



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

August 24, 2005

JOHN MARSHALL
GIVENS PURSLEY LLP
PO BOX 2720
BOISE ID 83701

RE: Water Appropriation Permit 65-13598
Your File No. 7346-1

Dear John:

Deb Nelson asked me to reply to you regarding her request that IDWR cancel Water Appropriation Permit 65-13598. IDWR has reviewed the beneficial use field report prepared in connection with the permit and has requested that the permit holder submit an application to amend the permit to depict the water use as it was actually developed. If the application for amendment is submitted, IDWR has the discretion to publish it in the newspaper or otherwise give notice to parties who may have some interest in the application. IDWR can also choose not to give notice when an application for amendment has been filed. Because the application for amendment has not been filed yet, IDWR has not determined if it will publish the application for amendment. If IDWR provides notice in accordance with Idaho Code § 42-203A, there will be opportunity for interested parties to protest the application. If IDWR does not publish the application for amendment and a water right license is issued in connection with the permit, anyone can request a hearing before IDWR in accordance with Idaho Code § 42-1701A.

In her letter, Deb listed the following items as possible reasons for canceling the permit.

- Unauthorized point of diversion.
- Permit partially undeveloped.
- IDWR's recommended license amount of 1 cfs is unwarranted.
- Adequate measuring device is not installed.

I will offer the following perspective on each of these items.

Point of Diversion

Many water rights are established with their points of diversion in different tracts than were initially intended by the permit holders. The points of diversion are established differently than permitted for a variety of reasons. If a permit holder does not apply to amend the permit prior to establishing the point of diversion, IDWR typically relies on other parties, particularly other water users and the landowners involved in the change, to notify IDWR if the change results in some problem.

In addition, there are many water rights diverted on public lands and used on private lands. IDWR typically relies on the public land manager to determine who has access to the public land, and therefore to the source of water. In this case, the Bureau of Land Management has not notified IDWR that there is a problem resulting from the establishment of a point of diversion on federal public land. Moreover, it does not appear that the BLM has prevented the permit holders from establishing a point of diversion on public land. If the permit holder applies to amend the permit to list the point of diversion on public land, the BLM can contest the change to the permit or subsequent license in the manner described above.

Permit Partially Developed

In discussing the fact that some of the water uses authorized by the permit were not established, Deb said that if it is issued, the license for 65-13598 "should be carefully limited to the use amounts, places of use, and points of diversion timely developed under the permit." The beneficial use field report completed by IDWR in connection with the permit indicates that much of the water use authorized by the permit was not developed. It also indicates that the points of diversion and place of use established by the permit holder are slightly different than what was permitted. IDWR takes very seriously the directive in Idaho Code § 42-219 to limit water right licenses to "the amount that has been beneficially applied." The license will not be issued for more water use than the field examiner was able to confirm unless the permit holder presents convincing evidence that the field report is in error. Moreover, as I indicated above, IDWR has requested that the permit holder apply to amend the permit to depict the points of diversion and place of use as they were developed. If the application for amendment is not submitted, the license will be limited to those elements of the actual use that conform to the permit.

Recommended License Amount

As for the recommended diversion rate, IDWR must, from time to time, calculate the diversion rate based on system parameters as opposed to making a direct measurement. Calculating diversion rates is an acceptable and reliable practice under certain circumstances. One circumstance that can result in a calculated diversion rate is the presence of some real impediment to obtaining a direct measurement. Impediments can include, but are not limited to, inability to access the diversion and distribution system and/or examination during a time of year when water is not available in sufficient quantity to be diverted at the maximum system capacity. While IDWR field examiners normally take reasonable measures to overcome impediments so that they can obtain direct measurements, they can and do employ some discretion so as not to require extraordinary measures that unduly burden the permit holders. In this case, the field examination was conducted in August when the flow in Fir Tree Gulch Creek was not sufficient to make a direct measurement of the capacity of the diversion and distribution system. Based on his calculations, professional expertise, and experience, the field examiner felt confident that the system could carry at least 0.69 cfs, and possibly more. Because the examiner's calculations do not show a capacity in excess of 0.69 cfs, IDWR will recommend that the license be issued

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for 0.69 cfs unless the permit holder provides evidence that the actual system capacity is higher.

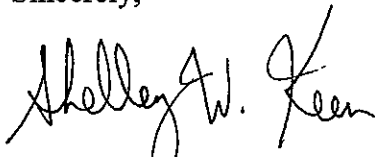
Deb's alternative method of calculating a diversion rate – essentially spreading the volume needed to fill the reservoirs over the period authorized for diversion – is not typical in this situation. The permit is for a one-time fill of the reservoirs each year. When a water right is for a one-time fill of a reservoir, the reservoir is typically filled during the spring runoff each year, and then diversions are curtailed for the remainder of the year. Authorizing a diversion rate that matches the system capacity allows the right holder to fill the reservoir when water is abundant and downstream senior water right holders are not likely to be injured. Usually a water right for a reservoir is not limited to the amount necessary to replace seepage and evaporation losses because it is possible, for any number of reasons, that the reservoir will need to be filled completely in any given year. However, if some water remains stored in the reservoir (carryover) during a particular year, the amount of water diverted into the reservoir during the next fill period should not exceed the amount necessary to fill the reservoir to the limit of the water right.

Measuring Device

IDWR believes the measuring device and lockable controlling works are satisfactory for regulation of the diversion of water under this permit by the watermaster. Assuming there are no leaks, the rate of flow in one end of a pipeline equals the rate of flow at the other end. Therefore, measuring and controlling the diversion at the end of the pipeline is adequate. Access by the watermaster to the measuring device and controlling works has not been an issue.

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

Sincerely,



Shelley W. Keen
Water Rights Supervisor

Cc: Betty L. Derbonne-Mooers
John Westra at IDWR Western Region