



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

October 21, 2008

TOM SUMMERS JR
5055 JUPITER HILLS DR
IDAHO FALLS, ID 83401

Re: License 23-11333

Dear Mr. Summers:

The Department has received your letter dated October 14, 2008 regarding the license referenced above. In your letter you asked for response regarding several questions raised in your letter. I will address your questions in the order presented.

Receipt of Payment for Transfer

In your letter and in prior correspondence with the Department, you indicated that the reason right 23-2071 was disallowed in the SRBA was due to nonpayment (or loss of receipt for payment) for a 1989 transfer application associated with the right. The water right file for 23-2071 indicates that the transfer was paid and receipted. There is no indication in the file that payment for the transfer was an issue. The Department would not process and approve a transfer application if payment was not received.

The SRBA claim file for right 23-2071 indicates that the right was disallowed in the SRBA due to forfeiture for non-use during the period 1964 to 1989 and the file includes documentation supporting the recommendation. I suspect that if payment records were discussed in the SRBA, they might have been related to assessments for Water District 01, not for payment of the transfer. As previously indicated, if you disagree with the SRBA Court's decree, you must file a motion with the court to set aside or amend the decree.

Mitigation for Consumptive Uses under New Appropriations

Your letter asks for the citation providing legal authority for the Department to require mitigation. Section 42-203A, Idaho Code provides in pertinent part:

In all applications...where the proposed use is such (a) that it will reduce the quantity of water under existing water rights...the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

Water Appropriation Rule 45.01(a) provides criteria for determining whether the proposed use will reduce the quantity of water under existing water rights. The rule provides in pertinent part:

A proposed use will be determined to reduce the quantity of water under an existing water right (i.e., injure another water right) if:

i. The amount of water available under an existing water right will be reduced below the amount recorded by permit, license, decree or valid claim or the historical amount beneficially used by the water right holder under such recorded right, whichever is less.

* * *

iv. An application that would otherwise be denied because of injury to another water right may be approved upon conditions which will mitigate losses of water to the holder of an existing water right, as determined by the Director.

As indicated in previous correspondence to you, the Department issued a moratorium order in 1993 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. 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 provides 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.

New consumptive uses of water in the non-trust area, including surface water, ground water or even surface water that sinks, have been subject to mitigation requirements since the moratorium order was issued. The permit for 23-11333 was issued with a condition to provide mitigation for the depletion of river flow resulting from diversion and use of water from Little Pine Creek.

Rental of 0.4 acre-feet per day for Mitigation

Your letter questions the basis for renting 0.4 acre-feet per day when mitigation is required. The quantity of 0.4 acre-feet per day was calculated as the volume diverted at the permitted rate of 0.2 cfs for twenty-four hours. After discussion with staff from Water District 01, it was determined that the rental of storage water could be provided to the Irwin to Heise reach through normal water right accounting procedures. The designated reach is the reach of the Snake River most likely impacted by diversion of water from Little Pine Creek.

Delivery of Water Rights in Water District 01

You indicated in your letter that your desire is to have your water right treated like any other water right distributed by the watermaster and that if Little Pine Creek does not reach the [Snake] river, then the watermaster should find any call for delivery of Little Pine Creek to be futile. As indicated above, new consumptive uses of water in the non-trust area have been subject to mitigation requirements since the moratorium order was issued. This is true even if

the source would not flow on the surface to the Snake River. For consumptive uses permitted since the moratorium order was issued, a futile call would not apply because any consumptive use of the water would reduce the contribution of the diverted source to ground water which is ultimately tributary to the Snake River.

Refund of Water District 01 Rental Fee

You requested a refund of \$1100 for your purchase of storage water through Water District 01 in 2007. As indicated above, the permit for 23-11333 was issued with a condition that water must be rented prior to diversion for mitigation purposes. Although you may not agree with the requirement, the permit was authorized under that condition, so the rental of water was appropriate and a refund by the water district is not recommended.

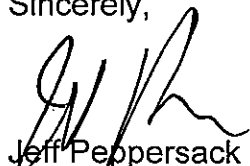
Issuance of Amended License

Due to the circumstances described in previous correspondence to you, the Department will not require you to mitigate at all times for diversion and use of water from Little Pine Creek under right 23-11333. The Department will issue an amended license for right 23-11333 to include the condition proposed in the Department's letter of September 30, 2008 and as restated below. The amended license will be issued as a preliminary order. If you disagree with the amended license, you will have opportunity to file a petition for reconsideration of the preliminary order.

When water is diverted under this right during times when flows in Little Pine Creek reach Antelope Creek, the right holder shall rent storage water in the amount of 0.4 acre-feet per day for release by the watermaster into the beginning of the Irwin to Heise Reach of the Snake River, except when the 10/12/2005 priority is being filled on the Snake River or excess water is being spilled past Milner Dam as determined by the watermaster of Water District No. 01. Rental of storage water is required to mitigate for depletion of river flow resulting from diversion of Little Pine Creek; if rental water is unavailable for mitigation, the watermaster shall curtail diversion of water under this right during times when mitigation is required. The right holder shall not divert flows from Little Pine Creek or otherwise prevent flows of Little Pine Creek from reaching Antelope Creek except under an authorized water right.

If you have any further questions, please feel free to contact the Department.

Sincerely,



Jeff Peppersack
Chief, Water Allocation Bureau

cc: Eastern Region, IDWR