

MEMORANDUM

TO: Gary Spackman

FROM: Aaron Marshall *AM*

DATE: September 2, 2008

SUBJECT: Walker Sand & Gravel Rights for Industrial Use
Right Nos. 37-8136, 37-8532, 37-20834

Recently, you reviewed draft licenses for Walker Sand & Gravel water rights in the Big Wood River basin that provide ground water for "Industrial" purposes, specifically for the processing of sand, gravel, asphalt, and concrete. You requested an evaluation of whether a condition should be included on the licenses that would require a water right transfer if there was a change in type of industrial use. Since most of the water used under these rights is non-consumptive and returned to the source, there is a concern that a change to a more consumptive type of industrial use would adversely impact other water rights.

These three rights provide a total of 989.5 AF. Water right 37-8136 provides 241.2 AF, 82.5 AF is for consumptive uses while 158.7 AF is for non-consumptive uses. Water right 37-8532 provides 219.7 AF, all of which is for non-consumptive uses. Water right 37-20834 provides 528.6 AF, all of which is for non-consumptive uses as required by a condition of the permit and subsequent draft license.

All water used in non-consumptive industrial processing is returned to the ground water source via seepage ponds. Using data provided by the ET-Idaho web site, an estimated 42.2 AF of water evaporates from the ponds annually.

In sum, the annual consumptive volume of water is approximately 124.7 AF. The remaining non-consumptive volume of water authorized by these three rights is 864.8 AF. A condition of water right 37-20834 requires the use of water to be non-consumptive and that all 528.6 AF be returned to the ground water by seepage or injection. Therefore, if the use of water for industrial purposes under these rights changed from sand and gravel processing to a more water consumptive industrial use, the potential depletion to the source through a change in type of industrial use is 336.2 AF.

Section 42-202(B)(1), Idaho Code, defines consumptive use as "that portion of the annual volume of water diverted under a water right that is transpired by growing vegetation, evaporated from soils, converted to nonrecoverable water vapor, incorporated into products, or otherwise does not return to the waters of the state. Consumptive use does not include any water that falls as precipitation directly on the place of use unless the precipitation is captured, controlled and used under an appurtenant water right."

Administrator's Memorandum, Transfer Memo No. 24, provides direction regarding a change in the consumptive use and the intensified use of water.

"Unless there is a specific condition of the water right limiting the amount of consumptive use, the amount of consumptive use of water under a water right is not an element of the water right, and changes in water use under a water right for the authorized purpose of use that simply change the amount of consumptive

use do not require an application for transfer provided that no element of the water right is changed and there is no potential for injury or enlargement."

"An application for transfer is not required to increase production under an authorized use of water, unless the proposed change would also result in a change to one or more of the elements of the water right(s) as licensed or decreed."

Generally, a transfer would not be required simply to change from one type of industrial use to another. However, in this case, it may be appropriate to condition these rights to require a transfer if there is a change in the type of industrial water use since the change could potentially impact prior water rights.

With this in consideration, I propose the following condition for inclusion on the water right licenses for 37-8136, 8532, and 37-20834:

that would increase the consumptive use
"Industrial use is for sand, gravel, asphalt, and concrete processing. The use of water for any other industrial purpose is not authorized by this right without an approved transfer."

An argument to this reasoning may be that conditioning a right in this manner would be inconsistent with the direction provided in Transfer Memo No. 24 regarding the allowable intensification of a water use.

Another option for consideration in licensing these rights, instead of including the proposed condition above, may be identifying the consumptive portion of the rights as industrial use (asphalt production, concrete production, truck and equipment washing, dust abatement, etc.) and the non-consumptive portion of the rights as a mining use (sand and gravel washing and separating). Since the use of water in mining is generally non-consumptive, and the non-consumptive uses under the Walker Sand & Gravel rights is for the "mining" of sand and gravel, distinguishing the use of water for industrial and mining purposes may be a preferred alternative. While I haven't found any past examples of a mining water right for the processing of sand and gravel, I think describing the right in this manner more accurately portrays the nature of use.

Aaron
I recommend the condition
with the additional language
added. This assumes the
consumptive use is expressly stated
in the licenses. If questions, let's talk.
Dary