

MEMORANDUM

Date: December 17, 2008
To: Water Right File 23-11387
From: cpadilla
Re: Permit Review

Any new appropriation in the non trust area seeking to divert water that is connected to the Snake River is required to mitigate for their consumptive uses. This applicant is seeking to mitigate for their use by releasing stored water at the direction of the watermaster and when storage water is not available for release, the permit holder will not divert water at all. Note that Palisades Creek does not have storage on it, therefore mitigation for this permit is required in accordance with condition #8. The stored water will not be able to reach the point of diversion for this permit. See the attached letter for further information on right processing in this area.

The permit is also subject to additional conditions because this section of Palisades Creek is protected as a recreational river under IC 42-1734A and B.



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

May 5, 2008

RONALD D CARLSON, PE
651 N 600E
Firth, ID 83235

Re: License 23-11333

Dear Ron:

I received your letter dated February 22, 2008 regarding the water right license referenced above. In your letter, you expressed concerns about: (1) the disallowal of a Snake River Basin Adjudication ("SRBA") claim for water right license no. 23-2071, and (2) the issuance of license no. 23-11333 with a condition requiring rental of storage water to mitigate for depletion of flows in the Snake River.

Tom Summers, et al ("Summers") claimed license no. 23-2071 in the SRBA. The Idaho Department of Water Resources ("Department") recommended disallowal of claim no. 23-2071 due to nonuse during the period 1964 to 1989. Staff reviewed both the claimed (as licensed) place of use and a place of use to which the right had been transferred. The Department confirmed nonuse of the water during that period. Summers filed an objection to the Department's recommendation and a response was filed by Nick Olson asserting nonuse of the water. The objection was resolved by stipulation agreeing to forfeiture or abandonment of the right, signed by Summers' attorney, Jerry Rigby. The SRBA court disallowed claim no. 23-2071 in 2005.

Tom Summers filed application for permit no. 23-11333 in 2005 to replace license no. 23-2071. Permit no. 23-11333 was issued with a condition requiring rental and release of storage water to mitigate for depletion of flows in the Snake River. License no. 23-11333 was issued on December 4, 2007 with the same condition.

As you know, in 1993, the Department issued a moratorium order for the non-trust water area of the Snake River Basin ("non-trust moratorium") that prohibited new appropriations of surface or ground water for consumptive uses. The non-trust moratorium was issued to protect existing water rights and established minimum stream flows. The non-trust moratorium order stated that the moratorium "shall be in effect until December 31, 1997." This letter confirms that the non-trust moratorium expired on that date.

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Although the non-trust moratorium has expired, water rights from the Snake River in the non-trust area are not fully satisfied at certain times, so injury must be considered for any new consumptive application. As an alternative to a moratorium prohibiting all new consumptive uses of surface and ground water, the Department will provide applicants an opportunity to show that diversion and consumptive use of water will not injure other rights or can be mitigated during times that injury would otherwise occur. The interconnection between surface and ground water in the area must be considered and addressed in any proposal.

Mr. Summers filed a petition for reconsideration for license no. 23-11333 on December 14, 2007. The petition requested that license no. 23-11333, as nearly as possible, be brought into conformity with license no. 23-2071 including priority date of April 3, 1964. The petition was denied on December 24, 2007 on the basis that the license could not bear a priority date earlier than the date of receipt of the application for permit and that the license cannot be adjusted to confirm use not in conformance with the permit. The denial order did not specifically address the condition requiring mitigation water.

Since that time, Mr. Summers has communicated with the Department through emails, a meeting, and then a letter received by the Department on January 14, 2008 to discuss the license and to request changes to the mitigation requirement. Because the Department did not previously address the condition requiring mitigation in response to the petition for reconsideration, Mr. Summers may submit an alternate mitigation plan for consideration by the Department. An alternate plan could include information to show that diversion and consumptive use of water will not injure other rights or can be mitigated during times that injury would otherwise occur. The interconnection between surface and ground water in the area must be considered and addressed in any proposal.

The Department will mail Mr. Summers a copy of this letter to provide him an opportunity to submit an alternate plan with supporting information. If acceptable, the Department will issue an amended license to authorize the changes. Diversion and use of water under the license must comply with existing conditions of the license unless the Department approves an alternate plan.

Please feel free to contact me if you have additional questions related to this matter.

Sincerely,



David R. Tuthill, Jr.
Director

cc: THOMAS J SUMMERS JR
Eastern Region, IDWR
Water Allocation Bureau, IDWR

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