

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF LICENSE NO. 37-21719) ORDER GRANTING PETITION FOR
IN THE NAME OF WILD WEST INC.) RECONSIDERATION, IN PART
) AND DENYING PETITION FOR
) RECONSIDERATION, IN PART
_____)**

BACKGROUND

On December 21, 2017, the Idaho Department of Water Resources (“Department”) issued License 37-21719 (“License”) in the name of Wild West, Inc., (“Wild West”) as a Preliminary Order. On January 4, 2018, Wild West filed a Petition for Reconsideration (“Petition”).

Pursuant to Rule 730.02.a of the Department’s Rules of Procedure (IDAPA 37.01.01), a petition for reconsideration must be filed within 14 days of the service date of the Preliminary Order. Wild West filed its Petition within 14 days of the service date of the Preliminary Order and, therefore, the Petition was filed in a timely manner.

Wild West’s Petition contends that certain items included in the Preliminary Order are incorrect and should be modified. In the analysis section below, each contention is identified and a response is provided.

ANALYSIS

Diversion Rate

In its Petition, Wild West states:

The maximum diversion rate should be the permitted amount of 0.11 cubic feet per second (“cfs”) as each of several establishments independently may use up to 0.04 cfs.

Permit 37-21719 was issued with a maximum diversion rate of 0.11 cfs for domestic use for up to 25 retail businesses. Rule 35.01.r of the Department’s Beneficial Use Examination Rules (IDAPA 37.03.02) provides as follows:

Unless required as a condition of permit approval, an on-site examination and direct measurement of the diversion rate are not required for the following water uses if the beneficial use, place of use, season of use, and point of diversion can be confirmed by documentary means such as well driller reports, property tax records, receipts and other records of the permit holder, or photographs, including aerial photographs:

- i. Irrigation up to five (5) acres.

ii. Storage of up to fourteen point six (14.6) acre-feet of water solely for stock watering purposes.

iii. Any uses other than irrigation or storage if the total combined diversion rate for all the uses established in connection with the permit does not exceed twenty-four one hundredths (0.24) cubic feet per second.

The field examiner's report for 37-21719 did not include any calculations or measurement results indicating any justification for a diversion rate other than the permitted amount of 0.11 cfs.

Conclusion: IDWR should change the diversion rate to 0.11 cfs as requested by Wild West.

Acre Foot Limit

In its Petition, Wild West states:

The 11 acre feet ("AF") volume limitation should be deleted as the permit had no such annual volume limitation.

Rule 35.01.j of the Department's Beneficial Use Examination Rules (IDAPA 37.03.02) provides in pertinent part as follows:

For each use of water the examiner shall report an annual diversion volume based on actual beneficial use during the development period for the permit. The method of determining the annual diversion volume shall be shown. The annual diversion volume shall account for seasonal variations in factors affecting water use, including seasonal variations in water availability.

Idaho Code §42-219 provides, in pertinent part as follows:

Upon receipt by the department of water resources of all the evidence in relation to such final proof, it shall be the duty of the department to carefully examine the same, and if the department is satisfied that the law has been fully complied with and that the water is being used at the place claimed and for the purpose for which it was originally intended, the department shall issue to such user or users a license confirming such use. Such license shall state the name and post-office address of such user, the purpose for which such water is used and the quantity of water which may be used, which in no case shall be an amount in excess of the amount that has been beneficially applied.

The field examiner's report for 37-21719 did include calculations of estimated water use providing a justification for an allowable annual diversion volume of 11.0 acre-feet.

Conclusion: IDWR should not delete the 11.0 acre-foot limit as requested by Wild West.

Fire Suppression

In its Petition, Wild West states:

Fire suppression should be added as a use since there is a fire hydrant on the property that is served by the well and the building also has a fire suppression system hooked up to the well.

Permit 37-21719 was issued with a maximum diversion rate of 0.11 cfs for domestic use for up to 25 retail businesses. Fire protection or a similar use description was not listed as a beneficial use on Permit 37-21719.

Idaho Code § 42-211 provides, in pertinent part as follows:

Whenever a permit has been issued pursuant to the provisions of this act, and the permit holder desires to change the place, period, or nature of the intended use, or make other substantial changes in the method of diversion or proposed use or uses of the water, he shall file an application for amendment upon forms to be furnished by the department of water resources together with the statutory fee for filing and recording same, and upon receipt thereof it shall be the duty of the department of water resources to examine same and if approval thereof would not result in the diversion and use of more water than originally permitted and if the rights of others will not be adversely affected thereby, the director of the department of water resources shall approve said application and return an approved copy to the permit holder.

Idaho Code § 42-211 allows for the change in nature of use, not the addition of a use. The permit holder did not file an amendment of permit 37-21719 to change the nature of use from domestic to fire protection. The permit holder also developed the domestic use described by permit 37-21719 and license 37-21719 should be issued for the entire permitted rate of 0.11 cfs for domestic use.

Idaho Code § 42-201 (3) provides, in pertinent part as follows:

Notwithstanding the provisions of subsection (2) of this section, water may be diverted from a natural watercourse and used at any time, with or without a water right:

(a) To extinguish an existing fire on private or public lands, structures, or equipment, or to prevent an existing fire from spreading to private or public lands, structures, or equipment endangered by an existing fire;

Water can be diverted from the well that serves as the point of diversion for license 37-21719 in order to fight an existing fire without having the use described on license 37-21719.

Conclusion: IDWR should not add fire suppression (fire protection) as a use as requested by Wild West.

Condition #1

In its Petition, Wild West states:

Condition # 1 should be revised as follows because the field examiner's report additionally identified public restroom facilities, a fire hydrant, and restaurants and there also are other additional covered uses:

Domestic use is for retail and commercial businesses, offices, restaurants and public restroom facilities and does not include lawn, garden, landscape of other types of irrigation.

Permit 37-21719 was issued with the following condition indicating:

Domestic use is for 25 retail businesses and does not include lawn, garden, landscape, or other types of irrigation.

The field examiner's report for 37-21719 included information documenting the development of one building with five different "retail spaces" and public restroom facilities. The examiner's report indicated that the development included a coffee shop and a partially developed restaurant. The examiner's report also indicated that the retail spaces could be divided to allow for up to 10 retail spaces. At the time of the examination, no businesses were in operation, but evidence was observed of previous operation of businesses. The nature of the development is variable and has included, and could include, different types and numbers of businesses.

Conclusion: Condition # 1 should be modified as requested by Wild West.

Condition #5

In its Petition, Wild West states:

Condition # 5 should be deleted due to the non-consumptive and domestic nature of the use.

Condition #5 on license 37-21719 states:

This right is for the use of trust water, and it is subject to review 20 years after its initial approval (date of permit approval) to re-evaluate the availability of trust water for the authorized use and to re-evaluate the public interest criteria for reallocating trust water.

Permit 37-21719 was issued with the following condition indicating:

Any license issued by IDWR pursuant to the right or portion thereof for the use of trust water is subject to a term review of 20 years after the date of this approval to determine availability of water for the use and to re-evaluate the public interest at the end of the term.

The conditions on permit 37-21719 and license 37-21719 both identify the use of trust water under the right and allow for the review and determination of the future availability of trust water and a re-evaluation of the public interest criteria for reallocating trust water.

Rule 30 of the Department's Water Appropriation Rules (IDAPA 37.03.08.040.01.d) provides in pertinent part as follows:

LOCATION AND NATURE OF TRUST WATER (RULE 30).

01. Snake River Water Rights Agreement. The legislation ratifying the Snake River water rights agreement between the state of Idaho and Idaho Power Company places in trust a part of the flows available to Idaho Power Company under its hydropower water rights in the Snake River Basin between Swan Falls Dam and Milner Dam. The flows subject to the trust water provisions and reallocation under Section 42-203C(2), Idaho Code, are as follows:

- a. Trust water flows under the Snake River water rights agreement are located in the Snake River between Swan Falls Dam located in Section 18, Township 2 South, Range 1 East, Boise Meridian (B.M.) and Milner Dam located in Sections 28 and 29, Township 10 South, Range 21 East, Boise Meridian (B.M.) and all surface and groundwater sources tributary to the Snake River in that reach.
- b. Surface water and groundwater tributary to the Snake River upstream from Milner Dam is not trust water. After giving notice and considering public comment, the Director will designate the area in which groundwater is presumed to be tributary to the Snake River upstream from Milner Dam. Modification or changes in the designated boundary may be made only after providing notice and considering public comment. The area presently designated as tributary to the Snake River in the Milner Dam to Swan Falls Dam reach is appended to these rules (See Attachment A in APPENDIX A located at the end of this chapter), for information purposes only.

The source of the water diverted under right 37-21719 is ground water within the area designated as tributary to the Snake River upstream from Milner Dam. Accordingly, the water diverted is trust water. The Department has issued many permits for appropriation of trust water dating back to the late 1980s containing conditions indicating a 20 year term similar to the term outlined on the conditions on permit 37-21719 and license 37-21719. The conditions allow the Department to review whether there is sufficient trust water to allow continual recognition of the water right, and if so, whether continued use of the trust water is in the public interest. This condition was included on the permit consistent with the Department's authority to condition water rights under Idaho Code 42-203A and should be carried forward as necessary to protect the public's interest in the trust water.

Conclusion: IDWR should not remove Condition # 5 as requested by Wild West.

ORDER

IT IS HEREBY ORDERED that the Petition for Reconsideration is GRANTED, in part. License 37-21719 should be modified by identifying the diversion rate for domestic use and the resulting maximum diversion rate as 0.11 cfs and modifying condition # 1 so that it states, "Domestic use is for retail and commercial businesses, offices, restaurants and public restroom facilities and does not include lawn, garden, landscape or other types of irrigation." License 37-21719 has been revised to reflect these changes. All other arguments and proposals made in the Petition for Reconsideration are DENIED.

Dated this 11th day of January, 2018.



Corey Skinner
Southern Region Manager

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2018, I mailed a true and correct copy, postage prepaid, of the foregoing **ORDER GRANTING PETITION, IN PART, AND DENYING PETITION, IN PART** to the person(s) listed below:

**WILD WEST INC
525 RIVERSIDE AVE
LYNDHURST NJ 07071**

**DANA HOFSTETTER
HAWLEY TROXELL ENNIS & HAWLEY LLP
PO BOX 1617
BOISE ID 83701-1617**

**WATER DISTRICT 130
NATHAN ERICKSON
650 ADDISON AVE W STE 500
TWIN FALLS ID 83301**

via e-mail



Denise Maline
Administrative Assistant