



State of Idaho

DEPARTMENT OF WATER RESOURCES

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November 29, 2006

JAMES E. RISCH
Governor

KARL J. DREHER
Director

Mr. Christopher H. Meyer
Givens Pursley LLP
Suite 200
277 North 6th Street
P. O. Box 2720
Boise, ID 83701

VIA FACSIMILE TO (208) 388-1300 AND FIRST CLASS MAIL

Re: Water Right Nos. 29-02284 and 29-02301

Dear Chris:

This letter is provided in response to your letter dated November 9, 2006, regarding the above referenced water rights. In your letter, you requested written confirmation regarding the law governing the use of the above referenced water rights on behalf of your client, Southeast Idaho Energy, LLC (SIE).

As background, water right license no. 29-02284 was issued on May 12, 1952, to Westvaco Chemical Division Food Machinery & Chemical Corporation. A Report of Engineer prepared on April 16, 1952, documenting the extent of beneficial use indicated the purpose of use under the right as manufacturing and included the following remark: "This water is mainly used for cooling purposes and is reported as being returned to a drain unaltered qualitatively [*sic*] unless it perhaps carries an additional trace of phosphorus. Water is returned to a drain which flows through the Simplot property then into a natural drain into the Portneuf River."

Water right license no. 29-02301 was issued on May 1, 1955, also to Westvaco Chemical Division Food Machinery & Chemical Corporation. A Report of Engineer prepared on April 16, 1953, documenting the extent of beneficial use indicated the purpose of use under the right as manufacturing and industrial.

As you noted in your letter, partial decrees were issued for both water rights in the Snake River Basin Adjudication (SRBA) on March 22, 2004. Water right no. 29-02284 was decreed for industrial use in the amount of 4.5 cfs and 3,257.9 acre-feet per year. Water right no. 29-02301 was decreed for industrial use in the amount of 4.00 cfs and 2,895.9 acre-feet per year.

Regarding the six issues for which you sought confirmation, the following addresses each issue in the order listed in your November 9 letter:

1. *The change from one type of manufacturing activity to another does not constitute a change in the nature of use, so long as both the old and new uses are "industrial." The fact that the prior specific industrial operation is described in the permit approvals and proofs of beneficial use does not change this. Accordingly, SIE would not be required to apply for a change (or transfer) of the water rights under Idaho Code § 42-222.*

A change from one industrial use to another industrial use would not constitute a change in nature of use, unless specific conditions incorporated in the water right further limit the type of beneficial use under the right. Neither of the partial decrees for right no. 29-02284 or right no. 29-02301 includes any specific conditions limiting the industrial use under the rights. Without such conditions, a transfer is not required to change from one industrial use to another, provided that no element of the water right is changed.

2. *The water rights on their face do not specify any particular return flow or limit on consumptive use. Consequently, SIE (or its successor) would be allowed to modify the pattern of diversion and/or return flow (compared to the pattern in effect under FMC's operation) and could consume up to 100 percent of the authorized diversion in beneficial use of the water right. This would be true even if an element of the water right (other than the nature of use) were changed and the water rights were subjected to a transfer proceeding under Idaho Code § 42-222.*

Since a transfer is not required to simply change from one industrial use to another industrial use under water rights no. 29-02284 and no. 29-02301, provided no element of either of the rights is changed, the current owner or any subsequent owner, including SIE, can divert and consume up to 100 percent of the authorized diversion rates under the rights for industrial purposes. However, in the event a change to any element of the rights is sought, which would require filing an application for a transfer, the transfer if approved could not allow enlargement or injury to any other existing rights. Therefore, while it is not appropriate to prejudge a future, hypothetical transfer, the extent of historic beneficial use under either of the rights could limit the right sought to be transferred to prevent enlargement or injury to other rights. However, the specific facts of an actual transfer would have to be considered to determine what limitations may be appropriate to prevent enlargement or injury.

3. *At this time, no change in any element of the water rights is contemplated. In the event, however, that it became necessary to add a new point of diversion or otherwise change some element of the water rights, we understand that the change would need to be approved by the Department pursuant to Idaho Code § 42-222.*

This is a correct statement.

4. *In the event of such a change (not involving a change in the nature of use), the Department would not consider prior diversion patterns, return flow, consumptive use, or actual historical use or limit the water rights based on such considerations. Instead, the holder would be entitled to use the full diversion quantity on the face of the partial decree (so long as the nature of use is not changed).*

This is similar to issue 2 above, and the response is the same as for issue 2 above.

5. *Under no circumstance would the Department consider any allegation of partial or total forfeiture or abandonment based on non-use prior to the issuance of the partial decrees. (This is not intended to limit the authority of the Department to consider actual historic beneficial use in the event of a change in nature of use.)*

The Department presumes that a right has not been forfeited within the five-year period after a partial decree has been issued for the right. The basis for this presumption is the SRBA District Court's *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcase Nos. 36-02708, et al. (issued December 29, 1999). The court determined that forfeiture provisions are tolled for purposes of establishing forfeiture for claims pending in the adjudication. Although the Department presumes that a right has not been forfeited or abandoned within the five-year period after a partial decree is issued, the presumption is rebuttable and the issue could be raised if an application for transfer is protested.

6. *Likewise, no issue or allegation regarding any condition, error, or deficiency in connection with any prior transfer or other action of the Department predating the 2004 partial decrees would be entertained. In other words, there is no need for the purchaser to conduct due diligence on the water with respect to the history of the water right prior to the partial decree.*

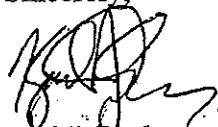
The Department recognizes the partial decrees as the lawful determination of the validity and extent of the rights unless changed by a court having jurisdiction to alter the decrees.

Beyond these six issues, you correctly noted in your November 9 letter that since the FMC plant closed, water rights no. 29-02284 and no. 29-02301 "have been placed in the Idaho Water Supply Bank and have been leased to others on an annual lease" at least during the years 2002, 2005, and 2006. Such use of these rights is pursuant to a private lease between FMC Corp. and the American Falls – Aberdeen Ground Water District, Bingham Ground Water District, and the Bonneville-Jefferson Ground Water District. That lease automatically renews on April 15 each year unless terminated by either the lessor or lessee with at least a 90-day written notice in advance of termination.

Christopher H. Meyer
November 29, 2006
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I hope this response is helpful to you and your client. Please let me know if you have additional questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl J. Dreher', with a stylized flourish at the end.

Karl J. Dreher
Director

c: Jeff Peppersack – IDWR
Phillip Rassier – Deputy Attorney General, IDWR
John Simpson – Barker, Rosholt & Simpson LLP