

Miller, Nick

From: Miller, Nick
Sent: Monday, November 02, 2020 10:20 AM
To: 'Shane Andrews'
Cc: Eddy Chapman; Kelly, Patrick
Subject: RE: Discussion on Draft Permit No. 77-14325 - Variety Excursions, LLC
Attachments: 11012020_final draft.pdf

Shane,

Here is another copy of a draft permit approval as you requested. I am prepared to issue the permit immediately, but will hold off for a couple of days to give you time to look it over with your client. You will, of course, also have an opportunity to petition for reconsideration of the approval if you see a need to do so.

Nick.

From: Shane Andrews [mailto:shaneandrews@idahoconstructionlawyers.com]
Sent: Thursday, October 29, 2020 4:10 PM
To: Miller, Nick <Nick.Miller@idwr.idaho.gov>
Cc: Eddy Chapman <eddy@idahoconstructionlawyers.com>; Kelly, Patrick <Patrick.Kelly@idwr.idaho.gov>
Subject: RE: Discussion on Draft Permit No. 77-14325 - Variety Excursions, LLC

Nick,

I was checking my files and noted that this was not sent to you. Please find the affidavit attached. Can you please send me the proposed permit for Variety Excursions again. I believe that we can get this finalized within the next few days.

Thank you,

Shane Andrews

Blewett Muhlitz Hally, LLP
Lewiston, Idaho
www.idahoconstructionlawyers.com
Phone: (208) 413-6678
Fax: (208) 413-6682



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From: Miller, Nick <Nick.Miller@idwr.idaho.gov>
Sent: Friday, June 12, 2020 8:38 AM
To: Shane Andrews <shaneandrews@idahoconstructionlawyers.com>

Miller, Nick

From: Miller, Nick
Sent: Tuesday, July 21, 2020 12:59 PM
To: 'Shane Andrews'
Cc: Eddy Chapman; Kelly, Patrick
Subject: RE: Discussion on Draft Permit No. 77-14325 - Variety Excursions, LLC
Attachments: Draft Permit 77-14325_072120.pdf

Shane,

Here is a copy of the draft permit approval with the proof of beneficial use due date changed to reflect a 5-year development period.

Nick.

From: Shane Andrews [mailto:shaneandrews@idahoconstructionlawyers.com]
Sent: Monday, July 20, 2020 12:35 PM
To: Miller, Nick <Nick.Miller@idwr.idaho.gov>
Cc: Eddy Chapman <eddy@idahoconstructionlawyers.com>; Kelly, Patrick <Patrick.Kelly@idwr.idaho.gov>
Subject: RE: Discussion on Draft Permit No. 77-14325 - Variety Excursions, LLC

Nick,

I am out of the office today, so I have limited resources. However, I have received confirmation that Variety is a registered foreign entity authorized to do business. I expect to be in the office tomorrow, and as such, I anticipate finalization of the affidavit referenced below.

Would you please send me an updated draft permit showing the 5 years as referenced below so I can forward it onto my client for approval?

Thank you,

Shane Andrews

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From: Miller, Nick <Nick.Miller@idwr.idaho.gov>

Sent: Friday, June 12, 2020 8:38 AM

To: Shane Andrews <shaneandrews@idahoconstructionlawyers.com>

Cc: Eddy Chapman <eddy@idahoconstructionlawyers.com>; Kelly, Patrick <Patrick.Kelly@idwr.idaho.gov>

Subject: RE: Discussion on Draft Permit No. 77-14325 - Variety Excursions, LLC

Hi Shane,

I generally concur with your summary of the items we discussed. A few points of clarification/confirmation:

1. I can and will adjust the deadline to submit proof of beneficial use to authorize a 5 year development period for the permit. As you correctly note, 42-204 lists a number of circumstances for which the permit holder can request an extension of time to file proof of beneficial use, so the "additional applications" you mention refer to filing a request for extension of time to file proof, and that would be filed just prior to the end of the 5 year period if you need additional time because of one of the circumstances outlined in 42-204.
2. We are not lifting a requirement that the conduit be above ground, because that was never a requirement. The condition as written says the conduit "shall be above ground or otherwise easily accessible". The proposal to leave a section accessible in an open pit, at least until the permit is licensed, meets the condition as written.
3. The requirement to keep records of power production and submit them with the performance curve at the time you file proof of beneficial use is there for us to estimate the volume of water used to generate power. We discussed a relatively simple way of doing that – installing a cumulative power meter on the output of the generator that would totalize kW hours passing out of the generator and into your distribution system. Periodic readings of that total would suffice to estimate an average daily kWh production over the interval and, with the performance curve, we can back out and estimate of the volume of water used to generate that power.
4. Condition 6 subordinates this use to all uses, upstream and down, except hydropower. This language is placed on the permit consistent with the requirement of Rule 50.03 of the Department's Water Appropriation Rules (IDAPA 37.03.08.50.03). Although that rule goes beyond what is stated in 42-203B(6), the rule does have the force of law and the condition based on that rule is placed on all new water rights for power purposes. I can understand the concern of having such a broad subordination condition placed on the permit. However, in practice, your system as described in the application is both non-consumptive and does not cause delays or disruption to delivery of water downstream. So, any call by a downstream user would be futile.
5. Your statement is accurate and the interpretation seems consistent with a plain reading of 42-203B(9).
6. Your statement is accurate.

As far as the schedule for issuing the permit, we had originally planned to issue it if we received no opposition within 14 days of the June 3rd draft circulation. I received a comment from BLM that they are ok with the draft, so their concerns are addressed. If Variety Excursions is now satisfied with the draft permit, then we could issue it any time, but for the last hurdle of demonstrating that Variety Excursions is authorized to do business in Idaho, consistent with 42-206.

We will continue holding the permit until we receive the affidavit and supporting documents Patrick emailed you recently. If you do still have concerns about the conditions on the draft permit, we can discuss them before issuing the permit, or you can wait until the preliminary order approving the permit is issued and pursue avenues for appeal. Normally the first avenue would be to petition the department for reconsideration within 14 days of the date of the preliminary order.

Feel free to call me or write back if you have further questions.

Nick.

From: Shane Andrews [<mailto:shaneandrews@idahoconstructionlawyers.com>]

Sent: Thursday, June 11, 2020 3:33 PM

To: Miller, Nick <Nick.Miller@idwr.idaho.gov>

Cc: Eddy Chapman <eddy@idahoconstructionlawyers.com>

Subject: Discussion on Draft Permit No. 77-14325 - Variety Excursions, LLC

Nick,

Thank you for taking the time to discuss the draft permit for Variety Excursions, LLC with me this afternoon (June 11, 2020).

My notes from the discussion indicate the following:

1. That a 10 year time period on proof of application of water to beneficial uses is not available pursuant to I.C. 42-204, however a 5 year time period is available, which represents the maximum allowable time absent additional applications. In the event there are outstanding permitting or construction issues unforeseen at this time, there is a procedure in which Variety could seek additional time, and that procedure is outlined in I.C. 42-204 and forms are available online.
2. That IDWR will lift the requirement for the conduit to be placed above ground. That IDWR would like an approximately 4 foot section of the conduit to remain exposed until the licensing process is completed and tests can be conducted, at which time the uncovered section can be covered.
3. That real time data production for water volume and power generation is not required. Data logs are acceptable. In addition, there is no objection to the logs containing data entries at the time the last occupant leaves the lodge in the fall/winter with subsequent data logged at the time the first person arrives in the spring/summer to suffice and fulfill this requirement. That a kilowatt per hour meter or some other such measuring device is acceptable and that IDWR is willing to work with Variety in determining this process.
4. You will be confirming the interpretation and rationale for item number 6 on the draft permit regarding the subordination of rights and then providing me with an explanation/justification for this provision deviating from plain language in I.C. 42-203B wherein it expressly provides for upstream subordination.
5. You confirmed my reading of number 7 wherein any cancellation or alteration which may occur by the director takes effect only at the completion of the term, which in this case is 12/31/2045. In the event no such actions are taken, the permit automatically renews for the same time period.
6. That a description of the currently approved measuring devices is available on the IDWR website, however those items are subject to change and the necessity of the provision of number 13 and 14 only arise if/when IDWR issues such direction.

In addition to the foregoing, it is understood that the permit will not be issued within 14 days of the date the letter was issued as there are concerns with paragraph number 6 that need to be cleared up and Variety must provide sufficient proof that it is an entity authorized to engage in business in Idaho prior to the issuance of the permit.

Please confirm the accuracy of my understanding and representations contained in this email

Thank you,

Shane Andrews

Blewett Mushlitz Hally, LLP

Lewiston, Idaho

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State of Idaho
Department of Water Resources
Permit to Appropriate Water
No. 77-14325

DRAFT

Priority: August 28, 2009

Maximum Diversion Rate: 5.50 CFS

This is to certify that

VARIETY EXCURSIONS LLC 11405 PARK RD STE 180 ANCHORAGE KY 40223

has applied for a permit to appropriate water from:

Source : BEAR CREEK

Tributary: SALMON RIVER

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>
POWER	01/01 to 12/31	5.50 CFS

Location of Point(s) of Diversion

BEAR CREEK NW¼ SW¼, Sec. 9, Twp 24N, Rge 05E, B.M. IDAHO County

Place of Use: POWER

Twp	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
24N	05E	9								X									

Conditions of Approval

1. Proof of application of water to beneficial use shall be submitted on or before **August 01, 2025**.
2. Subject to all prior water rights.
3. The right holder shall install or construct a straight length of conduit or ditch suitable for installation of a device for measuring the entire flow of water being diverted in connection with this right. If the right holder uses conduit, the straight length of conduit shall be at least fifteen times the diameter of the conduit and shall be above ground or otherwise easily accessible.
4. To facilitate determination of the volume of water beneficially used by this project, the right holder shall provide the Department a copy of the characteristic performance curve for the turbine(s) and a copy of the monthly power generation figures during the development period. These items shall be submitted with the required Proof of Beneficial Use statement. Failure to submit these items shall be cause for the Director to reject the Proof of Beneficial Use statement.
5. The amount of water diverted under this water right may not exceed 50% of the stream flow of Bear Creek at the point of diversion described below at any given time.
6. The rights for the use of water acquired under this right shall be junior and subordinate to all other rights for the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this right and shall not give rise to any claim against any future rights for the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.
7. The term of this permit or subsequent water right license 77-14325 shall extend to 12/31/2045. Prior to the expiration of the term, the Director may issue an order canceling all or any part of the use authorized herein, may establish a new term, or may revise, delete, or add conditions under which the water right permit or subsequent water right license may be exercised. The order shall take effect on the date the current term expires. If the Director does not issue such an order, the term shall

State of Idaho
Department of Water Resources
Permit to Appropriate Water
No. 77-14325

DRAFT

- automatically extend to a length equal to the project's prior term and any prior conditions on the water right permit or subsequent water right license shall remain in effect.
8. Prior to the diversion and use of water under this approval, the right holder shall comply with all fish screening and/or fish passage requirements of the Idaho Department of Fish and Game.
 9. The point of diversion and place of use does not include federal land.
 10. This right does not constitute Idaho Public Utilities Commission or Federal Energy Regulatory Commission approval that may be required.
 11. The diversion and use of water described in this right may be subject to additional conditions and limitations agreed to by the protestant and the right holder under a separate agreement to which the Department is not a party. Because the Department is not a party, the Department is not responsible for enforcement of any aspect of the agreement not specifically addressed in other conditions herein. Enforcement of those portions of the agreement not specifically addressed in other conditions shall be the responsibility of the protestant and the water right holder.
 12. When notified by the Department or by a watermaster with regulatory authority over this right, the right holder shall report the amount of water diverted in connection with this right. The report shall be submitted in the manner and frequency specified by the Department or the watermaster.
 13. Upon specific notification by the Department, the right holder shall install and maintain acceptable measuring device(s), including data logger(s), at the authorized point(s) of diversion, in accordance with Department specifications.
 14. Upon specific notification by the Department, the right holder shall install a lockable device of a type acceptable to the Department in a manner that will provide suitable control of the diversion.
 15. This right is subject to the provisions of Idaho Code §§ 42-205 through 42-210, restricting the sale, transfer, assignment, or mortgage of this right. Failure to comply with these provisions is cause for immediate cancellation of this right.
 16. Use of water under this right shall be non-consumptive.
 17. This right does not grant any right-of-way or easement across the land of another.

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

Signed this _____ day of _____, 2020.

DRAFT

NICK MILLER
Western Regional Manager

Miller, Nick

From: Price, Fredric W <fwprice@blm.gov>
Sent: Tuesday, June 09, 2020 9:37 AM
To: Miller, Nick
Cc: McCrea, Sandra L
Subject: 06-03-2020 Draft Permit Approval: 77-14325, Variety Excursions LLC

Nick,

RE: 06-03-2020, Draft Permit Approval:
77-14325, Variety Excursions LLC

The draft approval dated 06-03-2020 works for BLM. It is consistent with the settlement agreement.

Fredric W. Price
Water Rights Specialist
BLM, Idaho State Office
1387 S. Vinnell Way
Boise, Idaho 83709-1657
(208) 373-3831
fwprice@blm.gov

From: Miller, Nick <Nick.Miller@idwr.idaho.gov>
Sent: Tuesday, January 28, 2020 3:43 PM
To: Price, Fredric W <fwprice@blm.gov>
Subject: RE: [EXTERNAL] Variety Excursions Pre-Hearing Conference

Thanks!

We'll get working on it.

Nick,

From: Price, Fredric W <fwprice@blm.gov>
Sent: Tuesday, January 28, 2020 2:11 PM
To: Miller, Nick <Nick.Miller@idwr.idaho.gov>
Subject: Fw: [EXTERNAL] Variety Excursions Pre-Hearing Conference

Nick,

RE: 77-14325, Variety Excursions, LLC

I filed this with your office yesterday (01-27-2020).

Fred

From: Shane Andrews <shaneandrews@idahoconstructionlawyers.com>
Sent: Thursday, January 23, 2020 11:01 AM
To: Price, Fredric W <fwprice@blm.gov>
Cc: McCrea, Sandra L <smccrea@blm.gov>; Eddy Chapman <eddy@idahoconstructionlawyers.com>
Subject: RE: [EXTERNAL] Variety Excursions Pre-Hearing Conference

Fred,

I was able to obtain approval to execute the stipulation on this matter, please find it attached. I presume that I can now begin to discuss the matter with F&G to nail it all down. Please confirm.

Thank you,

Shane Andrews

Blewett Mushlitz Hally, LLP
Lewiston, Idaho
www.idahoconstructionlawyers.com
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From: Price, Fredric <fwprice@blm.gov>
Sent: Thursday, November 7, 2019 1:47 PM
To: Shane Andrews <shaneandrews@idahoconstructionlawyers.com>
Cc: Sandra McCrea <smccrea@blm.gov>
Subject: Re: [EXTERNAL] Variety Excursions Pre-Hearing Conference

Shane,

RE: 77-14325, Variety Excursions, LLC

It just occurred to me that I haven't seen a signed agreement sent my way yet. Are you still pursuing the project?

Fredric W. Price
Water Rights Specialist
BLM, Idaho State Office, ID-933b
1387 S. Vinnell Way, Boise, ID 83709
(208) 373-3831
fwprice@blm.gov

On Wed, Jul 24, 2019 at 10:22 AM Price, Fredric <fwprice@blm.gov> wrote:

Shane,

Looks great. Approved.

Fredric W. Price
Water Rights Specialist
BLM, Idaho State Office, ID-933b
1387 S. Vinnell Way, Boise, ID 83709
(208) 373-3831
fwprice@blm.gov

On Wed, Jul 24, 2019 at 10:20 AM Shane Andrews <shaneandrews@idahoconstructionlawyers.com> wrote:

Fred,

Out of an abundance of caution, please find a "redline" copy showing the addition of the counterparts language. If this meets with your approval, I will forward it on to my client.

Thank you,

Shane Andrews

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From: Price, Fredric <fwprice@blm.gov>
Sent: Wednesday, July 24, 2019 9:11 AM
To: Shane Andrews <shaneandrews@idahoconstructionlawyers.com>
Cc: smccrea@blm.gov; Gary Madenford <gmadenford@blm.gov>
Subject: Re: [EXTERNAL] Variety Excursions Pre-Hearing Conference

Shane,

RE: 77-14325, Variety Excursions, LLC
9:30 am MT, Pre-Hearing Conf

Based on our discussion during the pre-hearing conference, BLM is prepared to offer the attached Settlement Agreement to resolve BLM's protest.

Fredric W. Price
Water Rights Specialist
BLM, Idaho State Office, ID-933b
1387 S. Vinnell Way, Boise, ID 83709
(208) 373-3831
fwprice@blm.gov

On Fri, Jul 19, 2019 at 12:16 PM Parker, Cody <Cody.Parker@idwr.idaho.gov> wrote:

Hello everyone,

Our pre-hearing conference which was initially set for the 24th of this month has to be moved to the 26th. You can call in at 9:30 Mountain Time using the regular procedure. Please let me know if this doesn't work for you.

Thanks

Cody Parker
Idaho Dept. of Water Resources
Water Resource Agent
208.334.2190
cody.parker@idwr.idaho.gov