



United States
Department of
Agriculture

Forest
Service

Salmon-Challis
National Forest
Lost River Ranger District

P.O. Box 507, 716 West Custer
Mackay, ID 83251
208 588-3400

File Code: 2730

Date: April 3, 2012

RECEIVED

APR 04 2012

Department of Water Resources
Eastern Region

Gordon Fulton
5907 Hwy 93
Mackay, ID 83251

Dear Gordon,

We see that you have filed Application for Permit No. 34-14339 with the Idaho Department of Water Resources (IDWR) to divert water from Rock Creek in the SESWSE of Section 34, T10N, R22E. The purpose of use is power generation. We understand this to be your Rock Creek diversion and pipeline on National Forest System (NFS) land authorized through Department of the Interior Right-Of-Way (ROW) IDI 0 011980. Enclosed are copies of the ROW and a Bureau of Land Management (BLM) Serial Register Page for ROW 011980. The ROW is for an 'Irrigation Ditch' and the Serial Register Page is specific to 'irrigation facilities' and 'non-energy facilities'.

Under the Act of March 3, 1891 the ROW is authorized for the irrigation purposes. An amendment to the Act approved May 11, 1898 allows for hydropower as subsidiary or secondary use to the original use. At the present time the use of the pipeline is 100% irrigation. Use of water year round for hydropower purposes would mean that the use would be for power generation 100% of the year and used only for irrigation 55% of the year. There is a question whether the easement granted under the Act of March 3, 1891 as amended, could be used for hydropower as primary purpose.

The current irrigation use of the ROW appears to be for 6.4 cfs from May 1 to October 15. There is one water right for 3.2 cfs from April 1 to November 15. Diverting water according to this scenario - with installation of a generator on private land, would not require additional permitting by the Forest Service. However, expansion of the season of use or quantity of water diverted to enable year-round power generation does not appear to be authorized under the ROW and extends the burden of the ROW which may require a new authorization by the Forest Service.

In No. 10a of the IDWR Application For Permit you correctly identify that the point of diversion is on land owned by the 'Department of Agriculture Forest Service'. However, in No. 10 c you do not identify the authority, arrangement or document "enabling the applicant to make this filing" with respect to using the NFS land for beneficial use of power generation.



We have concerns about the diversion and use of water sought in application 34-14339. All occupancy and use of NFS land must be appropriately authorized. Application 34-14339 is effectively a new appropriation of 6.4 cfs from NFS land during the non-irrigation season. It would extend the season of use and the amount of water being diverted from NFS land. If this request proceeds, appropriate authorization for use of the NFS land is an important matter that must be resolved.

We also have concerns about possible effects on NFS land and resources. We have resource concerns with respect to dewatering Rock Creek during the non-irrigation season and associated impacts to riparian dependent plants and animals. We understand that the Idaho Fish & Game has already expressed similar concerns. In addition, an appropriate measuring device at the diversion to assure proper water withdrawals may be warranted. Other concerns may arise as consideration if this matter proceeds. There are numerous procedures, laws and rules that must be followed when a new use of NFS land and resources is proposed. Moreover, it is unknown if separate authorization would be granted if resource impacts are significant.

You also need to be aware that because land owned by the United States is involved that Federal Energy Regulatory Commission (FERC) regulations and procedures apply. This would be the case whether or not application 34-14339 is pursued for hydropower year-round use or only during the irrigation season. Pursuant to section 23(b)(1) of the Federal Power Act, hydropower projects must be licensed or granted an exemption from licensing. More information on FERC requirements for licensing and exemptions is available through their Small Hydro Hotline at 1-866-914-2849. At the present time we are not aware that you have a FERC license or if your proposal has been determined to be an exemption. A FERC license or documentation of exemption will need to be submitted to us before an authorization to occupy and use NFS land for power generating purposes will be considered.

For your convenience I am including a link to FERC where more information is available:

<http://www.ferc.gov/industries/hydropower/gen-info/licensing/small-low-impact.asp>

Should you be successful in obtaining the appropriate FERC documentation, the Forest Service will be in a position to consider the appropriate authorization authority for the occupancy and use of NFS land. If a new authorization is needed that would be the time for you to submit a proposal for power generation. If your proposal is accepted as a formal application, the evaluation of that application would be subject to all applicable law, regulation and policy such as the Endangered Species Act, the Historic Preservation Act, the National Environmental Policy Act, 36 CFR 251.50 and cost recovery. It could be quite some time before a decision on the occupancy of NFS land would be final.

By a copy of this letter we are notifying IDWR of these issues and that at the present time the authority and authorization for you to occupy and use NFS land for the purpose of power generation is not clear. Pursuant to Idaho Administrative Code (IDAPA 37.03.08) Rule 45, we request that application 34-14339 not be approved until these occupancy, use and authorization matters are resolved.

If you have any questions about this matter, please contact me at (208) 588-3402.

Sincerely,

A handwritten signature in black ink, appearing to read "Diane L. Weaver". The signature is fluid and cursive, with the first name "Diane" being more prominent than the last name "Weaver".

DIANE L WEAVER
District Ranger

Enclosures (2)

cc: James Cefalo, Idaho Department of Water Resources

**DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
CASE RECORDATION
(MASS) Serial Register Page**

RunDate/Time: 03/08/12 02:45 PM

Page 1 of 1

01 03-03-1891;026STAT1101;43USC946-951

**Total Acres
27.642**

**Serial Number
IDI--- 0 011980**

Case Type 287100: ROW-IRRIGATION FAC

Commodity 971: NON-ENERGY FACILITIES

Case Disposition: AUTHORIZED

Case File Juris: CHALLIS FIELD OFFICE

Serial Number: IDI--- 0 011980

Name & Address		Int Rel	% Interest
FULTON DAVID	MACKAY ID 83251	HOLDER	100.000000000
SMITH FRANCIS	MACKAY ID 83251	HOLDER	100.000000000

Serial Number: IDI--- 0 011980

Mer Twp Rng Sec	SType	Nr SuffSubdivision	District / Field Office	County	Mgmt Agency
08 0090N 0220E 004	LOTS	1-4;	CHALLIS FIELD OFFICE	CUSTER	BUREAU OF LAND MGMT
08 0090N 0220E 005	ALIQ	S2NE,SENW;	CHALLIS FIELD OFFICE	CUSTER	BUREAU OF LAND MGMT
08 0090N 0220E 005	LOTS	1;	CHALLIS FIELD OFFICE	CUSTER	BUREAU OF LAND MGMT
08 0100N 0220E 034	ALIQ	S2SW,SWSE;	CHALLIS FIELD OFFICE	CUSTER	CHALLIS NF

Serial Number: IDI--- 0 011980

Act Date	Code	Action	Action Remarks	Pending Office
11/01/1960	124	APLN RECD	RSP	
11/07/1960	393	DEC ISSUED	APLN REJ-DEN	
12/05/1960	103	ADDTL INFO RECD	CORR TRACING	MLF
12/21/1960	307	ROW GRANTED-ISSUED		
12/21/1960	503	LENGTH IN MILES	2.28;	
12/21/1960	504	WIDTH IN FEET (TOTAL)	100;	
02/28/1966	287	PROOF CONST/USE ACPT		
11/01/1983	304	AUTH AMENDED/MODIFIED	/A/ SEE REMARKS	
11/01/1983	505	DIAMETER OF PIPE (INCHES)	15;	
01/20/1989	466	ADM-JURIS TRF OUT	FS;	
01/20/1989	974	AUTOMATED RECORD VERIF		
04/21/2009	041	COMPL EXAM/RPT COMPLETED		
04/24/2009	950	COMPLIANCE APPROVED		
01/01/9999	763	EXPIRES		

Line Nr Remarks

Serial Number: IDI--- 0 011980

0001	ORIGINAL CONSTRUCTION WAS CONCRETE IRRIGATION DITCH
0002	05/15/1989 CASEFILE TRANSFERRED TO USFS REGION 4
0003	/A/THE CHALLIS-AREA EARTHQUAKE OF OCT 1983 DESTROYED
0004	THE CONCRETE TROUGH. THE ROW HOLDERS REPLACED IT
0005	WITH BURIED, 15-INCH STEEL PIPE.

NO WARRANTY IS MADE BY BLM
FOR USE OF THE DATA FOR
PURPOSES NOT INTENDED BY BLM

A2ILO-113
(August, 1960)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Land Office
P. O. Box 2237
Boise, Idaho

LO:VSS
Idaho 011980

DEC 21 1960

DECISION

Right-of-way Granted

DETAILS OF GRANT

Serial number of grant: Idaho 011980

Name of grantee: Francis Smith and David Fulton

Map showing the location and dimensions of grant:

Map designations: Smith-Fulton Concrete Ditch Development

Date filed: December 5, 1960

Permitted use by grantee: Irrigation Ditch

Authority for grant: Act of March 3, 1891 (26 Stat. 1101) as amended

Regulations applicable to grant:

Code reference: 43 CFR, Subparts A and B, Part 244
Circular numbers: 1913

Date of Grant DEC 21 1960

Expiration date of grant: . .

Rental:

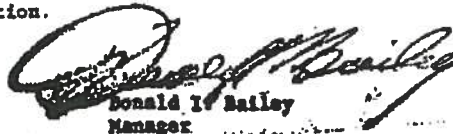
Amount: None
When payable by grantee: None

TERMS AND CONDITIONS OF GRANT

Pursuant to the authority vested in the undersigned by Order No. 541 of the Director, Bureau of Land Management, dated April 21, 1954 (19 F.R. 2473), as amended, a right-of-way, the details of which are shown above, is hereby granted subject to the following terms and conditions:

1. All valid rights existing on the date of the grant.
2. All regulations in the circulars specified above.
3. Filing of proof of construction within five years of the date of the grant.
4. Further terms and conditions as follows:

(a) Pursuant to 43 CFR 244.9 the District Manager, Salmon District Office, Box 385, Salmon, Idaho, has the authority to conduct all business with the grantee with respect to use of lands and disposition of resources, and the grantee is requested to contact the above-designated official prior to beginning of construction.


Donald I. Bailey
Manager

Strobel:rb-12/20/60
cc: Case Record

Director, BLM, Wash., D.C. w/copy map
DM I-4