



State of Idaho

DEPARTMENT OF WATER RESOURCES

Eastern Region, 900 North Skyline Drive, Suite A • Idaho Falls, Idaho 83402-1718

Phone: (208) 525-7161 • Fax: (208) 525-7177 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

July 20, 2010

Tom Bassista
Idaho Department of Water Resources
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402

Re: Boyd Smith Stream Channel Alteration – South Leigh Creek

Dear Mr. Bassista,

In April 2010, I met with you, Boyd Smith, and Ryan Colyer to discuss a stream channel alteration application filed by Mr. Smith. The application proposes to alter a portion of South Leigh Creek running through Mr. Smith's property. South Leigh Creek in that area has a high-flow side channel that runs parallel to the main channel. Mr. Smith maintains an aesthetic pond on the side channel. Storage in the pond is authorized under Water Right 22-13159. The proposed stream channel alterations did not appear to affect the capacity or the functionality of the pond or require additional water rights. Therefore, at the meeting, I stated that there were no apparent water rights issues associated with the application.

The stream channel application has been amended to now include a fish screen on the side channel, just upstream of the pond, and a new creek channel beginning at the fish screen, connecting the side channel to the main channel for fish passage. Based on the information provided, it is still my opinion that there are no water rights issues associated with the application. Installation of a fish screen in a natural channel does not, by itself, constitute a diversion and does not require a water right. Fish screening is an issue best handled by the Department of Fish and Game. Further, the creation of a new creek channel to connect the natural channels of South Leigh Creek does not constitute a diversion, as long as the change is made under the joint authority of the Army Corps of Engineers and the IDWR Stream Channel Program. I am more than happy to continue to work with you if there are other questions that arise in your permitting process.

Sincerely,

James Cefalo
Water Resources Program Manager
IDWR – Eastern Region

Cc: Rob Harris

Cefalo, James

From: Rob Harris [rharris@holdenlegal.com]
Sent: Monday, July 19, 2010 3:50 PM
To: Cefalo, James
Cc: Bassista, Tom; 'Boyd Smith'; 'Ryan Colyer'
Subject: Request for Letter Regarding Water Rights
Attachments: RE: Boyd Smith Stream Channel Alteration Follow-up; South Leigh Creek Revision_100701.pdf

James:

Attached is a copy of an email I received from Tom Bassista regarding a stream channel alteration permit filed on behalf of Boyd Smith. We visited by phone briefly about this, but simply to recap, my understanding is that you did look into a water right issue back in April of this year and met with my clients and their consultant, Ryan Colyer of Biota. At that time, my understanding is that based on your review, there was not a water rights issue. The water right is Water Right No. 22-13159. Since that time, in an effort to work through issues regarding the side channel work and to address concerns regarding the pond authorized by Water Right No. 22-13159, we have proposed to install a fish screen just up from the pond to keep fish from coming into the pond. A copy of the conceptual design is also attached.

For what it is worth, here are my initial thoughts concerning the water right. I've had a chance to review the water rights backfile and other information relative to Water Right No. 22-13159, which authorizes the pond within what we call the "side channel" of S. Leigh Creek on the Boyd Smith property. If you review that file, the impetus for the application for permit in 2001 was flood damage that occurred on the property, primarily due to channelization of the side channel from the prior landowner. The pond was constructed to prevent future flood damage and for aesthetic purposes, and in consultation with Lone Goose Environmental, permits were obtained to construct the small 1AF pond on the property. The pond naturally filled with seepage water from the creek, some of which was from the Kilpack ditch (which diverts water from S. Leigh further upstream). The application for permit states that the source is seepage or waste water from Kilpack ditch. For reasons not clear, the license only includes a source of wastewater, but we presume that incorporates both types of water applied for (natural seepage, and/or Kilpack waste water). The point of diversion for the pond is the location of the pond.

My understanding of the fish screen is that it will function as a type of splitter. In prior communications with IDWR officials, I understand that it is common to have these types of splitters, which are not considered points of diversion on a water right. For example, there is a splitter on the N. Leigh/Middle Leigh branch which is not considered a point of diversion, and also, the headgates to the Great Feeder are not listed as points of diversion on the water right holders that divert from the Great Feeder. With these examples, our position is that the fish screen would not be a point of diversion, and the installation of the fish screen would not require an amendment to the existing water right, or a new water right. Water will naturally continue down the side channel (particularly during high flows), and seepage or waste water will also continue to seep into the pond irrespective of the fish screen.

As we've said previously, the main channel and side channel of S. Leigh were channelized with bulldozers prior to my clients ownership, and the work we propose will restore that habitat, and in my view, will decrease the potential for flooding on the property because of increased velocity from the prior channelization. My understanding of the stream restoration is that it will construct bends and involve incorporation of other items that will naturally prevent erosion and assist in decreasing flow velocity to restore the stream back to a normal functioning stream.

My understanding is that your prior position was that there were not water right issues involved with this stream channel alteration permit. With regards to the installation of the splitter and fish screen, we also discussed this, and your assessment is that it does not constitute a point of diversion that would require a transfer or a new water right permit.

Tom is requesting a letter from you to confirm your position in light of the proposed fish screen/splitter. If you could prepare such a letter and provide it to Tom consistent with our discussion, that would be great.

Thanks for your assistance, and if you have any questions, let me know.

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC
1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405-0130
Phone: (208) 523-0620
Fax: (208) 523-9518
E-Mail: rharris@holdenlegal.com

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Cefalo, James

From: Bassista, Tom
Sent: Monday, July 19, 2010 11:00 AM
To: Rob Harris
Subject: RE: Boyd Smith Stream Channel Alteration Follow-up

Rob: Sorry I have not responded sooner. Grouse Creek Ranch is keeping me plenty busy!

At this point, I am only prepared to issue a permit based on IDFG recommendations and I can try to fit that in this week. This would at least get the landowner started on main stem S. Leigh Creek work. If IDWR accepts the new modification we can just issue a permit addendum to authorize that work (However, that process take more than a week to complete.)

I was under the impression that the new plans Ryan presented was for me to review and determine what regulatory oversight was needed to move forward with those conceptual plans. Since then, I have given this some thought. Based on the information you and Ryan provided, in response to my comments, we can move forward as stated below.

If your client is requesting to modify the application to request those changes I need the following:

- A letter from the IDWR Regional Manager or Water Right Supervisor stating that either the original proposal (on stream pond) and/or the new proposal (diversion channel into pond) does not require a change in water rights. I would like this written documentation for the Stream Channel file.
- A final set of detailed plans describing the new modification. A letter requesting and describing the change (This letter also needs to go to the Corps).

I then need to have adequate time to review the new plans with agencies, especially the Idaho Department of Fish and Game (I really need their buy off on this one). The Corps may need to issue a permit modification based on the new plans.

Please let me know if you need to discuss. I will be in the office all day.

Tom

From: Rob Harris [mailto:rharris@holdenlegal.com]
Sent: Monday, July 19, 2010 9:12 AM
To: Bassista, Tom
Subject: Boyd Smith Stream Channel Alteration Follow-up

Tom:

I'm following up on the Boyd Smith stream channel alteration permit matter. I sent an email on July 8th after your concern that it may involve water rights issues. I hope this answered your questions, and just wanted to follow up to see if anticipate that the permit will be issued some time this week. I know you would like to issue the permit as it has been on your desk for some time, and I am concerned that my clients and the consultants are beginning to become frustrated. I would much rather prefer to work through any remaining issues quickly and have the matter resolved this week. If there is anything you need from me, or if I can assist in any way, let me know.

Thanks,

Robert L. Harris
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

1000 Riverwalk Drive, Suite 200
P.O. Box 50130
Idaho Falls, ID 83405-0130
Phone: (208) 523-0620
Fax: (208) 523-9518
E-Mail: rharris@holdenlegal.com

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CONCEPTUAL
REVISED SIDE CHANNEL AND POND CONFIGURATION
WITH FISH SCREEN
SOUTH LEIGH CREEK PROJECT AREA
TETON RANCH, TETON COUNTY, IDAHO
July 1, 2010

