



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

July 25, 2008

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

CHARLES G BROCKWAY
BROCKWAY ENGINEERING
2016 N WASHINGTON ST SUITE 4
TWIN FALLS ID 83301

RE: Potential Ground Water Mitigation Plan, Water Right Nos. 37-276F and 37-8574

Dear Dr. Brockway:

On June 6, 2008, the Idaho Department of Water Resources (IDWR) received a letter from you referencing a recent telephone conversation with Shelley Keen regarding water right nos. 37-276F and 37-8574 in the upper Big Wood River basin. You requested a written response to specific questions about mitigation and forfeiture of water rights.

Your first question was, "Assuming the hydrology is acceptable, can IDWR approve a mitigation plan which proposes to mitigate for an existing groundwater right rather than for a new permit?"

The irrigation of land authorized by the aforementioned water rights does not appear to require the use of water from the Big Wood River prior to the use of ground water. However, considering the potential for a delivery call in this area, it may be prudent to submit a mitigation plan for future need if necessary. Assuming the hydrologic parameters of a proposed mitigation plan adequately offset the depletions of water from the Big Wood River in quantity, time, and location, the plan could be approvable if it provides mitigation for a specific delivery call. Conjunctive management delivery calls in the Eastern Snake Plain Aquifer have required recent use of a water right for consideration in an acceptable mitigation plan. There may be a need to consider past use if conjunctive management is implemented in the Big Wood River basin. In such an instance, the plan could provide mitigation subject to the priority date of the mitigation right.

Your second question was, "If such a plan were approved, would protection from forfeiture of the surface right still be achieved under 42-223(10)?"

Section 42-223(10), Idaho Code, states, "No portion of any water right shall be lost or forfeited for nonuse if the nonuse results from the water right being used for mitigation purposes approved by the director of the department of water resources including as a condition of approval for a new water right appropriation approved pursuant to section 42-203A, Idaho Code, a water right transfer approved pursuant to section 42-222, Idaho Code, a water exchange approved pursuant to section 42-240, Idaho Code, or a mitigation plan approved in accordance with rules promulgated pursuant to section 42-603, Idaho Code."

Until the mitigation plan was approved and implemented for a delivery call pursuant to the Conjunctive Management Rules, the surface water right would remain subject to forfeiture. The right could be offered for lease to the Water Supply Bank until needed for mitigation. If accepted, the right would be protected from forfeiture under section 42-223(5), Idaho Code. The right could then be removed from the Bank by the owner when needed for mitigation. However, the right would remain subject to rental by the general public while leased to the Bank and may not be available for mitigation when needed. Note that rental of the surface water right may be viewed as unstacking and an enlargement of the right. An alternative may be to rely on the forfeiture toll from the Snake River Basin Adjudication and an application for extension of time to avoid forfeiture.

Please contact me if you have any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Aaron Marshall".

Aaron Marshall
Sr. Water Resource Agent

C: Allen Merritt – IDWR Southern Regional Office