

MEMORANDUM

DATE: June 1, 2009

TO: Idaho Water Resource Board Minimum Stream Flow Subcommittee for
Central and Southwest Idaho

FROM: Shelley W. Keen, ^{SNF}Water Rights Section, IDWR

RE: Water Right Transfers within Big Wood River Minimum Stream Flow
Reaches

The minimum stream flow (MSF) water rights on the Big Wood River may impede or prevent up-gradient transfers of established water rights.

The Big Wood River has three minimum stream flow water rights:

- **37-8258** Priority Date: 1/16/1986 Quantity: 200.0 cfs
From the Sawtooth National Recreation Area boundary downstream approximately 9 miles to the confluence with Warm Springs Creek.
- **37-7919** Priority Date: 6/19/1981 Quantity: 70.0 cfs
From Warm Springs Creek downstream approximately 18 miles to the Bellevue Canal diversion.
- **37-8307** Priority Date: 10/16/1987 Quantity: 119.0 cfs
From Warm Springs Creek downstream approximately 18 miles to the Bellevue Canal diversion.

Ground water and surface water in the valley are hydraulically connected. From Ketchum to Hailey the river gains, i.e. receives discharge from the ground water system. The stream gains help to satisfy the minimum stream flows from Ketchum downstream to Bellevue.

Five transfer applications propose moving ground water or surface water rights from below Bellevue upstream nearly to Ketchum. Two more transfers propose moving ground water and surface water rights from below Bellevue to an area several miles upstream from Ketchum.

The up-gradient ground water transfers will likely remove water historically contributing to the stream gains that satisfy the MSFs. Moving surface water rights upstream will result in more water being diverted from an MSF reach. If these transfers are authorized, either the MSFs may not be met, or other junior right holders may have to be curtailed to satisfy the MSFs. The result

of curtailment would be injury to the junior right holders. IDWR is directed by statute to prevent water right transfers from injuring other water right holders.

One option for approving the transfers while avoiding injury may be to subordinate the transferred rights to the MSF water rights. Subordination would mean the transferred rights, even though they have senior priority dates, could be curtailed to satisfy the minimum stream flows.

Another option may hinge on the interpretation of the conditions of approval for the MSF rights. All three MSF rights bear a condition similar to this, which is from Right 37-8258:

Use of water under this right shall recognize and allow the continued beneficial diversion of water under any prior existing water right established by diversion and application to beneficial use or by an application, permit, or license on file issued by the Director under provisions of Chapter 2, Title 42, Idaho Code, with the priority of the water right dated earlier than 01/16/86, the priority of this right.

The condition does not refer to transfers specifically, but the transfers are based on "prior existing" water rights. IDWR's current interpretation is that because the condition does not specifically address transfers, IDWR should evaluate the potential impact of a transfer on the MSFs and other junior appropriators as it would for any water right.

Another possible interpretation raised by an attorney for some of the transfer applicants and also raised by some IDWR staff members is that the condition subordinates the MSFs to prior existing water rights, even if they are transferred to new diversion points. Under this interpretation, the impacts to the MSFs would not be considered in connection with up-gradient water right transfers in the basin.

Another factor complicating IDWR's analysis of the proposed transfers is that only one stream gage, located at Hailey, is available to measure stream flows. Consequently, it is not always obvious when the minimum stream flows are actually being met, or how frequently they have not been met. If more stream gages were in place, and if they showed that the Big Wood River stream flows always exceeded the minimums by more than the proposed transfer amounts, then perhaps the transfers could be approved without the prospect of injury to other water rights.

IDWR would appreciate the subcommittee's comments regarding this issue.

Note: On 6/2/2009 the Board committee expressed its intent to protest the transfer applications to prevent injury to the minimum stream flows. SWK