



State of Idaho

DEPARTMENT OF WATER RESOURCES

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November 5, 2008

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

ROBERT L HARRIS
HOLDEN KIDWELL HAHN & CRAPO PLLC
PO BOX 50130
IDAHO FALLS, ID 83405

Re: Application for Permit 35-13542 – South Interchange Properties, LLC

Dear Rob,

I received your letter dated September 1, 2008 regarding the application referenced above. Your letter was a response to a draft memorandum dated June 17, 2008 to Jeff Peppersack from Mat Weaver discussing multiple mitigation proposals for the application. You stated you had not yet received a final version of the memorandum with the listed attachments. I have enclosed a final version with attachments for your reference.

Your letter also responded to many items in the draft memorandum and recounts the history of trying to finalize the application and mitigation plan. You expressed frustration with the level of scrutiny by the Department for 7.4 acre-feet of consumptively used water under the application. Although the application proposes consumptive use of only 7.4 acre-feet per year, the Department must consider the quantity, timing, and location of effects to other rights if there is potential for injury due to pumping 140 acre-feet annually. A mitigation plan should address potential injury to other rights in quantity, location, and timing in a way that can be reasonably administered by a watermaster or the Department.

Your letter asks for a formal response to each of your mitigation proposals. The enclosed memorandum discussed above should provide that response. The Department has not promulgated rules or finalized policy memoranda regarding evaluation of mitigation plans for applications as of this date, but is currently working to develop policy for guidance to staff. I invite you to participate in the Department's Transfer/Mitigation workshop scheduled for November 13, 2008 to discuss policy regarding mitigation plans.

Under Mitigation Proposal No. 2 in your letter you propose that South Interchange Properties, LLC would join a ground water district for mitigation purposes in the event administration of the ESPA is ordered by the Director. This new proposal was not addressed in Mat Weaver's memo. A similar proposal for the City of Shelley application to appropriate water no. 27-12155 was rejected in an order denying a motion for summary judgment, of which you have a copy. Consequently, I won't further discuss the reasoning in this letter.

You proposed that the Department should submit to you a reasonable and acceptable mitigation plan. Department staff has made a significant effort to respond to your proposals and provide you with information. As you know, it is the applicant's burden to show that the proposal will not reduce the quantity of water available under existing water rights, or to provide mitigation to compensate for the reduction. The Department is not comfortable assuming the applicant's responsibility to propose a mitigation plan. I am sensitive to your frustration with the expiration of three years since the application was filed. Nonetheless, to date, a formal mitigation plan has not been offered with the application. If you would like the Department to make a decision on your application, please select and submit a specific proposal along with any other supporting documentation you may wish to provide in support of your plan. The Department will consider the plan and issue a decision based on criteria in Idaho Code § 42-203A and the Water Appropriation Rules of the Department.

Finally, you suggested a meeting might be beneficial to discuss the mitigation proposals and address concerns. I and/or Department staff are happy to meet with you to discuss the application.

Sincerely,



Gary Spackman

Enclosure

cc: Jeff Peppersack
Mat Weaver