

Keen, Shelley

From: Rob Harris [rharris@holdenlegal.com]
Sent: Monday, January 19, 2009 11:49 AM
To: Keen, Shelley
Subject: RE: Petition for Reconsideration for Permit Approval No. 23-11387
Attachments: DOC011909.pdf

Shelley:

I have had an opportunity to visit with my client, Jeff Aleixo, about condition no. 6 in the approved application for permit no. 23-11387. The condition currently reads "The right holder shall use a pump installed outside the high water mark of Palisades Creek to divert water in connection with this right. Only a flexible pipe may extend from the pump to the water below the high water mark. The intake for the pipe shall be screened with ¼ inch or smaller mesh to protect fish and wildlife."

This condition appears to be from the Idaho Water Board's Comprehensive Water Plan for the South Fork of the Snake River. This plan was adopted on December 13, 1996. The relevant portions of the comprehensive water plan are attached to this email. This report identifies Palisades Creek as a "natural river", and therefore, as shown on page 89 of the Comprehensive State Water Plan, prohibits the "construction of water diversion works." Later in that same column, it clearly states that the Idaho Water Resource Board recognizes that they cannot interfere with "vested rights, or the repair, replacement, or continued operation of existing facilities and works." However, based on this plan, it does not allow the construction of any new diversion works in or adjacent to the creek channel below the ordinary high water mark.

As a general matter, we are not opposed to what the plan provides, but as the condition currently reads, it appears to set forth the **only** authorized method of diverting water from Palisades Creek (a pump with a screen). My client has an engineer designing how he thinks diverting water may best be accomplished without a headgate, and we have received suggestions from IDWR staff as well to construct a sandpoint away from the creek channel. I believe a sandpoint is the direction the engineer is heading, but no final decision has been made. Because we would like the option to consider alternatives, I suggest that we amend the permit condition to read as follows:

"In accordance with the Idaho State Water Board's Comprehensive Water Plan for the South Fork of the Snake River, the right holder shall utilize diversion methods from Palisades Creek which do not require the construction of a headgate or other physical diversion works which will alter the natural channel of Palisades Creek. In the event the right holder elects to use a flexible pipe and pump to divert from Palisades Creek, the intake for the pipe shall be screened with ¼ inch or smaller mesh to protect fish and wildlife."

Let me know if this language is acceptable. If so, let's replace the current condition no. 6 with it, and issue an amended license.

Thanks for your assistance on this matter. If you have any questions, let me know.

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1/20/2009

ACTIONS AND RECOMMENDATIONS

A principal role of the Board is to establish water policy for the state, including the development of comprehensive water plans for specific geographic areas. In planning for the water resources of the state, the Board is charged with weighing and balancing competing uses and needs. Multi-objective resource planning necessarily involves making trade-offs aimed at achieving the best combination of objectives.

Actions and recommendations of the Board are consistent with the Idaho Code, private property rights, local and state management plans, and recognize public consensus achieved at South Fork Snake Advisory Group meetings conducted April, May and June, 1996. These actions and recommendations reflect the desires of local citizens of the basin and in the region. All local, state, and federal agencies are encouraged to administer their activities to help achieve the actions and recommendations contained in the Comprehensive State Water Plan for the South Fork Snake River Basin.

Actions

The South Fork Snake Plan comprised a review and analysis of the present and future needs and opportunities for fifteen resource categories¹ specified by the Idaho Legislature. A need was identified to provide for state protected river designation to protect current values for Idaho and to preclude federal designation.

¹ Resource categories include navigation; power development; energy conservation; fish and wildlife; recreational opportunities; irrigation; flood control; water supply; timber; mining; livestock watering; scenic values; natural or cultural features; domestic, municipal, commercial, and industrial water uses; and other aspects of environmental or economic development [Idaho Code 42-1734A(3)].

STATE RIVER PROTECTION DESIGNATIONS

A comprehensive state water plan may designate waterways as "natural" or "recreational." As defined by the Idaho Code, a recreational or natural river is "a waterway which possesses outstanding fish and wildlife, recreation, geologic or aesthetic values" [Idaho Code 42-1731 (7) and (9)]. Natural rivers are free of substantial man-made development in the waterway, and the riparian area is largely undeveloped. Recreational rivers may include man-made development in the waterway or the riparian area. A designation is made only if the Board determines the value of preserving the waterway is in the public interest and outweighs developing the river for other beneficial uses.

It is the policy of the Board to amend a comprehensive state water plan when it determines that amendments are in the public interest. If development opportunities conflicting with the designation become available before a review period, an amendment to the plan can be requested. The Board will consider proposals for amendment to the South Fork Snake River Basin Water Plan from private parties as well as state agencies. In the event the Board determines that a proposal will not substantially impair the values which were the basis of a protected river designation, the Board shall amend the plan following the procedures required for the adoption of the original plan (Idaho Code, Sections 42-1734A and B).

The Idaho Water Resource Board considers the impacts of protected river designations on the social, economic and environmental livelihood of the region, and determines the value of preserving the outstanding waterways of the South Fork Snake River Basin with their current beneficial uses outweighs the value of further development at this time. The Board believes

state protected river designations are preferable to federal protection, and are in the best interest of the residents of Idaho. Federal protection limits the flexibility of planning for the reach, and removes the option of amending the designation by action of the Idaho Water Resource Board and Idaho Legislature. Federal agencies are encouraged to manage lands to compliment the state protection designations.

Pursuant to Idaho Code 42-1734A(6), the following activities are prohibited within the stream channel or below the highwater mark on the reaches designated "natural" rivers:

- construction or expansion of dams or impoundments;
- construction of hydropower projects;
- construction of water diversion works;
- dredge or placer mining;
- alterations of the stream bed; and
- mineral or sand and gravel extraction within the stream bed.

The Board determines which of the above prohibitions apply to rivers designated "recreational". Prohibitions for natural or recreational designations do not interfere with activities necessary to maintain and improve existing utilities, roadways, managed stream access facilities, diversion works, and for the maintenance of private property. State designation does not change or infringe upon existing water rights or other vested property rights. It does not restrict the expansion or maintenance of existing uses.

To protect the public interest, current resource use, and the multiple-use character of the basin, the Idaho Water Resource Board designates river/stream reaches as natural or recreational as indicated. The Board recognizes that no action using their comprehensive state water planning authorities can interfere with vested rights, or the repair, replacement, or continued operation of existing facilities and works.

Natural Rivers

The Board designates the following stream reaches as "natural" rivers:

Fish Creek (5.2 miles²): Headwaters to confluence with McCoy Creek

Big Elk Creek (4.5 miles): Idaho-Wyoming state line to 100 yards upstream of the Big Elk Creek trail head

Little Elk Creek (3.5 miles): Headwaters to confluence with Spring Run Canyon

Bear Creek and perennial tributaries (36.1 miles): Bear Creek from area where Skyline Road (Forest Road 077) no longer parallels the creek (located in T.2 S., R. 43 E., NE 1/4 of Section 20) downstream to Deadman Creek confluence, and the following perennial tributaries:

- South Fork Bear Creek: headwaters to mouth
- Deadman Creek: headwaters to mouth
- Chaparral Hollow: headwaters to mouth
- Warm Springs Creek: headwaters to mouth
- North Fork Bear Creek: headwaters to mouth
- Small Creek: headwaters to mouth
- Poison Creek: headwaters to mouth
- Currant Creek: headwaters to mouth
- Muddy Creek: headwaters to mouth

Palisades Creek and perennial tributaries (29.7 miles): Headwaters to junction with Forest Trail 099, and the following perennial tributaries:

- North Fork Palisades Creek: headwaters to mouth
- East Fork Palisades Creek: Idaho-Wyoming state line to mouth
- Corral Creek: Idaho-Wyoming state line to mouth
- Lost Spring Canyon: headwaters to mouth
- Dead Man Canyon: headwaters to mouth
- Little Dry Canyon: headwaters to mouth

²Mileage was calculated with a geographic information system using hydrography at a scale of 1:100,000.

- Dry Canyon: headwaters to mouth, including Upper Palisades Lake
- Water Fall Canyon: headwaters to confluence with Dry Canyon

Fall Creek and perennial tributaries (13.1 miles): Fall Creek from its headwaters to confluence with Trap Creek, and the following perennial tributaries:

- East Fork Fall Creek : headwaters to mouth
- Willow Springs Creek: headwaters to mouth

Pine Creek and perennial tributaries (2.8 miles): Pine Creek 100 yards downstream of power line crossing (located in T. 2 N., R. 43 E., Section 15) to confluence with South Fork Snake River

North Fork Pine Creek and perennial tributaries (15.0 miles): North Fork Pine Creek from its headwaters to confluence with Elk Flat Fork, and the following perennial tributaries:

- Elk Flat Fork: headwaters to mouth
- Holter Creek: headwaters to mouth
- Red Creek: headwaters to mouth
- Corral Creek: headwaters to mouth

West Pine Creek (5.2 miles): Headwaters, including unnamed headwater tributaries to 100 yards upstream of West Pine Girls Camp (located in T. 3 N., R. 44 E., NW 1/4 of Section 29)

Burns Creek and perennial tributaries (17.3 miles): Burns Creek from its headwaters (and including unnamed headwater tributaries) to the Burns Canyon trail head, and the following perennial tributaries:

- Beartrap Canyon: headwaters to mouth
- Little Burns Canyon: headwaters to mouth
- Jensen Creek: headwaters to mouth
- Hell Hole Canyon: headwaters to mouth

State "natural" designation does not change or infringe upon existing water rights or vested property rights.

Recreational Rivers

The Board designates the following river/streams as "recreational" rivers:

South Fork Snake River (63.9 miles): Palisades Dam to confluence with Henrys Fork

Burns Creek (tributary to reservoir) (4.7 miles): Headwaters to Idaho-Wyoming state line

Trout Creek (4.6 miles): Headwaters, including all unnamed headwater tributaries, to confluence with Palisades Reservoir

McCoy Creek and perennial tributaries (62.9 miles): McCoy Creek from its headwaters to backwaters of Palisades Reservoir, and the following perennial tributaries:

- Spring Creek: headwaters to mouth
- City Creek: headwaters to mouth
- Clear Creek: headwaters to mouth
- Camp Creek: headwaters to mouth
- Wolverine Creek: headwaters to mouth
- Miners Delight Creek: headwaters to mouth
- Kirk Creek: headwaters to mouth
- Iowa Creek: headwaters to mouth
- Box Canyon Creek: headwaters to mouth
- Hell Creek: headwaters to mouth
- Jensen Creek: headwaters to mouth
- Bitters Creek: headwaters to mouth

Indian Creek (tributary to reservoir) (1.8 miles): Idaho-Wyoming state line to Smith Canyon

Big Elk Creek (0.4 miles): One-hundred yards upstream of Big Elk Creek trail head to backwaters of Palisades Reservoir

Little Elk Creek (1.1 miles): Confluence with Spring Run Canyon to the backwaters of Palisades Reservoir

Bear Creek and perennial tributary (16.4 miles): Headwaters to point where Skyline Road (Forest Road 077) no longer parallels the creek

(located in T.2 S., R. 43 E., NE 1/4 of Section 20), and from Deadman Creek confluence to backwaters of Palisades Reservoir, and the following perennial tributary:

- Elk Creek: headwaters to mouth

Sheep Creek (5.4 miles): Headwaters to confluence with South Fork Snake River

Palisades Creek (8.2 miles): Junction with Forest Trail 099 to confluence with South Fork Snake River

Indian Creek (tributary to main stem)(5.9 miles): Headwaters to confluence with South Fork Snake River

Fall Creek and perennial tributaries (39.3 miles): Confluence with Trap Creek to mouth, and the following perennial tributaries:

- Beaver Creek: headwaters to mouth
- Trap Creek: headwaters to mouth
- Haskin Creek: headwaters to mouth
- Camp Creek: headwaters to mouth
- Gibson Creek: headwaters to mouth
- Blacktail Creek: headwaters to mouth
- South Fork Fall Creek: headwaters to mouth
- Currant Hollow: headwaters to mouth

Rainey Creek and perennial tributaries (25.1 miles): Headwaters to confluence with South Fork Snake River, and the following perennial tributaries:

- North Fork Rainey Creek: headwaters to mouth
- South Fork Rainey Creek: headwaters to mouth

Pritchard Creek (6.5 miles): Headwaters to confluence with South Fork Snake River

Pine Creek and perennial tributaries (21.6 miles): Headwaters to 100 yards downstream of power line crossing (located in T. 2 N., R. 43 E., Section 15), and the following perennial tributaries:

- Tie Canyon: headwaters to mouth
- Poison Creek: headwaters to mouth
- West Pine Creek: one-hundred yards

upstream of West Pine Girls Camp to mouth

- Mike Spencer Canyon: headwaters to mouth

North Pine Creek and perennial tributary (8.1 miles): Elk Flat Fork confluence to mouth, and the following perennial tributary:

- Lookingglass Creek: headwaters to mouth

Black Canyon (9.1 miles): Headwaters to confluence with South Fork Snake River

Warm Springs (0.2 miles): Source to confluence with South Fork Snake River

Burns Creek (0.6 miles): Burns Canyon trail head to confluence with South Fork Snake River

Wolverine Creek (3.4 miles): Headwaters to confluence with South Fork Snake River

Cress Creek (0.1 miles): Source to confluence with Sunnydell Canal

A recreational designation for the South Fork Snake River is not intended to prevent a water user from cleaning, maintaining, or replacing an existing water diversion structure. A water user may remove obstructions from the stream channel such as gravel bars, if the obstructions interfere with the delivery or use of water under any existing water right.

Activities prohibited on "natural" rivers are also prohibited on "recreational" rivers in the South Fork Snake Basin with the following exceptions:

- Alterations of the South Fork Snake River stream bed necessary to keep the river within its historical meander below Heise, or other similar activities necessary to fulfill the flood management responsibilities of Flood Control District No. 1 are allowed in the reach from Grassy Banks (one mile above Heise gage) to the confluence with the Henrys Fork. Such activities must comply with the Stream Channel Protection Act and the rules adopted to implement the act.

- Alteration of the stream bed for installation of fisheries enhancement structures is allowed on the following reaches designated recreational: Bear Creek, Big Elk Creek, Fall Creek, North Fork Pine Creek, Palisades Creek, Pine Creek, Pritchard Creek, and Rainey Creek. Alterations of the stream bed must comply with the Idaho Stream Channel Alterations Rules and Minimum Standards.

- Stream channel alterations are allowed for public agencies to reconstruct or realign recreation trails to prevent resource damage on the following reaches designated recreational: Cress Creek, Bear Creek, Trap Creek, South Fork Fall Creek, Palisades Creek, North Fork Pine Creek, and Rainey Creek. Alterations of the stream bed must comply with the Idaho Stream Channel Alterations Rules and Minimum Standards.

- Stream channel alterations are allowed for public agencies to reconstruct or construct new livestock bridges to prevent resource damage on the following reaches designated recreational: Bear Creek, South Fork Fall Creek, Lookingglass Creek and North Fork Pine Creek. Alterations of the stream bed must comply with the Idaho Stream Channel Alterations Rules and Minimum Standards.

- Stream channel alterations are allowed for temporary roads for vegetation management on Burns Creek (tributary to Palisades Reservoir). Alterations of the stream bed must comply with the Idaho Stream Channel Alterations Rules and Minimum Standards.

- Stream channel alterations for recreational dredge mining may continue on McCoy Creek from the headwaters to Fish Creek confluence, and on the following perennial tributaries: City Creek, Camp Creek, Miners Delight Creek and Iowa Creek. This activity is allowed as currently regulated by the Caribou National Forest through a Special Use Permit issued according to the guidelines established in the "Environmental Assessment for Small Placer Mining Operations in the Caribou Basin Area"

(Record of Decision issued December 12, 1994), and with a Stream Channel Alteration Permit from the Idaho Department of Water Resources. Temporary diversions for the purposes of sluicing are allowed, but must obtain a Temporary Approval of Water Appropriation from the Idaho Department of Water Resources.

- Construction of boat ramps and docks may be allowed on the South Fork Snake River with Board and other regulatory agency approval for the reaches between Palisades Dam to Pine Creek confluence and Black Canyon to Henrys Fork confluence. Alterations of the stream bed must comply with the Idaho Stream Channel Alterations Rules and Regulations and Minimum Standards. This exemption does not apply to the reach between Pine Creek confluence to Black Canyon.

These prohibitions do not interfere with activities necessary to maintain and improve existing utilities, roadways, managed stream access facilities, diversion works, and for the maintenance of private property. State "recreational" and "natural" designation does not change or infringe upon existing water rights or vested property rights. Figure 21 shows the stream reaches with state protection designations.

MINIMUM STREAM FLOWS

It is the policy of Idaho that the Idaho Water Resource Board should seek to appropriate waters in the state for instream flow purposes when it is in the public interest. Idaho Code, Title 42, Chapter 15 provides the authority and spells out procedures for the Board to appropriate water for minimum streamflows. A minimum streamflow is a quantity of water, or lake level, in the public interest required to protect fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation or water quality. By law, a minimum streamflow is not an ideal flow, but the minimum necessary to achieve the objectives. The water right is held by the Board and is junior to all earlier water rights. It is not a guaranteed minimum flow, but is only achieved after senior water rights are fulfilled.