

Memorandum

Date: November 30, 2010

To: File 37-8205

From: Craig L. Saxton

Re: Can the reduction in surface area of the original Clarendon Reservoir be used for mitigation?

Overview:

Priority date evidence indicates that Clarendon Reservoir was established in the late 1930's. In 1992, IDWR verified that water was no longer being stored in the Clarendon Reservoir. In 2000, a statement of Resumption of Beneficial use was submitted, along with Transfer 68545, with the intent of re-establishing the historical storage use in a multiple pond system rather than in one big pond. The overall surface area of the multiple pond system developed was smaller than the surface area of the historical Clarendon Reservoir. The reduction in surface area results in less evaporation and less consumptive use. That reduction in consumptive use by the reduced reservoir surface area has been proposed as mitigation to water right permit 37-8205.

Brockway Engineering calculated the original surface area of the Clarendon Reservoir as 14 acres. The re-establishment of the storage use in the new development of a 4 pond system has a combined surface area of 11.8 acres. Brockway Engineering proposes the difference of 2.2 acres should be used to mitigate the consumptive use under permit 37-8205.

Can the reduction in surface area of the original Clarendon Reservoir be used for mitigation? Or, is there 2.2 acres of valid water right surface area to mitigate with?

Timeline:

From 1992 to at least 1999, no storage at all was occurring in Clarendon Reservoir. This is documented in a memo in the backfile of water right 37-2446 dated July 12, 2002 from Sharla Curtis. Sun Valley Land & Minerals Inc. proceeded to develop a multiple pond storage system to reestablish the historical storage water right.

- On September 20, 2000, Brockway Engineering submitted letter that included surface area and volume measurements for ponds 1, 2, and 3 that lie within the foot print of the original Clarendon Reservoir. Total surface area is 9.35 acres and volume is 67.6 acre-feet.

This letter also stated that it was not possible to excavate and restore the original storage volume within the reservoir because of higher than expected ground water levels (*Note that the original storage volume has not been verified*).

- On October 11, 2000, Sun Valley Land & Minerals Inc. submitted a Resumption of Beneficial Use statement supporting re-establishment of 9.35 acres of pond surface area.

At the same time, transfer 68545 (TR 68545) was submitted. TR 68545 proposed changing water rights 37-2446 (live flow) and 37-4369 (storage), to create 5 ponds to replace the original Clarendon Reservoir that would store a maximum of 143 acre-feet.

- On August 20, 2001, Blaine County and Sun Valley Land and Minerals Inc. signed a settlement agreement to resolve Blaine County's protest to TR 68545. In addition to the 9.35 acres of surface area and the 67.6 acre-feet that was resumed in the construction of ponds 1, 2, and 3, the agreement allowed for construction of a 4th pond that would have a surface area of 3.78 acres or less and volume of 34.35 acre-feet or less.

Per the settlement agreement, the total surface area of ponds that could be developed is 13.13 (•13.1) acres with a max volume of 102.35 acre feet.

- In June of 2002, IDWR staff prepared a report that verified the existence of 3 ponds currently storing water. The records contain no verification of the storage capacity of the three ponds.
- On March 26, 2003, TR 68545 is approved limiting total volume to 102 AF. TR 68545 was approved acknowledging the August 20, 2001 protest settlement agreement. The settlement agreement limited the development of a 4th pond to an additional 3.78 acres of pond surface. An approval condition listed on both water rights 37-2446 and 37-4369 reads:

Use of water under this right may be affected by agreements between the protestants and the right holders.

TR 68545 authorized a total volume of 102 acre-feet, and the settlement agreement defined the maximum surface area of the ponds to be limited to a maximum of 13.1 acres of pond surface.

- As of 2009, the total pond surface area developed is 11.8 acres.

Analysis:

Water right 37-4369 describes the storage component of the system. The extent of the water right that was resumed on October 11, 2000 is limited to the extent of beneficial use of storage water developed at that time. A water right cannot resume use of more storage than was actually developed.

The available evidence of the development of beneficial use at this time is the September 20, 2000 letter from Brockway Engineering where it was calculated that the three ponds in the original foot print of Clarendon Reservoir had a surface area of 9.35 acres and a storage volume of 67.6 acre-feet. The existence of the ponds 1, 2, and 3, and that they were storing water, was verified in 2002 by IDWR staff.

Despite that only 9.35 acres of surface area and 67.6 acre-feet of volume was resumed, TR 68545 authorized an additional storage volume making 102 acre-feet the maximum volume that could be stored in the multiple pond system. Although the surface area limit is not described in TR 68545, the settlement agreement between Blaine County and Sun Valley Land & Minerals Inc. do establish a pond surface area limit.

Recommendation:

The reduction in surface area from the original Clarendon Reservoir cannot ~~not~~ be used for mitigation. That portion of the unverified water right was never resumed and therefore lost.

To pursue using pond surface area reduction for mitigation, the applicant needs to show the extent of development within the last 5 year, and what part of that development will be dried up in order to provide mitigation. Available records indicate that the extent of development is the existing 11.8 acres of surface area and therefore if the applicant plans to keep the surface area and volume of the ponds as they currently exist, there is nothing available for mitigation.

In addition, if IDWR were to allow the reduced surface area from the historical pond to the existing 4 pond system, to be used for mitigation, it would defeat the purpose of the protest settlement agreement. IDWR would essentially be saying that the authorized surface area of the multiple pond system exceed that total described in the protest settlement agreement.

Agreement is for 13.1 acres of surface water

Actual developed pond surface area: 11.8 acres

Proposed mitigation acres: 2.2 acres

Total surface area of the actual developed pond surface area and that of the proposed mitigation is 14.0 acres. This violates that protest settlement agreement.

Sources:

WR Backfile for 37-2446

<u>Pages:</u>	<u>Document</u>
218-219:	Blaine Co protest to TR App
185:	Allen Merritt's summary of pre-hearing conference
163-166:	Settlement Agreement Blaine co and Sun Valley Land & Minerals
145-146:	Sharla Curtis Memo recommending TR 68545
147-148:	Allen Merritt Memo recommending TR 68545
251-253:	Brockway letter stating that can't dig original ponds to 143 AF because of the high water table.
22:	Resumption of Beneficial Use Statement (10-11-2000)

MEMORANDUM

To: Files 37-2446 & 37-4369

From: Sharla

Date: July 12, 2002

Re: Recommendation for Transfer 68545

As stated in Allen Merritt's memo of 9/19/2001, this transfer was filed to add a point of diversion in Section 34 and change the place of use under both rights to include two (now limited to one) new ponds in addition to the three ponds which have already been excavated and developed in lieu of the one reservoir which was developed in the early 1900's.

The transfer was protested by Fish and Game, Deer Creek Ranch and Blaine County. All three protests were resolved by agreements between the parties.

After a thorough review of department Dam Safety files and all the materials submitted as exhibits with the transfer application, I offer the following timeline and information as a basis for my final recommendation.

- 1975 This is the first documentation found in Dam Safety files; storage capacity is not mentioned at this point
- 1976 In a letter from Chuck Brockway, he refers to the height of the dam as 18.4 feet and asks for processing of the Application for Construction of a Small Dam because the maximum storage would be less than 100 feet, and the application identifies 70 af as the amount of water that would be stored behind the dam
- 1977 Allen Merritt measures height of dam at 18.8 ft with a 10-acre surface area and 80 af of estimated stored water
- 1980 Documents prepared by Allen Merritt reference 10-acre surface area and estimated storage of 70 – 80 af.
- 1984 Because of an invasive problem of silt, the reservoir was documented as an 8-acre surface area and 30 af storage
- 1985 Silt remained a problem and owner wanted to re-construct and re-dredge
- 1988 Reservoir remained heavily silted with estimates of 8-acre surface area and 30 af storage. In this year, the ownership of the facility had changed and the new owners were notified of a list of deficiencies that needed to be addressed or the dam needed to be breached.
- 1991 Excavation work had been done, silt was wasted on flat area, no estimation listed for surface area of storage

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- 1992 Mike Stubblefield and Sunny Hornbaker made an inspection, no storage at all was occurring, dam height was 18 ft., gate had been removed from impoundment and this dam was taken off of Dam Safety's "active" inventory list
- 1994 An application for extension of time to avoid forfeiture is submitted and approved, with a resumption date set as November 1, 2000.
- 1995 Corey Skinner made a field inspection and reported that facility was not capable of storing water in its current condition
- 1997 Still no water being stored
- 1999 Chuck Brockway was present at an inspection, no storage taking place and admission that water had not been stored for years.
- 2000 The extension of time to avoid forfeiture expired and a Resumption of Beneficial Use form was submitted.
- 2002 In June of this year, Corey prepared a report that verified the existence of 3 ponds current storing water; the records at the State Office contain no verification of the storage capacity of the three ponds, however.

Brockway Engineering has prepared a document entitled Determination of Historical Reservoir Volume and has used the "claimed" volume listed under 37-4369 as the only documentation to base the requested transfer on. Documentation in the department's own records do not necessarily confirm those figures. The maximum storage capacity that has been documented in the department's records is 80 af with a maximum surface area of 10 acres.

After discussing this application with Glen Saxton, we have determined that approval of the transfer can occur with a condition limiting the volume to 102 af as agreed by all parties and a condition stating that approval of the transfer is not a determination of the historical volume of water stored. In this way, we leave the option open for future review of the question of forfeiture due to decreased storage capacity as a result of siltation.

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MEMO

FROM: Allen Merritt *AM*

DATE: September 19, 2001

TO: Transfer File No. T5862 (68545)

In the name of: **Sun Valley land and Minerals Inc.**

Water Right(s): 37-02446
37-04369

SUBJECT: Review and Recommendation

This transfer proposes to add a diversion point and change the place of use of the rights associated with storage and flows through the old Clarendon Dam and Reservoir. Due to the extensive silt deposition in the old reservoir this transfer proposed to modify the facility to provide for 5 ponds replacing the old reservoir. Three ponds have been constructed near the old footprint of the Clarendon Reservoir and two additional ponds were proposed slightly downstream. The transfer proposed a total storage volume of 143 acre feet reported to be the historical storage volume in the old Clarendon Reservoir.

The transfer was processed and protested by Idaho Department of Fish and Game (F&G), Deer Creek Ranch (DCR), and Blaine County (BC).

F&G resolved their protest with the applicant agreeing to provide fish passage through the ponds.

DCR resolved their protest with a private agreement with the applicant that I understand involves the release of water to DCR downstream during certain times to protect their water rights.

A hearing was scheduled to hear the matter with BC but just prior to the hearing an agreement was made resolving this protest. The agreement limited the storage volume to 102.35 acre feet and to four ponds total (three ponds in the old reservoir area and the fourth downstream).

An issue relating to the protests of this transfer was that of forfeiture or partial forfeiture of the storage volume in the reservoir. As the file indicates there has been a time when some of the storage has been degraded due to deposition of silt in the reservoir and for some time the reservoir was drained as ownership evolved. There was an extension of time to avoid forfeiture filed for the subject water right with resumption due 11/1/2000. It appears that resumption was made for ponds 1, 2 and 3 at the old reservoir site around 8/1/2000 and then this transfer filed 10/11/2000 which is essentially for construction of ponds 4 & 5 downstream (Now limited to just one pond):

Administration or legal staff needs to look at this forfeiture issue. I feel this issue deserves close consideration since most reservoirs in the state have capacities that are affected by silt deposition and most often if efforts are made to clean them forfeiture of water rights are not considered. I think that a precedence may be established here that may have consequences for reservoir owners and their maintenance programs.

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Recommendation

I recommend that this transfer be approved subject to the following conditions:

- Review by administration or legal staff.
- Limit approval to 4 ponds and 102.4 af total volume per agreement with BC.
- Subject to other agreements with F&G and DCR.
- Provide fish passage through all ponds.
- Subject to watermaster control in district 37.

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Tel. 208.726.0847
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ISB #3660

Attorney for Protestant Blaine County

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AUG 27 2001

Department of Water Resources
Southern Region

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF
APPLICATION FOR TRANSFER
NO. 68545,

SUN VALLEY LAND & MINERALS,
INC.,
Applicant,

BLAINE COUNTY,
Protestant.

SETTLEMENT AGREEMENT AND
STIPULATION FOR WITHDRAWAL OF
PROTEST

COME NOW, Protestant Blaine County and Applicant Sun Valley Land & Minerals, Inc. and stipulate to the withdrawal of the protest of Blaine County in the above-captioned matter upon the following terms, conditions and understandings:

1. That the Applicant has certain water rights designated under License No. 37-2446 and Claim No. 37-4369 with the Idaho Department of Water Resources (hereinafter "Water Rights").

SETTLEMENT AGREEMENT AND STIPULATION FOR
WITHDRAWAL OF PROTEST - Page 1

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2. That the Water Rights are intended to be amended or changed pursuant to this stipulation and agreement.

3. That the Water Rights have been used in connection with the Clarendon Reservoir in the Deer Creek drainage, a tributary to the Big Wood River in Blaine County.

4. That over the years sediment has build up in the Clarendon Reservoir decreasing the capacity of said reservoir, and various attempts have been made to remove the sediment and thereby increase the capacity of said reservoir.

5. That instead of excavating and refilling the reservoir, Applicant filed the transfer application in the above-captioned matter which would have allowed three (3) smaller ponds to be constructed in the footprint of Clarendon Reservoir and also would have allowed two (2) ponds to be constructed a short distance downstream from the reservoir.

6. That initially Blaine County, Deer Creek Ranch, Inc., and the Idaho Department of Fish and Game protested Applicant's transfer application in the above-captioned matter.

7. That Deer Creek Ranch, Inc. has withdrawn its protest pursuant to and in accordance with the terms and conditions of the agreement attached hereto as Exhibit "A".

8. That the Idaho Department of Fish and Game has withdrawn its protest pursuant to and in accordance with the terms and conditions of the letter agreement attached hereto as Exhibit "B".

9. That the Applicant does hereby agree to amend or change the Water Rights and any claims relating thereto to allow: (a) no more than three (3) ponds

to be located within the footprint of the original Clarendon Reservoir with a combined surface area of 9.35 acres or less and a combined volume of 67.6 acre feet or less; and (b) subject to approval of the Idaho Department of Water Resources in the above-captioned matter, no more than one (1) pond below the aforementioned three (3) ponds in the general intended vicinity of ponds 4 and 5 described in the letter of Charles E. Brockway to Corey Skinner dated September 20, 2000, which pond shall have a surface area of 3.78 acres or less and a combined volume of 34.75 acre feet or less.

10. That, accordingly, the Water Rights in their entirety shall claim no more than 102.35 acre feet, and the approval of the Idaho Department of Water Resources of the transfer application in the above-captioned matter shall condition said approval on the limitation of the Water Rights as provided herein including the terms relating to the ponds described herein, and also upon the terms for withdrawal of the other two protests in this matter as described in Exhibits "A" and "B".

11. Based upon the foregoing terms and conditions, Blaine County agrees to withdraw its protest and the parties stipulate that the same may be withdrawn.

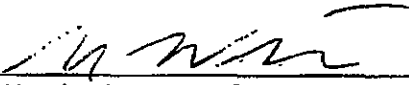
12. This instrument constitutes the entire integrated agreement between the parties hereto and may be altered, amended or revoked only by an instrument in writing duly signed by both parties. All prior and contemporaneous oral and written agreements between and among themselves and their agents or representatives relating to the subject of this agreement are merged in or revoked by this agreement.

13. No presumptions shall exist in favor of or against any party to this agreement as a result of the drafting and preparation of this agreement.

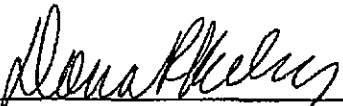
14. If action is brought to enforce the terms and provisions of this agreement, the prevailing party in such action shall be entitled to recover from the other party its reasonable attorney fees, together with all costs authorized by law (including any fees and costs on appeal).

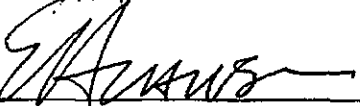
DATED this 20th ^{August} day of ~~July~~, 2001.

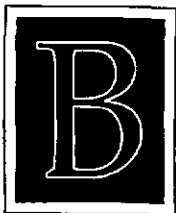

MARY ANN MIX
Chairman, Blaine County Board of Comm'rs

Approved: 
Douglas A. Werth, Attorney for
Protestant Blaine County

DATED this 22 ^{August} day of ~~July~~, 2001.


SUN VALLEY LAND & MINERALS, INC.
By: Donna R. Kelsey, its President

Approved: 
Edward A. Lawson, Attorney for
Applicant Sun Valley Land & Minerals, Inc.



BROCKWAY
ENGINEERING
P.L.L.C.

Hydraulics

Hydrology

Water Resources

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Department of Water Resources
Southern Region

September 20, 2000

Mr. Corey Skinner
Idaho Department of Water Resources
1341 Fillmore Street, Suite 200
Twin Falls, ID 83301

Subject: Resumption of Beneficial Use-Sun Valley Land and Minerals Inc.
Clarendon Dam, and Application for Transfer of Water Rights A37-02446 and
A37-04369

Dear Corey:

As of August 1, 2000, the new construction on Clarendon Dam was essentially completed and the facility is capable of storage at this time. I believe you have been appraised of the progress and have been supplied drawings of the new structures.

As you may recall, the original plan was for re-construction of the dam at the historic height and removal of sediment from the reservoir to restore the storage volume to the historic 143 acre feet as indicated on the amended SRBA claim. During the initial phases of excavation of sediment from the reservoir it became apparent that excavation to the original storage volume within the reservoir would not be possible due to higher than expected ground water levels. As a result, a revised construction plan, which included three smaller ponds within the original reservoir area and two new ponds on Company land below the dam, would be utilized. This concept comports to that which we discussed in your office in May 2000. The new dam reconstruction was therefore revised to include storage in Pond 3 with a revised storage volume of 35.5 acre feet and a hydraulic height of less than 10 feet. I am enclosing drawings to show the pond layout, spillways, and outlet works from Pond 3 into Deer Creek. Note that Ponds 1, 2, and 3 are filled from Deer Creek and Ponds 4 and 5 are off-stream ponds.

Storage volumes in the 5 ponds are shown in the following table. These volumes are based on surveyed elevations and recent aerial photos.

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Pond Volumes Based on Water Surface Areas and Average Depths					
		Area	Area	Depth	Volume
		Sq. Feet	Acres	Ft	Acre Ft.
Pond 1		84942	1.95	6.50	12.7
Pond 2		108900	2.50	7.75	19.4
Pond 3		213444	4.90	7.25	35.5
Total(1,2,3)			9.35		67.6
Pond 4		169884	3.90	9.20	35.9
Pond 5		158994	3.65	9.20	33.6
Total(4,5)			7.55		69.5
Total(1,2,3,4,5)			16.90		137.0

Also enclosed is a completed application for transfer to move 69.5 acre feet of storage from the original reservoir area to Ponds 4 and 5 located below the dam. The outlet facility to provide water to Ponds 4 and 5 is a 24-inch pipe with gated outlet and is complete as shown on the drawing for the dam. Storage in Ponds 4 and 5 can be commenced immediately although the final configuration for these ponds may be changed depending on the final plan for the area downstream of the dam.

Sun Valley Land and Minerals Inc. is prepared to commence filling the facility immediately. However, the flow in Deer Creek is very low due to drought conditions in the watershed and is currently flowing only at an estimated 5 to 10 cfs. Mr. Jay Sevy, President of Deer Creek Ranch Inc. the ranch downstream of the Clarendon facility, has formerly expressed concern about reductions in stream flow due to filling of the ponds and has requested that storage be delayed, at least until higher stream flows occur. The ranch downstream includes numerous ponds which have been stocked with fish and he is concerned that the lower flows caused by filling of the ponds would be harmful to both the fish and the habitat. Filling has been postponed since August 1 to prevent lower flows in Deer Creek in hopes that natural stream flow would increase. The flow has not increased significantly and on August 30, 2000 the Company received a Notice to Resume Water Use by November

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1, 2000 in compliance with the Application for Extension of Time to Avoid Forfeiture for Water Right No. 37-04369.

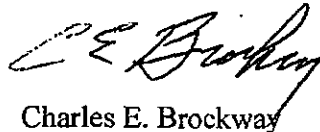
After talking to Glen Saxton, I have advised Sun Valley Land and Mineral Co to proceed to fill the ponds in order to comply with the order unless IDWR allows a delay in filling due to downstream impact. . Pond 2 has begun to fill with small flows from Jimmy the Harp Creek and storage can be commenced from Deer Creek.

I am submitting the completed form 3-222, Resumption of Beneficial Use, showing resumption of storage on August 1, 2000. The facility will be filled as fast as possible without jeopardizing the flow in Deer Creek and the ponds on Deer Creek Ranch.

Please review the enclosed and confirm that the Company has met the requirements for resumption and the requirements for the dam reconstruction. Also please advise as soon as possible whether additional delays in filling due to downstream impacts can be allowed without jeopardizing the water right.

I would appreciate your initial review of and response to the transfer application so that we can be assured it is complete and accurate before advertising.

Sincerely,



Charles E. Brockway

Enc: Brockway Engineering check Number 2811, for \$610.00.

Cc: Glen Saxton
Sun Valley Land and Minerals Inc.

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