

MEMO

DATE: February 6, 2009

TO: File

FROM: Mat Weaver

RE: 72-16625: Discussion Pertaining to Email from Norm Young
dated 2/2/09

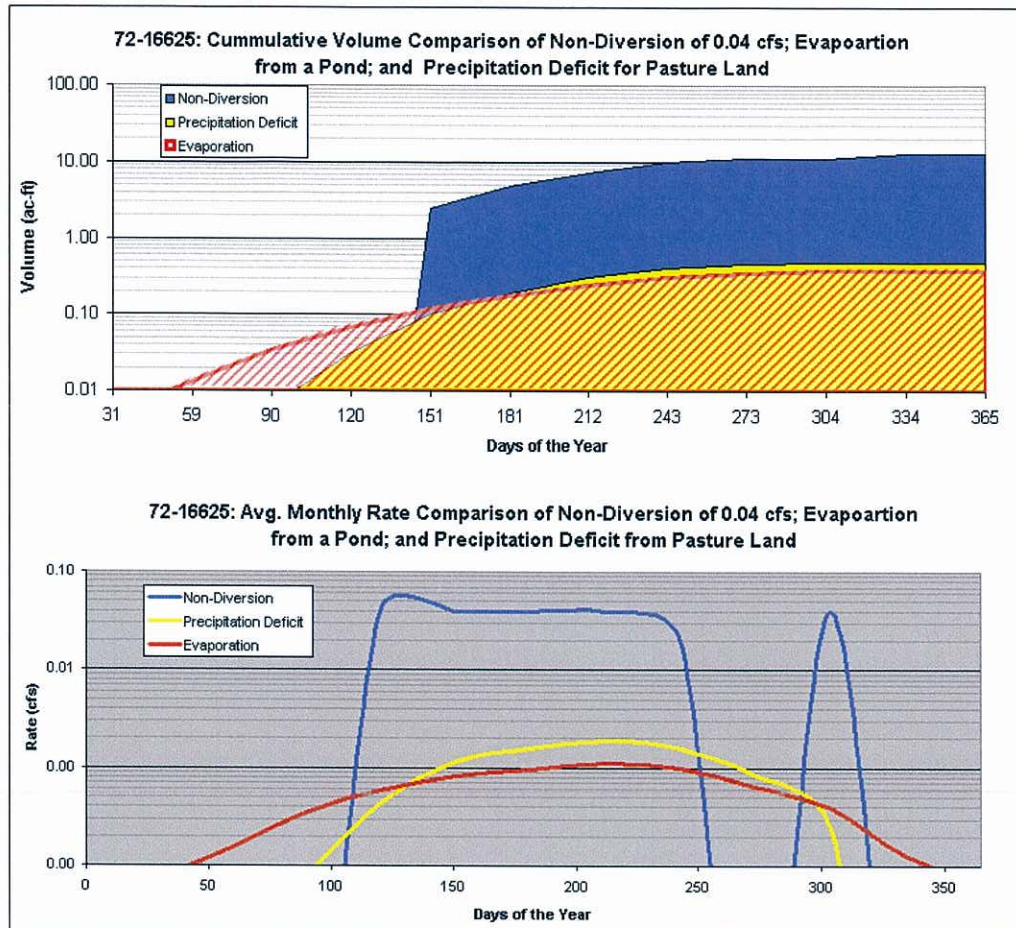
This memo is to clarify the Department's position regarding issues pertaining to the licensing of permit 72-16625 raised by Norm Young (ERO Resources) in an email dated 2/2/09. The email raised five concerns. Items one through three had already been addressed by the Department.

The fourth concern dealt with the addition of a fish passageway screening condition on the license. It is important to recognize that the Department is not mandating fish screening we are only mandating that the diversions be in compliance with any Idaho Fish and Game requirements. It is up to the water user to determine what those requirements are, if any, and comply. Furthermore, the uniformity in license conditions between new licenses and historically issued licenses is not a standard that the Department recognizes when drafting conditional language for new licenses.

The final concern raised in the email pertains to the concept of the necessity of mitigation when the irrigation rights (mitigating rights) are both in and out of priority and how that mitigation can be provided. When evaluating potential injury from a new appropriation the Department considers injury to existing-senior water right users in quantity, location, and time. If injury is found or predicted to occur, it must be mitigated such that concerns regarding the quantity, location, and timing of injury are fully assuaged. The following graphs (next page) illustrate the Department's position on this matter. The upper graph depicts the cumulating volume of average precipitation deficit¹ (proxy for crop consumption) for 0.20 acres of pasture and average evaporation from a pond of 0.15 acres over the course of one year. From this graph we can determine that with the implementation of the proposed mitigation practices, utilizing existing irrigation rights for mitigation, injury in quantity and location does not occur. The lower graph depicts the change in rate of non-diversion of irrigation water from Garden Creek, the change in rate of average evaporation from the pond, and the change in rate of average crop consumption (precipitation deficit) for 0.20 acres of pasture ground over the course of one year. From this graph it can be seen that when the mitigating water rights are out of priority (typically 6-8 weeks² a season), evaporation continues, but crop consumption does not occur due to a lack of divertible irrigation water. Therefore in this instance injury in time is potentially occurring to existing-senior water users.

¹ Evaporation and precipitation deficit values for the Challis (NWS-NOAA 1010633) site were obtained from Allen, Richard G. and Clarence W. Robison, 2006 (Revised 2007). Evapotranspiration and Consumptive Irrigation Water Requirements for Idaho, Research Technical Completion Report, Kimberly Research and Extension Center, University of Idaho, Moscow, ID. Values for pond surface and desiccated pasture ground were obtained from the Mitigation Plan submitted by ERO Resources.

² Personal correspondences with John Wyngartner (acting Watermaster for WD 72B) on 2/2/09, regarding the curtailment of FirstFruit's irrigation rights for a typical water year.



To address the timing issue of injury, ERO has proposed a new appropriation of spring water that will be diverted to the pond to make up evaporative losses during those times of the year that the irrigation rights are out of priority. The applicant continues to argue that because Water District 72B is managed by the Watermaster under a futile call system, and because the spring is disconnected from Garden Creek during those times of the year that the water rights are typically curtailed, the spring represents a unique supply of water to the pond that would not be curtailed.

The Department's position on this matter is unchanged. Because it is recognized by all parties that the ground water system and surface water system are interconnected in the Garden Creek drainage, we feel the two components must be conjunctively managed. Therefore, whether connected to Garden Creek via overland flow or not, the spring is part of the conjunctive ground water-surface water system of the drainage. Depletion to the system via the spring source is the same as depletion to the system via a diversion from Garden Creek and therefore is not a viable source of mitigation water. Any new right issued by the Department would be junior to the applicant's existing rights and therefore would also be curtailed when needed for mitigation.

In light of the Department's position on this matter we are issuing the license such that, when the irrigation rights are out of priority, and the pond can not be drafted in such a manner as to compensate for evaporative losses from the pond, no diversion of water to the pond from Garden Creek may occur.