilities are relatively minor in capacity). Since the system is not controlled by a storage facility, water availability in the creek is determined by natural flow processes and water present in the creek system at the earlier part of the season is not available later in the year. Said another way, water that is not diverted and used when flows are high in April is likely not available in the creek during September, when flows are low. If water in excess of historic use under the irrigation right is appropriated under the rental the amount of water available for use in Panther Creek could be impacted. Dedicating water to the rental in excess of the amounts historically diverted at times when flows in Panther Creek are lowest would injury existing water rights. The signed and executed version of Agreement 582 reflects a consideration of historic use of water right no. 75-14927 by utilizing climatic data to estimate consumptive use and the consideration of the availability of water in a naturally flowing system. This is not a deviation from the policies that guide the review of water rights or water supply bank applications.

Agreement 582 should not be reconsidered or amended at this time but may be reconsidered or amended at a later date if additional facts or data supported arguments are presented.