



State of Idaho

DEPARTMENT OF WATER RESOURCES

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March 23, 2011

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

SPF Water Engineering LLC.
Attn: Terry M. Scanlan
300 E. Mallard Drive, Suite 350
Boise, ID 83706

RE: APPLICATION TO LEASE WATER RIGHT NOS. 45-2748, 45-2749 AND 45-7137 TO THE WATER SUPPLY BANK

Dear Mr. Scanlan:

The Department of Water Resources (Department) has completed its review of your applications to lease the above-mentioned water rights to the Water Supply Bank (Bank). Based on that review, the Department cannot accept the water into the Bank.

The lease application requests water rights 45-2748, 45-2749, and 45-7137 be placed in the Bank for a total diversion of 6.88 cfs and 1928.6 AF. This would allow Mc Cain to continue to use water rights 45-2747, 45-2758, and 45-13970 for a total diversion of 8.74 cfs and 4,507.3 AF.

The Water Supply Bank Rules (also known as IDAPA 37.02.025) provide criteria to be considered when determining whether to accept a water right into the Bank. The rules prohibit enlargement of the use of the water right.

A review of Water Management Information System (WMIS) records show that Mc Cain diverted approximately 5,791 AF in 2009 and 3,292 AF in 2010. If this application were processed in 2009, Mc Cain would have exceeded the annual volume they were allowed to divert by more than 1,283.7 AF (5,791 AF diverted in 2009 minus 4,507.3 AF water rights not being placed into the water bank equals 1,283.7 AF). There would not have been an issue in 2010.

We generally expect an applicant will reduce their water use starting on the date they file to lease the rights to the Bank. This did not happen in 2009. If the right had been rented in 2009, there would have been the possibility of enlargement of the right, which is strictly prohibited by the Water Supply Bank Rules. Based on your 2009 diversions, it is difficult to ascertain the possibility for future use of the right. Please review your plans for the future and determine the appropriate amount to lease, if any, before applying again.

A separate issue involves the requests in the cover letter, dated June 8, 2009. You state that Mc Cain requests the following conditions be placed on the approvals:

- 1.) The water should be leased out of the bank for potato processing.

2.) Leases out of the bank should have a maximum term of one year.

Section 42-1761, Idaho Code, states:

The water supply bank shall make use of and obtain the highest duty for beneficial use from water, provide a source of adequate water supplies to benefit new and supplemental water uses, and provide a source of funding for improving water user facilities and efficiencies.

Including conditions limiting the type of beneficial use and rental terms fall contrary to the stated objectives of the Bank. We would not place an arbitrary limit on the type of beneficial use allowed. The only way that we could limit the rental of the water rights from the Water Bank for a single year is to grant a one year lease.

As stated previously, IDAPA Rule 37.02.03.025 requires that a Bank transaction does not enlarge a water right. To accept only a portion of an industrial right and protect against enlargement, we require documentation showing historic consumptive use for the last five years, and a proposed monitoring program to show how the consumptive use could be monitored during the term of the Bank lease.

If you decide to apply again, the new lease application(s) would also need to include proof of historic consumptive use and how the reduction in consumptive use can be monitored during the lease period. We cannot accept an application that limits the beneficial use, so your client will need to allow the water rights to be leased to all other water users whom wish to rent the water. This would include other potato processing facilities if such rental applications are filed and are good candidates for the leased right(s).

Please note that a water right is not protected from forfeiture unless it is accepted into the Bank or unless an exception or defense to forfeiture applies as described under Idaho Code § 42-223. If forfeiture is a concern, you may also consider filing an Application for Extension of Time to Avoid Forfeiture of a Water Right.

If you have any questions or concerns please contact me at the above address.

Respectfully,



Monica Van Bussum

C: McCain Foodservice Inc – 2275 Cabot Dr; Lisle, IL 60532-3653
Allen Merritt – IDWR Southern Regional Office
Brian Higgs – Watermaster, Water District 140