

Application for Permit No. 37-22252

Quantity / Diversion Rate

Dry Lot applied for a diversion rate of 0.52 cfs. IDWR only approved 0.50 cfs in the preliminary order. This appears to be a clerical error as there is no analysis or justification for reducing the diversion rate by 0.02 cfs. Therefore, Dry Lot requests IDWR to reconsider the diversion rate and increase it back to 0.52 cfs as listed in Dry Lot's application for permit.

Conditions of Approval

Condition #5

The condition states the annual volume of water shall not exceed the annual volume of water delivered "into the infiltration basin(s) . . . as measured at the point(s) of injection." Dry Lot does not propose to "inject" any water for ground water recharge into the aquifer, rather water will be recharged at the infiltration basins by gravity percolation. The infiltration basins "will be subsurface galleries with perforated pipe distribution systems and not open ponds." *See Narrative in Support of Water Right Permit, Transfer and Mitigation Plan for Irrigation ("Transfer Narrative")* at 3. Accordingly, the condition should be revised to state "into the infiltration basin(s) . . . as measured at the point of delivery."

Condition #7

Since Dry Lot's use of water under permit #37-22252 will be completely mitigated by the recharge proposed under water rights #37-22313, #37-22318, and #37-22323, the condition should be revised as follows:

7. The water right holder shall maintain control of rights 37-22313, 37-22318, and 37-22323 for mitigation purposes pursuant to Transfer 74449. Provided the water right holder recharges water pursuant to Transfer 74449, the diversion and use of water under this rights shall be deemed mitigated to the extent of the volume of water recharged for purposes of administration.

Alternatively, IDWR should clarify this condition to explain that Dry Lot's use of water under this right is "mitigated" for purposes of water right administration to the extent Dry Lot recharges water pursuant to Transfer 74449. For example, in the event of a water delivery call, Dry Lot's groundwater right should not be treated as a 2007 groundwater right since Dry Lot is completely mitigating its use with surface water with an 1883 priority date. A condition should be included to clarify this with the Watermaster for purposes of future administration.

Application for Transfer No. 74449

Volume (All Water Rights)

The existing surface water rights do not include any "volume" limitations. For purposes of the transfer approval, IDWR has included a maximum volume limitation of 56.9 acre-feet per year. Dry Lot disputes this volume limitation for the following reasons.

First, IDWR explains that 56.9 acre-feet represents "an annual volume consistent with the consumptive use volume associated with the land no longer irrigated: 27.5 acres x 2.07 ft/yr = 56.9 af/yr." The calculated net irrigation requirement near Hailey for alfalfa crops with less frequent cuttings, 2.07 feet per year for the full growing season, does not account for any water lost through delivery and irrigation inefficiency. Accordingly, IDWR wrongly assumes that irrigation of 27.5 acres at the former place of use, and the new place of use, has been or will be 100% efficient. Since no irrigation system is 100% efficient, IDWR must account for that fact and authorize Dry Lot to use sufficient water to meet the "full season consumptive irrigation requirement" at the new place of use, plus sufficient water to account for any irrigation inefficiency. Dry Lot presented the analysis of the amount of water required for both "flood irrigation" efficiency and "sprinkler irrigation" efficiency at page 4 of the *Transfer Narrative*.

IDWR should authorize the maximum amount of water needed, assuming “flood irrigation”, in the event the new place of use is irrigated in that manner.

In addition, the volume restriction does not account for the water diverted into the Hiawatha Canal for conveyance loss purposes. At a minimum, Dry Lot is entitled to additional volume to continue to divert water for conveyance loss purposes (0.10 cfs) in the Hiawatha Canal. This should be clarified in the condition. Accordingly, the annual volume associated with the water rights should be revised to a combined maximum limitation of 96.3 acre-feet.

Conditions of Approval (All Water Rights)

Condition #2

The second sentence should be removed. IDWR states that “To prevent injury to other water right holders, the right holder shall cease diverting 1.24 cfs of these rights from the Big Wood River.” IDWR has not provided any justification or injury analysis to demonstrate that 1.24 cfs should be left instream in the Big Wood River. Pursuant to Brockway Engineering’s analysis using the ground water model, use of water under the transfer for recharge and the new water right for irrigation shows that any impact on aquifer levels and river reach gains “is minimal or zero”. *See Transfer Narrative at 5, see also, Evaluation of the Impact of Proposed Dry Lot, LLC Water Right Applications Using a Big Wood River Aquifer Groundwater Model.* Moreover, Dry Lot has already agreed to leave 0.50 cfs instream in the Big Wood River, which as indicated, will provide “approximately 30 acre-feet per month during the irrigation season” when water is available and in priority under these water rights. Accordingly, no injury will result from the transfer. Therefore, the proposed condition to leave 1.24 cfs instream in the river is not justified.

Next, the third sentence in the condition should be revised as follows: “The watermaster shall also deliver 0.10 cfs of these rights into the Hiawatha Canal for conveyance loss.” Dry Lot cannot assume any obligation to regulate water use on the Hiawatha Canal and ensure the 0.10 cfs “shall remain undiverted”. Each water user on the canal must abide by its own water rights. Dry Lot has no legal authority to regulate the individual use of private water rights on the Hiawatha Canal. Although Dry Lot agrees that 0.10 cfs shall be diverted for conveyance loss purposes into the canal, the condition should be revised so that Dry Lot is not responsible to ensure that water remains undiverted.

The last sentence includes an erroneous combined diversion rate and maximum combined annual diversion volume. The “minimum” design diversion rate for the recharge infiltration basins is 0.32 cfs. This rate was also listed as the “average flow rate” necessary for full mitigation. *See Transfer Narrative* at 3, 5. However, the water rights allow Dry Lot to divert 1.06 cfs into the infiltration basins for recharge purposes (1.66 cfs – 0.50 cfs instream in Big Wood River – 0.10 cfs Hiawatha Canal conveyance loss).

Dry Lot requires flexibility to operate the infiltration basins at a higher diversion rate than the “minimum” design or “average” flow rate. For example, Dry Lot may be able to recharge at a higher rate at certain times of the irrigation season. There is no basis to preclude Dry Lot from maximizing recharge when authorized. Moreover, IDWR provides no basis or justification for limiting the diversion rate to 0.32 cfs, i.e. the “minimum design” rate.

Dry Lot agrees that it will divert only the amount of water that it can recharge at the infiltration basins (plus 0.10 cfs), both in terms of diversion rate and annual volume, and further agrees that the volume recharged is the maximum volume it can divert under water right 37-22252.

The last sentence of the condition should be revised to read as follows: “The combined diversion and use of water under rights 37-22313, 37-22318, and 37-22323 for ground water recharge is limited to a diversion rate of 1.06 cfs and a maximum diversion volume of 96.3 acre-feet as measured at the point(s) of delivery to the infiltration basins.”

Condition #4

Dry Lot disputes IDWR’s requirement that Dry Lot must obtain a “separate injection well permit”. The infiltration basins that Dry Lot proposes to use for groundwater recharge do not meet the definition of an “Injection well” set forth in Idaho Code § 42-3902(8), hence the condition is erroneous. First, the infiltration basin will not be a “bored, drilled or dug hole” or a “driven mine shaft or a driven well point.” Second, the infiltration basin will not be “deeper than its largest straight-line surface dimension.” As described in the *Transfer Narrative*, the length of the infiltration basin will be approximately “115 feet”. *Transfer Narrative* at 3. Dry Lot does not propose to excavate the infiltration basin “115 feet” into the ground. Finally, Dry Lot does not propose to use the infiltration basin for “injection”. Dry Lot proposes to recharge surface water by gravity percolation through “perforated pipe distribution systems”. *See Transfer Narrative* at 3. Since the infiltration basins do not meet the definition of an “injection well” pursuant to Idaho law, this condition should be removed.

Condition #5a

Dry Lot is not the only water user that will divert surface water rights from the Big Wood River into the Hiawatha Canal. Accordingly, Dry Lot should not be held responsible to “install and maintain” a “measuring device(s) and lockable controlling works” at the head of the Canal. It is Dry Lot’s understanding that a measuring device currently exists and that the device is under the control of the Water District 37 Watermaster. Dry Lot does not have the absolute right or

authority to modify that device or “maintain” it. Therefore, the condition should be removed. If IDWR disputes the existing measuring device or “maintenance” of that device, the Water District 37 Watermaster, or IDWR, should notify all of the Hiawatha Canal water users so that the appropriate action can be taken.

Condition #8

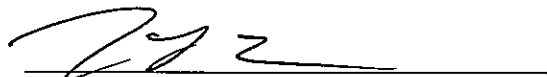
Dry Lot disputes this condition on the basis the elements should be revised as set forth above. The diversion rate and annual volume limitations listed in the “preliminary order” are not justified and should be reconsidered. To the extent those elements are modified as set forth above, this condition is acceptable.

REQUESTS FOR RELIEF

1. Dry Lot requests IDWR to reconsider the “preliminary orders” issued on December 14, 2009 and amend them as requested above.
2. Dry Lot requests a hearing on the “preliminary orders” pursuant to Idaho Code § 42-1701A(3).

DATED this 23rd day of December 2009.

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

Attorneys for Dry Lot LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2009, I served a true and correct copy of the foregoing by email and depositing same in the United States mail, postage prepaid, addressed to the following:

Gary Spackman, Interim Director
Shelley Keen, Manager (Water Rights Permits Section)
Idaho Department of Water Resources
P.O. Box 83720
Boise, Idaho 83720-0098
gary.spackman@idwr.idaho.gov
shelley.keen@idwr.idaho.gov
victoria.wigle@idwr.idaho.gov

Allen Merritt
Idaho Department of Water Resources
1341 Fillmore St., Suite 200
Twin Falls, Idaho 83301-3380
allen.merritt@idwr.idaho.gov


Travis L. Thompson