



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER

Governor

GARY SPACKMAN

Director

August 15, 2012

ROXANNE BROWN
SPF WATER ENGINEERING
300 E MALLARD DR SUITE 350
BOISE ID 83706

RE: Water Rights 75-14007, 75-14009, and 75-14011 (Wallace)

Dear Roxanne:

I am writing in response to your request for clarification of the water rights appurtenant to land owned by Beth Anne O'Connor Wallace and Jerold Wallace in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 31, Township 23 North, Range 23 East, B.M. I found three water rights appurtenant to the Wallaces' parcel:

- Right 75-14007 was decreed in 2009. It authorizes the diversion of 0.24 cfs of water from Golway Gulch Creek to irrigate 12.0 acres. It also reserves 0.02 cfs of water to remain undiverted from Golway Gulch Creek to mitigate for the development of a pond authorized by Permit 75-14062.
- Right 75-14009 was also decreed in 2009. It authorizes the diversion of 0.24 cfs of water from Smout Creek to irrigate 12.0 acres. It also reserves 0.02 cfs of water to remain undiverted from Smout Creek to mitigate for the development of the pond authorized by Permit 75-14062. Rights 75-14007 and 75-14009 are limited to the diversion of 0.48 cfs for the irrigation of a combined total of 12.0 acres.
- Right 75-14011 was also decreed in 2009. It authorizes the diversion of 0.23 cfs of water from Smout Creek to irrigate 12.0 acres. The partial decree for Right 75-14011 contains a remark stating that Rights 75-14007, 75-14009, and 75-14011 are limited to the irrigation of a combined total of 12.0 acres.

Rights 75-14007 and 75-14009 were originally claimed in the Snake River Basin Adjudication (SRBA) for a combined total of 13.0 acres of irrigation. In 2003 the property owners at the time, James Brownlee and Mary Angelia Brownlee, received Permit 75-14062 authorizing them to construct a small reservoir in an unnamed stream on their land. To mitigate for the depletion of water caused by the permitted impoundment, the Brownlees applied to change 1.0 acre of Rights 75-14007 and 75-14009 from irrigation to mitigation and refrain from diverting the water that had historically irrigated the 1.0 acre converted to mitigation. The Department approved the proposed change from irrigation to mitigation in Transfer 69672.

In 2004 Permit 75-14062 lapsed because the Brownlees did not submit the required proof of beneficial use statement. A letter received by the Department from James Brownlee in 2005 confirmed that he did not construct the proposed reservoir.

In 2006 the Wallaces notified the Department that they had acquired Rights 75-14007, 75-14009, and 75-14011 from the Brownlees. It appears the Wallaces are irrigating about 13.9 acres as of 2011.

This set of facts raises a couple of questions.

- First, since the reservoir authorized under Permit 75-14062 was not developed, can the mitigation components of Rights 75-14007 and 75-14009 revert back to irrigation, thus authorizing the Wallaces to irrigate 13.0 acres instead of 12.0 acres?

In Transfer 69672, Rights 75-14007 and 75-14009 both carried the following two conditions:

The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

One way of looking at the mitigation components of Rights 75-14007 and 75-14009 is that because the Brownlees did not develop the reservoir, there is no storage use to be mitigated. With no use to be mitigated, the change from irrigation to mitigation was never accomplished, approval of the transfer should be rescinded, and irrigation of 13.0 acres should be authorized in connection with Rights 75-14007 and 75-14009. However, there are two factors that may complicate this approach. First, the partial decrees for Rights 75-14007 and 75-14009 were issued after Transfer 69672 was approved. Does the Department have sufficient authority to alter the partial decrees without going through another transfer proceeding? Also, what about the 12-acre combined use limit in the partial decree for Right 75-14011? Even if the transfer were undone for Rights 75-14007 and 75-14009, the combined use limit in Right 75-14011 would still say that the three rights are limited to the irrigation of a combined total of 12.0 acres. Given these two complicating factors, I cannot say with certainty that the Department could remove all uncertainty in an order rescinding the transfer approval. To remove all ambiguity, I recommend filing a transfer application seeking to change the mitigation uses to irrigation and requesting an update of the combined use limit in Right 75-14011.

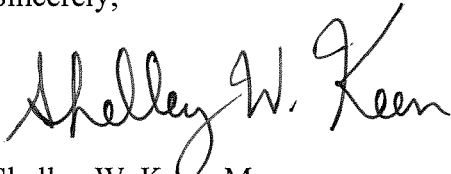
- Also, what is the combined diversion rate relationship among Rights 75-14007, 75-14009 and 75-14011? Taken at face value, the three rights seem to authorize 0.71 cfs to irrigate

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12.0 acres. That's nearly 0.06 cfs per acre, or three times the usual limit. From the conditions of approval in Transfer 69672, it is clear that Rights 75-14007 and 75-14009 were intended to authorize a combined total of 0.48 cfs to irrigate the 12 acres. Also, a comment in the electronic record of the SRBA recommendation for Right 75-14011 states, "[Q]uantity based upon ditch loss for 0.24 cfs deliver on a 4000 ft x 3 ft ditch [sic]." I interpret the comment to mean that because of conveyance losses it takes the authorized diversions of both Right 75-14009 (0.24 cfs) and Right 75-14011 (0.23 cfs) to deliver 0.24 cfs to the field. What remains unclear is whether beneficial use could be made of water diverted under Right 75-14007 at the same time that both of the two Smout Creek rights are being delivered in full. Again, resolving this question may require a transfer application.

If you have any questions, please call me at 208-287-4947, or email me at shelley.keen@idwr.idaho.gov.

Sincerely,

A handwritten signature in black ink that reads "Shelley W. Keen". The signature is written in a cursive, flowing style.

Shelley W. Keen, Manager
Water Rights Section