

RECEIVED

Form 202A 04/12

JUN 06 2013

ID No. TP-72-39DEPT. OF WATER RESOURCES
SOUTHERN REGIONSTATE OF IDAHO
DEPARTMENT OF WATER RESOURCES**APPLICATION FOR TEMPORARY APPROVAL OF WATER APPROPRIATION**

(For a use not intended to become an established water right, not to exceed a total diverted volume of five (5) acre-feet, and not to exceed one (1) year duration in accordance with Section 42-202A, Idaho Code.)

Name of applicant: Upper Salmon Basin Watershed Program Phone: 208-756-6322
Address: 955 Riverfront Dr., Suite B, Salmon, ID, 83467 Email: abbie.gongloff@osc.idaho.gov

1. Source of water: Yankee Fork of the Salmon River tributary to Salmon River
2. Location of point(s) of diversion:

TWP	RGE	SEC	GOVT LOT	¼	¼	¼	County	Source	Local name or tag #
12N	15E	29		SE	SW	NE	Custer	Yankee Fork Side Channel	

3. Location of place of use:

TWP	RGE	SEC	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
12N	15E	29		0.1	2.2											0.6			2.9

4. Describe proposed use of water Irrigate newly planted riparian habitat along Pond Series 3 located on USFS and JR Simplot property. The place-of-use area was recently reclaimed from dredge tailings to a side-channel and flood-plain. Irrigation will take place weekly.
5. Amount of water:
Maximum rate of diversion 0.33 cfs or 150 gpm.
Maximum daily volume 0.25 AF; total volume <5 AF.
6. Duration of diversion: from 6 June 2013 to 30 September 2013
Day-month Day-month
7. Describe proposed diverting works: A gas-powered pump and layflat hose fitted with a NOAA compliance fish screen
8. a. Who owns the property at the requested point of diversion? JR Simplot Company
b. Who owns the land to be irrigated or place of use? JR Simplot Company and US Forest Service
c. If the property is owned by a person other than the applicant, describe the arrangement allowing access to the water:
OSC has an access agreement to conduct a fish habitat and mining reclamation project.
9. Additional remarks: OSC is part of a cooperative effort with landowners JR Simplot Company and the US Forest Service to build, maintain, and monitor the rehabilitation of Pond Series 3 in the Yankee Fork. Irrigation of the riparian vegetation to help it become established is imperative.

I hereby acknowledge that I assume all risk if the diversion and use of the water under this approval injures other water rights. I certify this is a temporary use and that I am not seeking a continuing right to use water.

Abbie Gongloff 6/4/13
Signature of applicant Date

Received by ADM Date 6/6/2013 Time Noon
\$50.00 fee received by ADM # 5033305 Date 6/6/2013
Watermaster Comments received? Yes - JB Date 6-7-13

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that the department has examined this application for temporary approval to use water under the provisions of Section 42-202A, Idaho Code, and has determined that:

- _____ A. The application for temporary approval should be denied.
- X B. The application for temporary approval should be approved, since
1. The temporary approval can be properly administered.
 2. Other water sources are not readily available.
 3. The approval is in the public interest.
 4. The approval will not injure known public values associated with the water source or any known water rights.

This application is therefore hereby:

- _____ A. DENIED
- X B. APPROVED, subject to the following conditions:
1. Diversion and use of water under this approval is subject to all valid existing water rights.
 2. The applicant assumes all risk the use of the water under this approval may injure other water rights.
 3. This approval authorizes a maximum diversion of 5.0 AF and a maximum rate of diversion of 0.33 cfs.
 4. This approval does not grant a right-of-way across the land of another, does not create a continuing right to use the water and may not be used in connection with a use which requires a continuing water supply.
 5. The department may cancel this approval at any time if the department identifies injury to other water rights.
 6. This approval does not create a continuing right to use water.
 7. The holder of this temporary permit shall not divert at a rate or in a manner that will significantly reduce the flow in the water source or otherwise adversely affect fish, wildlife or other public values.
 8. Other: See attached additional condition sheet
-
9. This approval expires on 9/30/2013.

Signed this 7th day of June, 2013.



For the Director

ADDITIONAL CONDITIONS OF APPROVAL FOR TEMPORARY
PERMIT NO. TP-72-39

- Diversion must be screened to meet IDF&G requirements. Please call 208-756-6022 for specifications.
- All equipment involved with transporting water shall be treated/sterilized to avoid spread of invasive aquatic species prior to use. If equipment involved with transporting water has been moved into Idaho from another state (Particularly from NV, CO, UT, AZ, CA or TX) contact ISDA for an inspection. We recommend contacting ISDA (Amy Ferriter @ 208-332-8686) for treatment recommendations.
- Subject to regulation by watermaster of Water District 170.

RESTORATION AND MONITORING ACCESS AGREEMENT

THIS AGREEMENT is made this 11TH day of September 2012 between J. R. Simplot Company. ("Owner") the State of Idaho, Office of the Governor, by and through the Office of Species Conservation ("OSC") and Trout Unlimited Inc. ("TU") referred to together as the "Parties."

RECITALS

The Parties recite and declare:

- A. Owner is the owner of land located in Custer County, Idaho that lies adjacent to the Yankee Fork of the Salmon River upon which a water diversion and series of ponds are located (the "Pond Series 3 Property"). The Pond Series 3 Property is within a portion of Custer County Assessor's Parcel Number RP9912N15E3210 located in Section 29 T.12N, R.15E B.M. A map of the Pond Series 3 Property is shown on attached **Exhibit A**.
- B. TU's mission is to conserve, protect, and restore coldwater fisheries in North America. TU participates in the planning, construction and monitoring of conservation, protection and restoration projects. TU has worked with the United States Department of the Interior, Bureau of Reclamation to develop, design and permit a salmon and steelhead restoration project on the Pond Series 3 Property (the "PS3 Side Channel Project").
- C. OSC's mission is to coordinate policies and programs related to the conservation of threatened, endangered and candidate species in Idaho. OSC is dedicated to planning, coordinating and implementing the State's actions to preserve, protect and restore species listed as threatened and endangered under the federal Endangered Species Act ("ESA"), including the development of on-the-ground measures. Indirect funding for such measures is provided by, among other funding sources, the Bonneville Power Administration ("BPA"). OSC wishes to construct the PS3 Side Channel Project with BPA funding.
- D. The Owner, OSC and TU now wish to implement, monitor and maintain the PS3 Side Channel Project on the Pond Series 3 Property by entering into this Agreement that describes and confirms the Parties' respective commitments to the project.

AGREEMENTS

NOW THEREFORE, in consideration of the foregoing recitals, and the promises and covenants set forth herein, and for other good and valuable consideration, the legal sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

1. **OWNER.** Owner is aware that OSC will construct the PS3 Side Channel Project with funds from the Bonneville Power Administration and that TU will monitor the outcomes for anadromous fish from the PS3 Side Channel Project using funds from the Department of the Interior, Bureau of Reclamation. Owner is also aware OSC and TU are relying

upon the Owner's promises under this Agreement to justify the expenditure of their own limited monetary resources and personnel time on this project. With this understanding Owner hereby:

- 1.1. Provides OSC, its agents, subcontractors and representatives with an irrevocable license until July 31, 2015, to construct the PS3 Side Channel Project on the Pond Series 3 Property in accordance with the plans attached hereto as **Exhibit B** and with the restrictions described in Section 2, below. In the event OSC, its agents subcontractors and representatives fail to complete the construction of the PS3 Side Channel project on or before July 31, 2015, Owner may terminate this Agreement by providing no less than 30 days advance written notice to terminate. A copy of the notice shall be sent to OSC and TU.
- 1.2 Subject to OSC's obligation to complete the construction of the PS3 Side Channel Project on or before July 31, 2015, Owner hereby provides TU, its agents, contractors and representatives with a revocable license until July 31, 2020 to monitor the outcomes for anadromous fish from the PS3 Side Channel Project, in accordance with the plan attached hereto as **Exhibit C**, and with the restrictions described in Section 3, below. In the event this Agreement is terminated by Owner in accordance with Section 1.1 above, then this license shall be deemed revoked. Owner shall also have the right to revoke this license and terminate this Agreement should TU fail to perform its obligations described in this Agreement.
- 1.3 Agrees that in the event Owner disturbs the work performed to construct the PS3 Side Channel Project Owner will, subject to the limitation set forth in Paragraph 1.4, below, perform an equivalent restoration project on the Yankee Fork or reimburse OSC and TU for an amount of their out-of-pocket expenses incurred to construct and monitor the PS3 Side Channel Project that is proportionate to the amount of the PS3 Side Channel Project disturbed by Owner. Owner's commitments set forth in this paragraph shall expire on July 31, 2032. Upon such expiration, Owner is hereby authorized by OSC and TU to record a termination and release of this Agreement in the official real property records of Custer County, Idaho.
- 1.4 Notwithstanding anything in this Agreement to the contrary, the aggregate liability of Owner to TU and OSC whether for breach of this Agreement, tort or otherwise, arising in any way out of or related to this Agreement or the Pond Series 3 Property shall not exceed one hundred thousand dollars (\$100,000).

2. OSC. OSC agrees to:

- 2.1 Build the PS3 Side Channel Project as follows:
 - 2.1.1 Pursuant to the plans and specifications provided by the Bureau of Reclamation attached as **Exhibit B**, and in compliance with all applicable laws and regulations.
 - 2.1.2 Using Idaho licensed contractor(s). OSC shall provide notice to Owner either in writing or by electronic message of the contractors proposed to be

used to construct this project. Owner shall have the right to in its sole discretion to reject any proposed contractor either in writing or by electric message within two weeks of receiving notice from OSC (and thereafter if any contractor fails to comply with the requirements of this Agreement).

- 2.2 All contractors used for the PS3 Side Channel Project entering the Pond Series 3 Property shall carry General Liability insurance, including completed operations coverage, Auto Liability coverage, and Professional Errors and Omissions coverage with limits of at least \$1,000,000 (each) covering the services performed for OSC. Contractors shall also have Workers Compensation coverage in place covering employees consistent with Idaho Statutory requirements. All policies shall be endorsed with a waiver of subrogation in favor of Owner. Contractors shall have Owner named as an additional insured on the policies, and shall provide Owner with a certificate of insurance evidencing this coverage. Furthermore, prior to entering the Pond Series 3 Property OSC, its contractors, volunteers and/or agents shall each execute a waiver and release of any and all claims against Owner for any liability whatsoever, in a form that is acceptable to Owner.
- 2.3 OSC, at OSC's sole risk and expense, shall be responsible for immediately removing any liens or encumbrances recorded against Owner's property in connection with any work to be performed hereunder. In the event OSC fails to remove any such liens or encumbrances within 30 days of receiving written notice from Owner, Owner may (i) proceed, at OSC's expense, to remove said liens or encumbrances, and, (ii) revoke the license provided to OSC and terminate this Agreement (in which event the license provided to TU shall be deemed revoked).
- 2.4 OSC shall not conduct construction activities on Owner's property adjacent to the site of the PS3 Side Channel Project without prior permission to do so from Owner. Nothing in this Agreement provides, or shall be construed to provide, permission by Owner to allow public access to the Pond Series 3 Property.
- 2.5 OSC shall provide Owner with reasonable oral notice of its entry on the Pond Series 3 Property under the license provided to it in Section 1.1.
- 2.6 OSC shall hold Owner, its shareholders, contractors, employees and invitees, harmless and indemnify Owner and such related parties from and against any loss or damage including, without limitation, damage to or destruction of real or personal property and injury to and death of persons arising from or in connection with OSC's activities on the Pond Series 3 Property (including, without limitation, OSC's use of the access roadway maintained by the United States Forest Service situated on the real property of Owner and OSC's construction, maintenance, use or reclamation of the Pond Series 3 Project).
- 2.7 OSC's obligations under this Section 2 will survive the termination of this Agreement.

3. **TROUT UNLIMITED.** TU agrees to:

- 3.1 Monitor the completed PS3 Side Channel Project pursuant to and in accordance with the plan attached as **Exhibit C**.
- 3.2 TU shall provide notice to Owner either in writing or by electronic message of the contractors, volunteers or agents proposed to be used to monitor this project. Owner shall have the right in its sole discretion to reject any proposed contractor, volunteer or agent either in writing or by electronic message within two weeks of receiving notice from TU (and thereafter if any contractor fails to comply with the requirements of this Agreement).
- 3.3 TU, its contractors, volunteers and/or agents entering the Pond Series 3 Property to monitor the PS3 Side Channel Project shall carry general liability coverage covering the monitoring activities services performed by and for TU. The policy limits shall be at least \$1,000,000 per occurrence. Contractors shall also have Workers Compensation coverage in place covering employees consistent with Idaho Statutory requirements. All policies shall be endorsed with a waiver of subrogation in favor of Owner. Contractors shall have Owner named as an additional insured on the policies, and shall provide Owner with a certificate of insurance evidencing this coverage. Furthermore, prior to entering the Pond Series 3 Property TU, its contractors, volunteers and/or agents shall each execute a waiver and release of any and all claims against Owner for any liability whatsoever, in a form that is acceptable to Owner.
- 3.4 TU shall not conduct monitoring activities on Owner's property adjacent to the site of the PS3 Side Channel Project without prior written permission to do so from Owner. Nothing in this Agreement provides, or shall be construed to provide, permission by Owner to allow public access to the Pond Series 3 Property.
- 3.5 TU shall provide Owner with reasonable oral notice of its entry on the Pond Series 3 Property under the license provided to it in Section 1.1.
- 3.6 TU shall hold Owner, its shareholders, contractors, employees and invitees, harmless and indemnify Owner and such related parties from and against any loss or damage, including, without limitation, damage to or destruction of real or personal property and injury to and death of persons arising from the use of the revocable license provided in Section 1.2 by TU, its employees, contractors, volunteers, invitees and/or agents on the Pond Series 3 Property (including, without limitation, TU's use of the access roadway maintained by the United States Forest Service situated on the real property of Owner).
- 3.7 TU's obligations under this Section 3 will survive the termination of this Agreement.

4. REMEDIES

4.1. Injunctive Relief. If OSC or TU determines that a violation by Owner of the terms of this Agreement has occurred, OSC or TU shall provide Owner with written notice of said alleged violation. Owner shall then have 30 days to respond to said notice either accepting or disputing the claim by OSC or TU of the alleged violation. In the event Owner accepts responsibility for causing the alleged violation and if Owner fails to cure the violation within forty-five (45) days after receipt of notice thereof from TU or OSC, or under circumstances where the violation cannot reasonably be cured within a forty-five (45) day period, fail to begin curing such violation within the forty-five (45) day period, or fail to continue diligently to cure such violation until finally cured, TU or OSC may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Agreement, to enjoin the violation, ex parte as necessary, by temporary or permanent injunction, and to require the restoration of the PS3 Side Channel Project to the condition that existed prior to any such injury.

4.2. Binding Arbitration. In the event Owner denies that it caused or is responsible for the violation alleged by OSC or TU, Owner shall provide OSC or TU with notice denying any responsibility for the alleged violation within 30 days of receiving notice from OSC or TU. Within 15 days of receiving Owner's written response denying responsibility for the alleged violation, OSC or TU may provide written notice to Owner that the matter shall be referred to binding arbitration. Failure to provide Owner with the notice referring the matter to arbitration shall constitute a full release and waiver of any claims made against Owner for the alleged violation. Within 15 days of receiving OSC or TU's notice that the matter shall be referred to binding arbitration, Owner and OSC or TU shall select a mutually acceptable arbitrator and location for conducting the arbitration. The arbitrator's decision shall be final and legally binding and judgment may be entered thereon.

Each party shall be responsible for its share of the arbitration fees in accordance with the applicable rules of arbitration. In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, the other party is entitled to costs of suit, including a reasonable attorney's fee for having to compel arbitration or defend or enforce the award.

Owner's maximum liability that may become due in accordance with this Section 4, including, but not limited to attorney fees, arbitration fees and any other costs relating to the arbitration and replacement of disturbed habitat shall not exceed the aggregate sum set forth in Paragraph 1.4 above (\$100,000.00).

4.3. Forbearance. Forbearance by any Party to exercise its rights under this Agreement in the event of any breach of any term of this Agreement by another shall not be

deemed or construed to be a waiver by such Party of such term or of any subsequent breach of the same or any other term of this Agreement or of any of such Party's rights under this Agreement. No delay or omission by a Party in the exercise of any right or remedy upon any breach by another shall impair such right or remedy or be construed as a waiver.

5. RECORDING OF AGREEMENT

The parties hereby agree to record this Agreement in the Custer County Recorder's Office. In the event the Agreement is terminated in accordance with Section 1.1 above (or otherwise as permitted by this Agreement), Owner is hereby authorized by OSC and TU to record a termination and release of this Agreement in the official real property records of Custer County, Idaho.

6. NOTICE

Whenever any notice, demand, or request is required or provided for under this Agreement, such notice, demand, or request shall be provided in the manner specified to the following addresses or such other addresses as the Parties may indicate in writing, by postage prepaid, certified, or registered mail; to the following electronic messaging address, or; to the following phone number:

To Owner: J. R. Simplot Company
Attn: Vic Conrad
999 Main St., Suite 1000
Boise, ID 83707
vic.conrad@simplot.com
(208) 389-7359

To OSC: Office of Species Conservation
Attn: Mike Edmondson
P.O. Box 83720
Boise, Idaho 83720-0195
mike.edmondson@osc.idaho.gov
(208) 334-2189

To TU: Jerry Myers, Upper Salmon Project Manager
Trout Unlimited
194 Indian Creek Road
North Fork, ID 83466
jmyers@tu.org
(208) 394-2111

Notice shall be deemed to have been delivered upon receipt by the other party..

7. INSTRUMENT AS THE ENTIRE AGREEMENT

This instrument contains the entire agreement between the Parties, and no statements, promises, or inducements made by either party or agent of either party that are not contained in this written contract shall be valid or binding; this contract may not be enlarged, modified, or altered except in writing signed by the Parties and indorsed on this Agreement.

8. GOVERNING LAW

This Agreement shall be governed and construed under the laws of the State of Idaho. All activities undertaken pursuant to this Agreement shall be in compliance with all applicable law.

9. ATTORNEY FEES

If any action is brought by TU, OSC or Owner to enforce the provisions of this Agreement, the prevailing party, in such action, shall be entitled to reasonable attorney fees and court costs as determined by the court.

10. LIABILITY FOR ACTIONS

OSC and TU bear full legal liability for their own activities and the activities of their volunteers, contractors and agents, working under their supervision and direction, while performing the work described in Sections 2 and 3.

11. NO AGENCY OR PARTNERSHIP

Except as otherwise expressly set forth herein, this Agreement does not, and shall not be deemed to, make TU or OSC an agent or contractor for, or partner of Owner.

12. PARAGRAPH TITLES FOR CONVENIENCE ONLY

The titles for the paragraphs of this Agreement are used only for convenience of reference and organization and shall not be used to modify, explain, or interpret any of the provisions of this Agreement or the intentions of the Parties. Reference to a given section of this Agreement shall be deemed to include all subsections of that section.

13. EXECUTION OF THE AGREEMENT

13.1. Signatory Authority. Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents, and that such Party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such party.

13.2. Signing in Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as


an original document as if all the signatory Parties to all of the counterparts had signed the same document. Any signature page of this Agreement may be detached from any counterpart of this Agreement without impairing the legal effect of any signatures, and may be attached to another counterpart of this Agreement identical in form having attached to it one or more signature pages.

14. EFFECT OF AGREEMENT

This Agreement shall inure to the benefit of and be binding on the heirs, executors, administrators, assignees, subsequent owners of all or part of the Pond Series 3 Property, and successors of the respective Parties.

IN WITNESS WHEREOF, the parties have executed this agreement the day and year first above written.

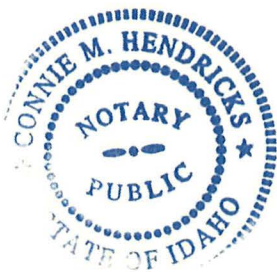
J. R. SIMPLOT COMPANY

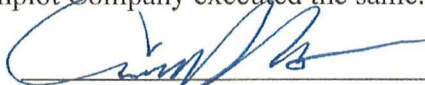

By Terry T. Uhling
Its Senior Vice President, Secretary
and General Counsel

State of Idaho)
) S.S.
County of Ada)

On this 11th day of September, 2012, before me, Connie M. Hendricks a notary public, personally appeared Terry T. Uhling known or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged me that he executed the same on behalf of J.R. Simplot Company, and acknowledged to me that J.R. Simplot Company executed the same..

S
E
A
L




Notary Public for Idaho

Residing at: Boise

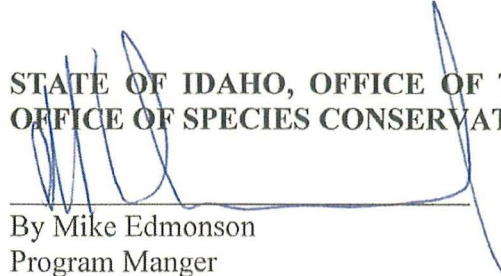
My Commission Expires: 8/22/2014

TROUT UNLIMITED INC.



By Kim Trotter
Director, Idaho Water Project

**STATE OF IDAHO, OFFICE OF THE GOVERNOR, BY AND THROUGH THE
OFFICE OF SPECIES CONSERVATION**



By Mike Edmonson
Program Manger

MEMORANDUM

Date: June 5, 2013
To: Upper Salmon Basin Watershed Program Temporary Water Permit File
From: Jim Bitzenburg
Re: Idaho Department of Fish and Game Comments

I spoke by phone today with Paddy Murphy of the Idaho Department of Fish and Game concerning the Temporary Permit on the Yankee Fork of the Salmon River. He said that IDFG had supplied screens to the Idaho Office of Species Conservation to place at the pump inlets and that would be sufficient to address IDFG concerns.

MEMORANDUM

Date: June 7, 2013
To: Upper Salmon Basin Watershed Program Temporary Water Permit File
From: Jim Bitzenburg
Re: U. S. Forest Service Comments

In a telephone message, Bart Gamett of the U.S. Forest Service Salmon-Challis National Forest office in Mackay said that the Forest Service is fully supportive of the project, and no conditions or restrictions are required by their agency.

MEMORANDUM

Date: June 5, 2013
To: Upper Salmon Basin Watershed Program Temporary Water Permit File
From: Jim Bitzenburg
Re: Watermaster comments

I emailed Nick Miller of the IDWR Boise office, who is the watermaster for that area. He had no problem with the application for this year, but said if the need continues, they would need to get a more permanent source, with measurement devices.

Bitzenburg, James

From: Miller, Nick
Sent: Tuesday, June 04, 2013 4:14 PM
To: Bitzenburg, James
Subject: RE: Temporary permit

I don't have an issue with this application for this year only, but if the need continues into future years, they should get a more permanent source, with measurement devices, etc...

Nick Miller, P.E.
Water Distribution Section
Idaho Department of Water Resources
322 E. Front St. Boise, ID 83720-0098
208-287-4956 (Office)
208-287-6700 (Fax)

From: Bitzenburg, James
Sent: Tuesday, June 04, 2013 3:59 PM
To: Miller, Nick
Subject: Temporary permit

Nick-

Attached is the Temporary Permit Application for the irrigation of the riparian habitat up on the Yankee Fork. I need to get your comments on this application. If you have any questions, give me a call or Email. Thanks for your help.

Jim

Jim Bitzenburg
Water Resource Agent
Southern Regional Office
Phone (208)-736-3033
Fax (208)-736-3037
james.bitzenburg@idwr.idaho.gov