

MEMORANDUM

TO: Hal Anderson
FROM: John Homan
DATE: June 11, 2008
RE: Pristine Springs Warm Water Rights

This memorandum reviews water right nos. 36-7130 and 36-8094 for the diversion and use of low temperature geothermal water on the Pristine Springs property. The Idaho Water Resource Board (Board) acquired decreed water right no. 36-7130 and water permit no. 36-8094 as a part of the recent purchase of the Pristine Springs property. Both water rights are related to the diversion and use of low temperature geothermal water from a well located on the property. Water right 36-7130, the earlier water right was originally permitted in 1970 at a rate of diversion of 6.0 cfs for fish propagation. This water right was originally developed to authorize the diversion of warm water from the well into ponds to raise catfish. Sometime later the hatchery and raceways were constructed at the Pristine Springs property and the fish ponds were no longer the primary facility used to grow the fish. In 1982, the Board's predecessor Aqua Life Inc. filed Application for Permit 36-8094 to use the water diverted from the well for power purposes. The intent of the owners at that time was to use the same water diverted for fish propagation under 36-7130 to generate power. The application was for 7.0 cfs. The Idaho Department of Water Resources (IDWR) eventually approved permit 36-8094 on April 17, 1992 subject to a number of conditions, including condition no. 11 which acknowledged that 36-7130 authorized diversion from the same point and documented that the validity of 36-8094 was dependant upon the warm water from the well being used to raise warm water fish or some other beneficial use that extracts the heat value from the water.

Although the original rate of diversion for the fish propagation under 36-7130 was set at 6.0 cfs, this rate was reduced to 4.5 cfs pursuant to a Settlement Agreement dated May 19, 1988 between the College of Southern Idaho (CSI) and Professional Investors in the Twin Falls County case no. 37298. Professional Investors, the owner of Pristine Springs during this time, agreed to reduce the rate of diversion from the well in return for CSI's recognition that the diversion of warm water for fish propagation constitutes a beneficial use of the water and the dismissal of the litigation. The reduction in the rate of diversion and certain other provisions of the Settlement Agreement were later incorporated into the Twin Falls County District Court's Order of Dismissal dated July 13, 1988. Eventually 36-7130 was decreed by the SRBA court in 1998 with the reduced

4.5 diversion rate. However, neither the May 19, 1988 Settlement Agreement or the court's dismissal order addressed the fate of 36-8094. The parties may have assumed that any subsequent authorized use under 36-8094 would necessarily be limited to the reduced rate of diversion authorized by 36-7130.

In 2003 IDWR approved Transfer no. 70370 to modify 36-7130 to add a new place of use for an additional raceway. The transfer approval included a condition which limited the combined total diversion rate to 4.5 cfs or some different rate to be determined later in the licensing proceedings for permit 36-8094. The approval condition provides for the possibility that the combined diversion rate could be changed in the future depending on the outcome of the licensing proceedings for 36-8094. Condition no. 11 to 36-8094 appears to stop short of directly limiting the development of 36-8094 to the rate of diversion authorized under 36-7130. The language in condition no. 11 of 36-8094 and the approval language in Transfer no. 36-70370 provide for the possibility that 36-8094 could be licensed at some different rate of diversion presumably up to 7.0 cfs, provided the water is used for the rearing of warm water fish.

IDWR has not yet conducted a complete beneficial use examination to proceed toward licensing 36-8094. The field examination conducted by Cindy Yenter, Senior Water Right Agent on January 23, 2002, concluded that between 6.0 cfs and 7.0 cfs was being diverted from the well. The completed beneficial use examination will likely reveal that 7.0 cfs is being diverted from the well for power generation and to rear warm water fish. Under I.C. §42-211, the Board may want to consider filing an application for amendment to permit 36-8094 to reflect the use of the water as it has been developed. Given that 2.5 cfs of the permitted 7.0 cfs is also being used for fish propagation, an amendment could be crafted to identify fish propagation as additional use under the permit. In order to process the license IDWR is required to advertise the proposed amendment and will need to determine the impact that the Twin Falls Groundwater Management Area Moratorium will have on the application.

IDWR originally issued a 5 year moratorium order restricting water development in the Twin Falls Groundwater Management Area on July 24, 1987. The moratorium order has been extended several times over the past and most recently was extended on April 17, 2008. The original moratorium order contemplated an agreement among those water users who were also parties in Twin Falls County case no. 37298. The purpose of that moratorium agreement was to identify those existing applications that the IDWR would continue to process subject to the specified terms in the agreement thereby eliminating the need to continue the litigation. Although water license 36-7130 and water permit 36-8094 were included in the agreement, the Board's predecessor, Professional Investors Inc, never executed the July 22, 1987 Moratorium Agreement with IDWR or the users in the management area. Because Professional Investors never executed the Moratorium Agreement with other water users, CSI pushed forward in court with its claims that 36-7130 had been forfeited or abandoned. The Settlement Agreement dated May 19, 1998 only involved CSI and Professional Investors Inc. and addressed water right 36-7130. It did not include IDWR or the other water users and did not address

36-8094. The Order of Dismissal issued by the Twin Falls County District Court simply incorporated the terms of the Settlement Agreement between the stipulating parties.

Notwithstanding the fact that the Board's predecessor and IDWR never entered into any agreement, IDWR does possess independent authority under I.C. § 42-1805(7) and the water appropriation rules to suspend taking action on applications and permits to protect existing vested water rights. Although the prospects for successfully amending permit 36-8094 may be limited, this approach does explain to some extent why the previous owners, Pristine Spring Inc. believed that it had a right to divert up to 7 cfs. I believe there is enough merit to this approach that IDWR could be convinced to provide additional time for the Board's tenant to move fish. Once the tenant's concerns are alleviated, the Board may be in a position to agree to the reduced diversion rate for 36-8094 and not need to proceed forward with an amendment.

Should the Board go forward and file an application to amend permit 36-8094 pursuant to I.C. § 42-211, the application is likely to be protested by those same entities who were parties to the CSI litigation that was dismissed in 1988. Because 7.0 cfs has been diverted from the well since before January 2002, the burden on the low temperature aquifer will not increase from what it has been over the past 6+ years.

Finally, there does not appear to be any evidence in the record to suggest that Pristine Springs may have developed a water right to make additional use of the water diverted from the warm water well to heat the houses or other outbuildings on the property. IWRB may want to consider filing a new application to appropriate water and add this use to address this issue.