

APR 20 2020

DEPARTMENT OF
WATER RESOURCESBEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHOIN THE MATTER OF WATER RIGHT)
PERMIT NO. 75-14954 IN THE NAME OF)
BRYAN AND CYNTHIA YENTER)EXCEPTION TO ORDER
DENYING PETITION FOR
RECONSIDERATION

On July 17, 2019, Bryan and Cynthia Yenter (Permit Holders) submitted Application for Permit 75-14954 to the Department of Water Resources (Department), proposing ground water irrigation on five (5) acres historically irrigated with surface water. Permit Holders indicated that ground water would be developed as a primary irrigation source on some or all of the acres. On March 3, 2020 the Department approved Permit 75-14954 (Permit). Condition No. 4 contained on the Permit requires the full use of surface water rights prior to use of ground water for irrigation, unless the surface water supply is “not reasonably sufficient”, or is not available due to drought, curtailment, or other reasons.

On March 19, 2020, Permit Holders timely submitted a Petition for Reconsideration (Petition), objecting to the inclusion of the “surface water first” condition on the Permit, on the grounds that the condition is unduly restrictive and not warranted in a basin which is open for new appropriation. On April 9, 2020, the Department issued an *Order Denying Petition for Reconsideration* (Order). The Order states:

“Idaho’s ground water resources are limited in certain areas and are generally of a higher quality than available surface water. Requiring the use of surface water, when available, conserves the ground water resources for times when surface water is not available and for purposes dependent upon water quality ... The Idaho Code § 42-203(A)5 requirement to conserve Idaho’s water resources applies statewide, not just in moratorium areas. On a case-by-case basis, the Department can consider whether the surface water first strategy is appropriate for a particular permit.” *Order* at 2.

The Order asserts that Permit Holders have not presented “site specific hydrogeologic or local public interest information supporting removal of the surface water first condition...” *Order* at 2.

Permit Holders take exception to the Order on the grounds that “surface water first” completely disregards that Basin 75 is open to new appropriations, and that water resource management in the Upper Salmon Basin River seeks to protect surface water resources, not ground water resources. The Order chastises the Permit Holders for not presenting supporting information, but the Order itself includes no factual data that the aquifer in the Permit area is compromised and needs protection. There is little hydrogeologic information available regarding the aquifer in the permit area. Unlike the Lemhi Basin, which is the subject of a number of reports, there have been no studies relative to the local aquifer downstream of the City of Salmon, and there is no predictive model for the area. There is no published evidence to suggest

that conversion of irrigated acres from surface water to ground water would be contrary to conservation of water resources in the permit area.

Permit Holders make the following arguments in support of their Exception.

Basin 75 is open for appropriation.

The Upper Salmon River basins, including the Department's Administrative Basin 75, are presently open to new irrigation appropriations from both ground and surface water sources. In Basin 75, a new appropriation authorizing primary ground water irrigation may be approved with no limiting conditions. This Permit, in the same basin, proposes conversion from surface water to ground water irrigation, but is subject to restrictive approval conditions which result in limited use of ground water. This makes little sense. If supplemental ground water use must be limited, then primary ground water irrigation should not be approved.

Aquifers in the Salmon Basins are not sole-source aquifers. The Order offers no data that the local aquifer is declining, or approaching critical conditions, or any other valid reason that withdrawals of ground water must be controlled or reduced. There is no justification for the use of the surface water first conditions in open basins. Even the Ground Water Act does not mandate that ground water be protected at all costs, only that the Director of the Department may apply conditions to protect the ground water resource as necessary. Idaho Code § 42-203(A)5 does not necessarily require conservation of ground water resources over surface water resources. With appropriate conditioning, it is not contrary to the conservation of water resources *in an open basin*, to permit conversion from surface water irrigation to primary ground water irrigation.

Ground water in the permit area is not of high quality.

The Order makes a generalized statement which does not apply to the Permit area. The local aquifer in the Permit area is not of pristine quality and is not sought after by other uses. Salmon Valley aquifers are shallow, lying primarily in stream and glacial sediments, and are adequately refilled by natural precipitation¹ and by incidental recharge from surface water flood irrigation. Ground water quality is marginal in many areas as it contains objectionable levels of iron, sulfur, or both. Ground water in some areas has been found to contain levels of dissolved solids which exceed EPA drinking water standards.² The City of Salmon does not use ground water for municipal supply, drawing instead from Jesse Creek and its tributaries. The aquifer is utilized primarily by rural residential wells because it is the only available source of domestic water, even though ground water often must be treated to reach desirable aesthetic quality.³ Ground water in the permit area is best suited for irrigation, and is a good alternative supply for irrigation or small conversion projects such as this one.

¹ Graham and Campbell, Ground Water Resources of Idaho, Idaho Department of Water Resources Report, August 1981, pg 31.

² Yee and Souza, Quality of Ground Water in Idaho, Us Geological Survey Water-Supply paper 2272, 1987, pg 28-29.

³ Evidence of this is largely anecdotal, although Permit Holders can submit four years of invoices from Culligan Water for treatment of their own domestic water.

Resource Management in the Upper Salmon River seeks to conserve surface water, not ground water.

The Upper Salmon Basin Watershed Program (USBWP) was founded in 1992 to implement projects that improve fish habitat and increase water flow and connectivity in streams and tributaries, while protecting existing irrigation diversions and maintaining full beneficial use of water. Strategies for the benefit of ESA-listed species, particularly anadromous fish, are key components of water planning and management in the Salmon River Basin. As stated in the Idaho State Water Plan, the first implementation strategy of the Wild and Scenic Rivers Agreement is to “Ensure that the water right application review process considers basin conservation plans and limiting factors for ESA-listed fish”.⁴ Use of the surface water first condition in the Salmon River Basin is in direct opposition to the management goals of the USBWP and the Idaho State Water Plan.

While many of the projects in the Salmon River Basin are sponsored and receive funding, others are completed entirely on a land owner’s own initiative, and go unrecognized. A small ground water project such as the one represented by this Permit is likely to create only an infinitesimal enhancement to stream flow in the Salmon River, but the project is undertaken in the same spirit as larger conservation projects. The application of the surface water first condition, which forces the use of ground water under the Permit to a supplemental status, is contradictory to the management goals of the area and is not in the local public interest.

Water right conditions must not be ambiguous.

Under the surface water first condition, ground water may not be diverted unless surface water is “not reasonably sufficient”:

“The right holder shall make full beneficial use of all surface water available to the right holder for irrigation of lands within the authorized place of use for this right. The right holder may divert ground water under the right to irrigate land with appurtenant surface water rights when the surface water supply is not reasonably sufficient to irrigate the place of use for this water right or is not available due to drought, curtailment by priority, or the seasonal startup and shutoff or maintenance schedule for canal company deliveries.” *Permit* at condition no, 4.

The Order fails to define what is meant by the term reasonably sufficient, or what would be expected in order to determine that surface water is not in fact reasonably sufficient:

“...[C]ircumstances vary when surface water may not be reasonably sufficient. Possibilities include droughts and priority cut, as stated in the condition. The Department does not view the language as ambiguous simply because the surface water first condition does not contain a comprehensive list of every circumstance when surface water may not be reasonably sufficient for an irrigation practice.” *Order* at 3.

It is not clear what this statement means. It is as ambiguous as the condition itself.

⁴ Idaho State Water Plan, pg. 71.

Ambiguity has no place in water right conditions. Water right conditions are applied as necessary by the Department to ensure that development and use under a water right does not interfere with existing rights. Ambiguous conditions may not effectively accomplish what is intended. For instance, the surface water first condition may look good on paper, but is impossible to consistently administer because the definition of "reasonably sufficient" is unknown. Different watermasters, water users, and Department staff will have opposing views about which delivery conditions constitute "reasonably sufficient". Consequently this creates uncertainty for the water user about when the permit may legally be exercised. A water right condition should say exactly what the Department intends, and should include the actions the water user is expected to take in order to satisfy the condition.

Conservation of water resources is addressed and injury to other rights is minimized under a new permit, if duty of water is not exceeded and if enlargement in use does not occur when the permit is used in combination with underlying rights. A condition limiting combined diversion and volume rates for the Permit acres is adequate to prevent the exceedance of the per-acre duty of water on the place of use. Condition no. 3 of the Permit satisfies this requirement.⁵ Enlargement under existing rights may be addressed by the substitution of condition no. 4 with the following condition:

If the portion of water rights 75-14847 or 75-14848 which are appurtenant to the place of use are sold, transferred, leased, or used on any other place of use, right no 75-14954 shall not be used.

Ground water conversion is a conservation practice which is in the local public interest.

Idaho Code § 42-250(2) defines water conservation practices as "any practice, improvement, project or management program, that results in the diversion of less than the authorized quantity of water while maintaining the full beneficial use(s) authorized by the water right. Water conservation practices include, but are not limited to, practices that result in ... reductions in conveyance losses, and reductions in surface and seepage losses occurring at the place of use." Conversion from surface water to ground water irrigation for certain acres is a water conservation practice which supports the management goals of the Salmon River Basin, and is in the local public interest.

Approximately 4 acres under the Permit may be irrigated with Salmon River water pursuant to decreed right no. 75-14847. Priority of this right is 1923; the area is not yet in regulation but this reach of the Salmon River is not flow limited and the right should remain in priority for the entire irrigation season. The four acres are situated at the end of a mile-long ditch; most or all the 0.11 cfs associated with that 4 acres are lost to seepage in the conveyance ditch before it reaches the place of use. Because the ditch is close to the river, it can safely be presumed that conveyance losses return to the river or to the shallow aquifer. But the acreage has remained largely unirrigated for the past several years because there is not adequate water to travel all the way down the ditch. This may technically satisfy the condition of "not reasonably sufficient",

⁵ The condition is appropriately applied, but the per acre rate of flow should be reduced to 0.02 cfs per acre to be consistent with the Wild and Scenic Agreement.

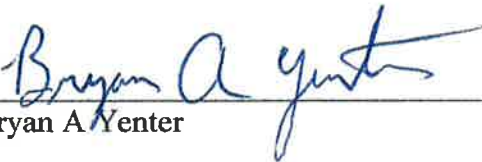
although the necessity of diverting and losing the river water to seepage, in order to divert from ground water, defies logic and is counter to the principal of conservation of water.

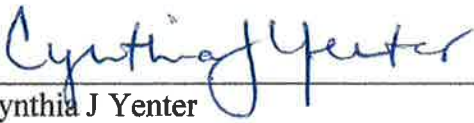
Under a properly conditioned conversion permit, 0.11 cfs of surface water under right no. 75-14847 would remain undiverted while ground water is in use on the Permit acres. The source well is within about ¼ mile of the Salmon River, and ground water is considered tributary to the river in this reach, so any potential impacts to the river from ground water pumping will be offset by the non-use of the underlying surface right. Full beneficial use will again be possible under the conversion project. Since all conveyance losses are eliminated, and the ensuing ground water applications by sprinkler systems will not exceed one inch per acre, there will be no net change to the local water balance.

Conclusion

The Order attempts, and fails, to justify use of default surface water first conditioning on this Permit. The Order does not consider local or regional water resource management in the Upper Salmon River Basin. Requiring use of surface water before ground water under this Permit is an arbitrary requirement that is not warranted by local water supply conditions, and which does not necessarily result in the conservation of water resources in the Salmon River basin.

Permit Holders request that the Director reject the Order Denying Petition for Reconsideration.

 4.20.2020
Bryan A Yenter Date

 4.20.2020
Cynthia J Yenter Date