

BEFORE THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR)
PERMIT NO. 37-8873 IN THE NAME OF)
INDIAN CREEK RANCHES OWNERS)
ASSN INC)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the issuance of a license, the Department finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On May 4, 1998 the Department received an application for permit (application) to develop a pond for wildlife storage on Indian Creek from Indian Creek Ranches Owners Association (applicant).

2. On July 14, 1998, the Department issued the applicant a permit (permit) to develop 1.9 AF of wildlife storage on Indian Creek north of Hailey. The permit was issued as a preliminary order and was mailed to the applicant on July 15, 1998. The permit became a final order of the Department without contest. The permit, numbered 37-8873, authorized a place of use in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22 and NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 23, T03N, R18E, B.M. The permit provided two descriptions for the point of diversion within the same legal descriptions as the place of use. A condition of approval on the permit authorized a single point of diversion.

3. On July 19, 2000, the Department received proof of beneficial use from Indian Creek Ranches Owners Association for 1.9 AF of wildlife storage. The Department advanced the priority date of the permit eighteen days to a new priority date of May 22, 1998, in response to the late proof of beneficial use.

4. On July 24, 2008, a Department examiner conducted a field examination of the water use established by the permit holder. The field examiner reported a pond constructed in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 22, T03N, R18E, B.M. The pond resides in the upper end of the Indian Creek Ranch Subdivision within a side channel of Indian Creek that connects with the main stem of Indian Creek a quarter mile downstream of the pond. The field examiner reported a pond surface area of 0.14 acres with a total storage capacity of 0.5 AF.

5. On February 2, 2009, the Department issued a preliminary order granting a license for Permit No. 37-8873 (license). The preliminary order was mailed to Indian Creek Ranches Owners Association on February 9, 2009. The license is for storage of 0.9 AF for an on-stream pond in the

ORDER DENYING PETITION FOR RECONSIDERATION

NE¼SE¼ of Section 22, T03N, R18E, B.M., for wildlife purposes.

6. Approval condition nos. 6 and 8 on the permit are, respectively:

a. "The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary for this purpose will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit."

b. "Water shall not be diverted under this right when flows in the Big Wood River are below established minimum stream flows."

7. Conditions of approval nos. 1 and 2 on the license are similar to condition nos. 6 and 8 on the permit. They say, respectively:

a. "When ordered by the Director, the right holder shall provide mitigation acceptable to the Director to offset depletion of lower Snake River flows needed for migrating anadromous fish. The amount of water required for mitigation, which is to be released into the Snake River or a tributary for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this right. Any order of the Director issued in accordance with this paragraph shall be in conformance with applicable rules allowing the right holder due process as the need for mitigation and the amount of mitigation are determined."

b. "Water shall not be diverted under this right when flows in the Big Wood River are below established minimum stream flows."

8. On February 23, 2009, the Department received a petition for reconsideration of the preliminary order from Dana Hofstetter, attorney for the applicant (petitioner). The petitioner asks the Department to amend the order in the following four ways, as quoted from the petition:

a. The Pond, as Designed, and Constructed, is Free-Flowing and, Accordingly, More than 0.9 Acre Feet is Diverted into the Pond Annually.

b. Indian Creek is Designated as a "Separate Stream," and Is Not Managed as a Tributary to the Big Wood River.

c. The Pond is Used for Aesthetic and Recreational Purposes, Along with Wildlife Purposes.

d. The Place of Use and Points of Diversion should Include the NW1/4SW1/4 of Section 23, Township 3 North, Range 18E as the Pond was Designed and Constructed Also to Be Partially Within this Location and Indian Springs also Feed the Pond and Should be Added as a Source.

9. The December 13, 1909, *Frost et al. v. Alturas Water Co. et al.* decree (Frost Decree), together with its supplements, is an adjudication of the waters of the Big Wood and Little Wood rivers. In *Frost*, the court held that certain "dry streams" were to be administered separately from the Big Wood and Little Wood rivers. Indian Creek was listed as a dry stream in the Frost decree.

ANALYSIS

As permitted, the application sought to impound 1.9 AF of Indian Creek for wildlife storage. A field examination confirmed the permit holder has constructed an on-stream impoundment of 0.5 AF, with evaporative losses of 0.4 AFA for a total of 0.9 AF put to beneficial use for wildlife storage. Water flowing through a pond is not an impoundment. The limitation of 0.9 AF for storage purposes does not prevent water from flowing through the pond. The Department does not issue water right permits or licenses for a rate of flow through an on-stream reservoir because doing so would create a minimum stream flow appropriation. Pursuant to Idaho Code § 42-1503-1504, only the Water Resource Board may apply for a minimum stream flow appropriation.

The term "separate stream" in context of the petition for reconsideration refers to Indian Creek not being tributary to the Big Wood River and being, therefore, administered separately. The petition for reconsideration states that "Indian Creek should not be identified as tributary to the Big Wood River on the License and Condition Nos. 1 and 2 should be deleted." The application which was filed with IDWR by the holder of the water right license listed Indian Creek as tributary to the Big Wood River. The permit also contained conditions of approval and remarks nos. 6 and 8, which two are nearly identical to conditions of approval nos. 1 and 2 in the subsequently issued water right license. The permit was issued with those conditions, recognizing the connection between subsurface flows and the Big Wood River, to protect senior water rights and flows related to public interest. This permit and license are not subject to the Frost Decree. At no time during the filing of the application or the granting of the permit did the applicant seek to remove, revise, or limit the conditions. Neither did the applicant seek to revise that Indian Creek is tributary to the Big Wood River. The petition for reconsideration on these issues should therefore be denied.

As permitted, 37-8873 listed wildlife storage as the only beneficial use to be developed. Adding beneficial uses not listed on the permit without proportionally reducing other uses would be an enlargement of the right. Moreover, the applicant has not applied for such a change. Therefore recreational and aesthetic uses cannot be added to license 37-8873. As a practical matter, the license, as issued, does not preclude such uses of water stored for the benefit of wildlife.

At the time of field examination for this permit, the examiner reported a pond only in the NE¼SE¼ of Section 22, T03N, R18E, B.M. As described on the application for permit and observed during the field examination, an earth dam is in place below where Indian Creek enters the pond, with a spillway back to the stream. With a pond of this type, the Department considers the earthen dam to be the point of diversion. Therefore, this is the only point of diversion for this license.

ORDER DENYING PETITION FOR RECONSIDERATION

There is no indication of springs in the application for permit. The permit was issued for appropriation of water from Indian Creek. Furthermore, the field examiner found no evidence of springs in the vicinity of the pond. Indian Springs should not be added as a source.

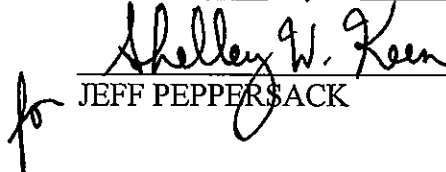
CONCLUSIONS OF LAW

1. A field examination confirmed the right holder appropriated 0.9 AF for wildlife storage purposes.
2. The approval conditions listed on the license are appropriate to protect holders of prior water rights and the public interest.
3. The license was issued for the beneficial use permitted and confirmed by field examination.
4. The license was issued for the use of water from the permitted source at the permitted location, as confirmed by field examination
5. The petitioner has not provided sufficient reason for the Department to grant the petition.
6. The Department should deny the petition pursuant to Idaho Code § 67-5243(3).

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order licensing Permit No. 37-8873 is **DENIED** pursuant to Idaho Code § 67-5243(3).

Dated this 16th day of March, 2009.


JEFF PEPPER\$ACK

ORDER DENYING PETITION FOR RECONSIDERATION