

MEMORANDUM

TO: File 37-7861

FROM: Daniel Nelson – Staff Hydologist

DATE: 2/22/2012

SUBJECT: Review of Combined Limitation Condition

I have been asked to review the combined limitation condition for water right 37-7861. The condition in question limits water rights 37-1244, 37-4389, and 37-7861 to a combined diversion rate of 0.714 cfs. A letter was received from Barker Rosholt and Simpson LLP stating that 37-4389 should not be included in this combined condition limitation.

My review of the application for permit for 37-7861 brings forth an assumption that water right 37-7861 planned to use only that water (diversion rate and volume) already being diverted under water right 37-1244. Section 10 of the original permit application water right 37-7681 states:

The applicant will be simply adding the above uses to water that has been decreed to him (and recorded) for irrigation and stock watering etc.

A copy of the decree was also included with the application for permit for 37-7681. Even though it appears as though the only water that would be used for hydropower under water right 37-7681 was the water (diversion rate and volume) being diverted for use under water right 37-1224, section 6a of the application confuses that assumption by stating the following:

Water to be piped to fish ponds then used for irrigation and some small hydro electric generator. Small amt. diverted at pond for recreation.

The above statement confuses the initial assumption that only the water (diversion rate and volume) diverted under water right 37-1244 would be used for the power generation, since the system description describes the power use at the end of the system. Therefore, the permit would maintain the same diversion rate as 37-1244, but would add additional volume because the owner would be diverting water hydropower when the owner was not irrigating or watering livestock under 37-1244. This brings about another assumption that water right 37-7681 was actually adding an additional volume of water to water right 37-1244, and not using the volume of water being used under 37-1224. There is no doubt that there is on flow rate, so there needs to be some sort of combined condition to avoid further confusion for the amount of water being diverted.

There is no mention of the water under 37-4389 irrigating the same acres as water right 37-1244, so there is no way to know if this land was irrigated from both sources at the time the permit was filed. Due to the priority dates of 37-1244 and 37-4389, it is safe to assume that both of these rights irrigated the same 11 acres at the time the application for 37-7681 was filed.

The Department staff licensing water right 37-7681 did make a reasonable assessment in trying to avoid an enlargement by adding water right 37-4389 into the combined limitations of water right 37-4389. However, it does appear as though the irrigation portion of the system was already in place. That being the case, the development of water right 37-7681 wouldn't be tied into the irrigation component of the other water rights. In discussing this with staff, there appears to be only one reasonable way to resolve this issue. I would recommend the following solutions:

- 1.) Water right 37-7681 should remove water right 37-4389 from the combined condition, so it read as follows ---- Rights 37-1224 and 37-7681 when combined shall not exceed a total diversion rate of 0.714 cfs.
- 2.) Water rights 37-1224 and 37-4389 should have the following condition--- Rights 37-1224 and 37-4389 when combined shall not exceed a total diversion rate for irrigation purposes of 0.714 cfs for 11 acres of irrigation.

The only way to resolve the possibility of enlargement is to ensure that system continues to operate as it was at the time the permit for 37-7681 was filed. The only way to avoid enlargement is to make sure that the above conditions are put on all of these rights. If the combined conditions for the irrigation use on water rights 37-1224 and 37-4389 are not placed on those rights, then the license for water right 37-7681 should remain as it is currently licensed.