

Memorandum

Date: December 19, 2012

To: Jeff Peppersack

From: Craig L. Saxton

Re: Review of Mitigation proposed by Technical Memorandum by Brockway Engineering, dated October 29, 2012

On October 29, 2012, Brockway Engineering submitted a Technical Memorandum containing supplemental Information for the mitigation plan for permit 37-8205. The memo proposes mitigating consumptive use losses for permit 37-8205 by retiring a portion of decree right 37-22128. I was asked to review this proposal.

History of 37-22128:

Right 37-22128 is the result of filing a SRBA claim for a portion of statutory claim 37-4370. The original statutory claim was claimed in the SRBA in two parts. Claim 37-22127 was for the domestic use only. Claim 37-22128 was for heating, recreation, and irrigation. The heating purpose of use was described on the original statutory claim as being for 1 home, 1 lodge, & pools. The recreation use was described as being for swimming pools and bath houses.

SRBA claim 37-22128 was filed on November 14, 1998. A Director's report for 37-22128 was submitted to the court on February 21, 2007. Starting on November 14, 2007, with an objection filed by Sun Valley Land & Minerals, Inc. (claimant), a series of objections and responses were filed by the claimant and a variety of other interested parties, in connection with the recommendation for 37-22128 (See Timeline below).

On March 2, 2011, after filing a SF5 stipulation agreement, 37-22128 was decreed by the SRBA court. The right was decreed for irrigation, heating and recreation uses with the following elements:

<u>Beneficial Use:</u>	<u>From / To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	04/15 to 10/31	0.040 CFS	4.90 AF
HEATING	01/01 to 12/31	0.130 CFS	40.00 AF
RECREATION	01/01 to 12/31	0.130 CFS	24.00 AF
	Total Diversion	0.160 CFS	44.90 AF

Mitigation Proposal:

In July of 2011, the permit holder constructed a recreational pond in connection with water right 37-22128. The pond has a surface area of 0.33 acres. The permit holder has been collecting data for over a year to calculate consumptive losses in the pond. Once the consumptive use is determined for 37-

22128, the permit holder proposes to then retire the necessary portion of the 37-22128 as mitigation for permit 37-8205.

Questions:

1. Does the fact that 37-22128 was decreed for recreation use authorized building a storage pond for recreation purposes that has never been part of that right?

37-22128 was decreed for recreation use. The beneficial use developed under 37-22128 did not include recreation storage or use for a pond or storage facility. This is supported by the permit holder on December 19, 2008, in a response to an amended objection filed in connection with subcase 37-22128. In the response, the permit holder stated that, ***"This right (37-22128) has no storage component so objections regarding ponds are meaningless."***

Transfer Processing Memo No. 24 provides that a transfer is required when changes to elements of a water right are made. Building the pond under 37-22128 adds recreation storage as a purpose of use. Since no transfer has been filed, the storage use or the pond is not a valid purpose of use. Any consumptive use losses proposed for mitigation are from an unauthorized use of water right 37-22128.

2. What is the historical consumptive use for right 37-22128 before the pond was built?

37-22128 recognizes irrigation of 1.3 acres as a purpose of use. The annual volume recommended for irrigation use is 4.9 AFA. This calculates out to 3.8 af/a. Standard charts for the area identify the consumptive use losses for irrigation to generally be 2.5 af/a. Total consumptive use under this right is estimated as $(2.5 \text{ af/a}) * (1.3 \text{ acres}) = 3.25 \text{ AFA}$

The historical consumptive use losses for recreation and heating uses are not clear, but would be minimal. The permit holder addresses the consumptive use losses for heating and recreation in a response to an amended objection filed in connection with subcase 37-22128. In the response, the permit holder stated that, ***"Heating and recreation are non-consumptive uses and volumetric measurement is not needed."***

Conclusion:

The pond that was built appears to be an unauthorized use of water and therefore evaporation losses measured from the pond cannot be offered as mitigation for permit 37-8205.

By retiring the irrigation use decreed under 37-22128, an estimate of 3.25 acre-feet of consumptive use could be used as mitigation for permit 37-8205.

SRBA Timeline for Subcase 37-22128

November 14, 2007: Sun Valley Land & Minerals, Inc. objects to recommended diversion rate and acreage.

November 15, 2007: Big Wood Canal Company objects to recommendation for 37-22128. Argues that aesthetic, wildlife, and recreation name not beneficial uses authorized by the Idaho Legislature or constitution to be held in the name of private entities.

December 28, 2007: Sinclair Oil Corp responds to Big Wood Canal Co objections stating that 37-22128 should not exist.

Jan 10, 2008: Jim Speck, on behalf of a group of Concerned Citizens, responds to Big Wood Canal Co objection stating that 37-22128 should not exist.

Jan 11, 2008: Sun Valley Land & Minerals, Inc. responds to Big Wood Canal Co objection saying the water right should exist as stated in their November 14, 2007 Objection.

Jan 14, 2008: Newfoundland Partners, responds to Big Wood Canal Co objection stating that 37-22128 should not exist.

January 15, 2008: Concerned Water Users respond to Big Wood Canal Co objection but doesn't say why.

May 23, 2008: Al Barker, Concerned Water Users, sends a letter to Ed Lawson (Sun Valley Land & Minerals, Inc.), and argues that rather than arguing if the water right should exist, they should discuss agreeable elements of the water right. One concern was regarding how to determine the consumptive use volume associated with the right.

June 28, 2008: Al Barker, Concerned Water Users, files motion to amend objection. They want to object to the quantity recommended under 37-22128 rather than whether it should exist or not.

July 28, 2008: Sun Valley Land & Minerals, Inc. files a memorandum opposing the Concerned Water Users Motion to amend their objection. They argue that Consumptive use is not an element of a water right (Pg 8).

November 21, 2008: Concerned water users file an amended Objection saying that a volume Measurement should be required.

December 19, 2008: Permit holder filed response to objection stating that the right has no storage component so objections regarding ponds are meaningless. They further state that heating and recreation uses are non-consumptive.

August 30, 2010: Sun Valley Land & Minerals, Inc. file amended claim that adds volume to water uses.

August 31, 2010: Amended director's report filed for 37-22128

September 23, 2010: Objection filed by Al Barker

March 3, 2011: SF5 filed for 37-22128

March 21, 2011: Special Masters report for 37-22128 issued

May 2, 2011: Partial Decree 37-22128 issued