

MEMORANDUM

DATE: October 3, 2008

TO: Gary Spackman

FROM: Shelley W. Keen *SWK*

RE: IWRB proposal to voluntarily reduce diversions under Right 36-8094

The issue addressed by the letter is that the Board must use the 7.0 cfs authorized under Right 36-8094 for some heat-dependent use before using it for power production. The Board's predecessor has been using 7.0 cfs to raise tilapia and to produce power. However, the right allowing the use of water from the well to raise tilapia, 36-7130, is for 4.5 cfs. Thus, 2.5 cfs of the 7.0 cfs is not authorized for a heat-dependent purpose. The Board cannot obtain another permit for the 2.5 cfs because of the restrictions imposed by the Twin Falls GWMA to prevent injury to senior geothermal water users. The Board does not want to reduce diversions to 4.5 cfs immediately because the current tilapia crop is not yet full-grown.

The Board's dilemma is real, and I think its voluntary reduction to 4.5 cfs in January is a reasonable way to avoid harm to the tilapia grower, harm to Board's reputation, and a possible messy enforcement action by IDWR against the Board that may not be resolved by January anyhow. For this part of the Board's proposal, I recommend simply acknowledging that the Board will reduce its diversion in January and thanking the Board for its cooperation.

I am troubled by the Board's intent to "file an amendment to its permit to reflect the water use as developed at the higher rate of diversion" if the reduction from 7.0 cfs to 4.5 cfs does not contribute to aquifer recovery in two years. It seems there are only two possible proposals that the Board could offer, and I do not think IDWR could approve either of them. The first possible proposal would be to amend the permit to delete the requirement that the geothermal water be used for its heat value first. This would be contrary to statutory directive. The second proposal would be to add fish propagation as a beneficial use authorized by the permit. IDWR has a longstanding view that adding a use to a water right without reducing some other use on the right constitutes enlargement.

IDWR could accept the Board's proposal and simply gamble that the diversion rate reduction will contribute to aquifer recovery, triggering the Board's commitment to permanently remain at the reduced rate. This gamble would be consistent with Ken Neeley's opinion, if I recall correctly. The safer option might be to accept the Board's proposal while pointing out the potential problems with the amendment option and reminding the Board that IDWR cannot commit to approving an amendment that has not been filed yet and is likely to be problematic.