

MEMORANDUM

DATE: June 28, 2012

TO: Water Right File 37-8862

FROM: Shelley W. Keen *SWK*

RE: Trust Water Status

IDWR issued Permit 37-8862 to the City of Bellevue for the diversion of up to 0.67 cfs of ground water for municipal purposes. The point of diversion for the permit is within the Trust Water Area, but the permit was not issued with a condition of approval designating the right as trust water or providing the opportunity for future review of the right. The typical condition for permits in the Trust Water Area says:

Any license issued by IDWR pursuant to the right or portion thereof for the use of trust water is subject to a term review of 20 years after the date of this approval to determine availability of water for the use and to re-evaluate the public interest at the end of the term.

This condition is sometimes called a “term review” condition.

When drafting the water right license for Right 37-8862, I wondered whether the permit should have had a term review condition and whether a term review condition should be added to the license. To consider these questions, I tried first to determine whether the right authorizes the diversion of trust water. I then tried to determine whether the term limit condition should be added at licensing if it was not on the permit.

To evaluate whether the right is trust water, I consulted the contract to implement the Swan Falls Agreement. The contract is often called the “1180 Contract.” I also consulted IDWR’s 1988 *Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area*. The following facts are pertinent to whether the permit should have been designated a trust water right:

- The diversion occurs within the Trust Water Area, as defined in the Water Appropriation Rules.
- The permitted use meets the definition of “nonconsumptive municipal” in Section 1(b) of the 1180 Contract because it would not result in depletion of the Snake River by more than 2 acre-feet per day.
- Section 2(e) of the 1180 Contract exempts nonconsumptive municipal rights from any claim by Idaho Power Company unless the minimum stream flow at Murphy is violated. It

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essentially subordinates Idaho Power's rights for power generation to nonconsumptive municipal water rights.

- In the *Policy and Implementation Plan for Processing Water Right Filings in the Swan Falls Area*, municipal rights are shown in Column 4 of Table 1. The heading for Column 4 in Table 1 is "Trust Water." According to the instructions on page 10, Column 4 includes "applications seeking water from a trust water source to which Idaho Power Company has subordinated its prior hydropower water rights." On the same page it also says that Column 4 applications "proposing use of trust water" will require a term review "unless IPCo's hydropower rights have been subordinated to the filing **and** it was released from Ada County Case #81375." [Emphasis added.]
- Permit 37-8862 is too new to have been a part of Ada County Case #81375.

Based on the indications that Column 4 includes trust water applications, it appears that the permit authorizes a diversion of trust water. However, because the use is within a category not subject to a delivery call to satisfy Idaho Power Company's water rights, it is not completely clear whether a term review condition would be appropriate for this right. Also, IDWR does not typically impose new limitations, like term review conditions, at licensing. Those kinds of limitations should normally be decided when the permit is issued. Since it is not clear that a term review should have been implemented for this right, I decided to remain consistent with usual practice by refraining from imposing the condition at licensing.