

Notes

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Date: November 9, 2015

Subject: Filling ponds with exempt domestic ground water rights

Water Rights staff members have recently received multiple inquiries about filling ponds with exempt domestic ground water rights. These notes summarize the conclusions drawn after extensive discussions involving Water Rights Section staff, Southern Region staff, the Water Allocation Bureau Chief, and the Deputy Attorney General on November 4, 2015.

We analyzed the following three general scenarios in which the construction of a pond is contemplated *in the future*:

1. If the pond and associated domestic use are collectively small enough to fit within the 13,000 gpd or 2,500 gpd limitation, then we should follow the guidance in Application Processing No. 67, which states, "A water right permit is not required to construct and use a pond that meets the statutory requirements for exemption for domestic uses (Sections 42-111 and 42-227, Idaho Code)." In other words, no water right filing is necessary to divert the ground water, subject to the daily volume limits and other requirements stated in Idaho Code § 42-111, and to retain the water in a pond, regardless of the size of the pond. If the Idaho Code § 42-111 daily volume limits will be exceeded to keep the pond full, to keep the pond water fresh, or to supply a use from the pond, see Scenario 3, below.
2. If the pond and associated domestic use are collectively small enough to fit within the domestic exemption limits, but the owner wants to accomplish the initial pond filling faster than 13,000 gpd (or 2,500 gpd), then the initial filling can be satisfied by a Water Supply Bank rental and no permit is needed for the pond and the topping off from the domestic well. In essence, this is a variant of Scenario 1 where the accelerated fill is a choice, not a necessity. The brief period in which the total use exceeds 13,000 gpd (or 2,500 gpd) is covered by the rental. The rest of the time, the total use does not exceed the Idaho Code § 42-111 daily volume limit.
3. If the pond and associated domestic use collectively exceed the domestic exemption limits because 13,000 gpd (or 2,500 gpd) will be exceeded to keep the pond full, or to supply uses from the pond, or to provide flow-through water, then **no part** of the pond can be covered by the domestic exemption. A permit would be required to fill the pond and to maintain the pond into perpetuity. If the pond is in a moratorium area or other restricted area necessitating mitigation, no part of the mitigation can be achieved with the domestic exempt use because mitigation requires giving up something. Commencing or increasing the domestic use to partially top off the pond is not giving up anything. A water user planning a project where the total use will exceed the domestic exemption

should not get mitigation credit for what could be developed under a domestic exemption. Mitigating the initial fill can be accomplished through a WSB rental. Mitigating the ongoing consumptive use will likely require retiring an irrigation use or some other consumptive use. As an analogy, let's say someone is establishing a commercial use in the barn adjacent to a home. The commercial use requires 100,000 gpd. IDWR would not agree with the argument that the new water right can be only 87,000 gpd because the domestic exemption associated with the home can be expanded to cover 13,000 gpd. Similarly, a proposal for a new home and irrigation of more than ½ acre would not get the benefit of a domestic exemption because the total use exceeds the limit. The new permit would need to cover the entire use, not just the irrigated acreage above a domestic exemption.

In addition to the scenarios proposing future ponds, we also discussed applying the domestic use definition and exemption to *existing* water uses. When we find an existing ground water use in excess of the domestic exemption with no water right filing, IDWR will assume an existing exempt domestic use covers as much of the total use as possible, often up to ½-acre of irrigation and up to 13,000 gpd (or up to 2,500 gpd), and an NOV will be issued only for the extent of development exceeding the domestic exemption. Looking back in time and assuming the exempt domestic use was fully developed is different than a proposal looking forward in time and seeking credit for an undeveloped portion of a domestic use.¹

For transfers of existing domestic water rights originally issued to be consistent with the Idaho Code § 42-111 limits, IDWR will usually allow full credit (typically up to ½-acre of irrigation and up to 13,000 gpd or 14.6 AF annually) for the domestic right.² However, IDWR may not recognize full credit for a domestic right if there is information suggesting the use has not historically equaled or exceeded the Idaho Code § 42-111 limits. This set of circumstances is typified by Magic Valley dairies that began under domestic water rights and grew to exceed the Idaho Code § 42-111 limits. Because new permits for new consumptive uses cannot be issued in the Magic Valley, the dairy operators transfer existing water rights to cover the use beyond the Idaho Code § 42-111 limits that they have already met or exceeded. Sometimes the domestic rights are included in the transfer applications to change the nature of use, add points of diversion, or rearrange the place of use.

¹ It seems like this practice would encourage users planning big projects to start them by developing an exempt domestic use so that portion of the development would not have to be included in a new application for permit.

² These rights usually originate from \$25.00 adjudication claims or from applications filed in a moratorium area.