

MEMO

Idaho Dept of Water Resources
Water Allocation Bureau
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TO: Files 37-95G, 37-2566,

FROM: Cherie Padilla

DATE: March 11, 2010

RE: Review of Petition of Reconsideration in Regard to Approval of Transfers 68497 and 68498

Introduction

On February 22, 2010, the department issued transfer approvals for transfer numbers 68497 and 68498. The transfer approvals reflected a new place of use as requested by the application for transfer.

On March 10, 2010, Brockway Engineering, the applicant's representative, filed a Petition for Reconsideration against the approval of the above transfers.

Nature of Petition

1. The requested change will affect both transfers 68497 (condition of approval #5) and 68498 (condition of approval #4), he disagrees with the wording of the standard condition:

Water rights 37-95G, 37-137C, 37-137D, 37-138C, 37-138D, 37-207C, 37-207D, 37-426E, 37-448D, 37-448E, 37-632G, 37-706E, 37-1082E, 37-1082F, 37-2566A, 37-2566B, 37-2594A, 37-2594B, 37-2612A, 37-2612B, 37-2615, 37-7239A and 37-7239B when used in combination are limited to the irrigation of a specific 638.1 acres within the 841.1 acre place of use authorized by these rights in a single irrigation season. The specific 638.1 acres to be irrigated by the right holder shall be identified prior to use by submittal of a land list and a representative electronic shape file or by submittal of a land list and a map sufficiently detailed to allow creation of an electronic shape file to be associated with this right in the geographic information system component of the water rights database maintained by the department. Before changing the 638.1 acres to be irrigated within the 841.1 acre place of use, the right holder shall submit a new land list and representative electronic shape file or map to the department prior to the irrigation season in which the change will occur.

Brockway would like the department to qualify the type of changes to the acreage by changing the above highlighted area to read:

Prior to any material change to the 638.1 acres to be irrigated within the 841.1 acre place of use, the right holder shall submit a new land list and representative electronic shape file or map to the department prior to the irrigation season in which the change will occur.

2. Brockway asserts that condition of approval #2, associated with transfer 68498, should be completely removed because the transfer is dealing with surface water only. The condition states:

#2. This right when combined with all other rights shall provide no more than 3.5 afa per acre at the field headgate for irrigation of the lands above.

3. Lastly, water right 37-137C associated with transfer 68498, lists 0.01 cfs as the diversion rate. The recommended flow rate is listed as 0.014 cfs. The rate should be adjusted accordingly.

Findings

- **Conditions**

The language requested in item #1 above stems from a couple of previously approved transfers 71652 and 73854 that were protested. As part of the protest withdrawal agreement, the wording, "prior to any material change" was added into the approval conditions in the transfers. Allen Merritt asked what was meant by "material changes" of the attorney involved in the protest, who replied, "the department doesn't want a new shape file every time a minor, insignificant realignment of a boundary or rerouting of a road in the property takes place."

The condition that we used in these approvals is standard, known within the department as condition 206. Even though we used the language in question in transfers 71652 and 73854, the department didn't adopt the new language in the approval conditions database.

Secondly, the petition disputes condition #2, as referenced above. Typically, the department does not use volume conditions on surface water rights. In this case, the department's volume calculation does provide 3.5 afa per acre, i.e. $5.67 \text{ cfs} \times 200 \times 1.9835/638.1 \text{ acres}$.

- **Timing**

Transfer 68497 and 68498 were issued as preliminary orders which became final 3/8/2010, or 14 days after the date that the transfers were mailed to the applicant and Brockway.

Conclusion

The Petition for Reconsideration filed by Brockway was untimely and will be denied. Pursuant to Rule 760 of the Rules of Procedure, the director can withdraw the final order and issue a substituted order on his own motion.

I believe the department should either adopt the language that Brockway suggested and edit the standard condition 206 or deny his request to change the condition and explain that the department will not use that language as a standard in PPU approvals and that it was a special circumstance in which it was used.

The qualifier, "material change" is open to interpretation and may cause confusion in both the water right holders and the department. This kind of language should be avoided in approval documents.

We should change the diversion rate from 0.01 to 0.014 cfs in the approval document in association with water right 37-137C. I agree with the explanation that Brockway provided in his petition and should at least make the changes to transfer 68498.