

MEMORANDUM

TO: Files

FROM: Steve Lester 

DATE: November 9, 2007

RE: **WILDLIFE APPLICATIONS – SUMMARY & PROPOSED
CONDITIONS OF APPROVAL**

This memo summarizes Western Region work over the last two years for a group of similar applications proposing wildlife projects in the lower portion of Basin 63 downstream from Star. Please see the following attachments to this memo:

- 11/8/07 memo summarizing extensive IDWR coordination with IDFG. Includes telephone and email log, 6/12/07 letter to IDFG about bypass flow condition of approval in Obendorf Permit 63-32067 for Sand Hollow Creek, 6/11/07 letter to IDFG about Tree Top Ranches applications for that creek and Boise River, 3/1/07 meeting notes with IDFG
- 3/2/07 IDWR notes provided to applicants when IDWR wrote each applicant to seek additional information.

Although the area in question is open for approval of new permits from surface water sources, the scope of the proposals caused some alarm at the regional office. We were venturing into uncharted waters, so to speak.

This started with two proposals by Obendorf and Iest in late 2004 for Sand Hollow Creek and Boise River wildlife uses totaling 110 cfs. Only after those two approvals were issued and several other filings were made did we realize something unusual was occurring.

Therefore we proposed a comprehensive approach to evaluate individual and cumulative effects of the projects. I discussed this approach with several agencies, seeking their thoughts on the best way to proceed with respect to any concerns they might have. This included IDFG, IDEQ, IDL, Army Corps of Engineers and Bureau of Reclamation.

No concerns from any of those agencies surfaced other than a conditionally resolved protest by IDFG against Tree Top Ranches Application 63-32462.

The 3/2/07 request for information was based on Rule 40 "large diversion" factors. As previously mentioned, the request included IDWR notes about the overall situation. The

request for information also focused on linking the desired quantity of water with a specific wildlife beneficial use. Most applicants provided little if any useful information to establish that link. Perhaps these projects will not benefit wildlife but will instead benefit people seeking to exploit the wildlife resource. The proposed beneficial uses might be incorrectly stated, although maybe we should not get hung up on that.

Applications Other than Tree Top Ranches

Most of the other applications plus a few more filed recently have not been processed or advertised. Two Obendorf applications not yet processed have already been protested (drain ditches just south of the Boise River) by another one of the wildlife applicants.

Some of the applications are senior to Tree Top, including Watson's 63-32461 for 30 cfs from Sand Hollow Creek (not processed yet) downstream from Tree Top.

Processing will continue this winter. We should continue to send comment letters to IDFG for each additional application as it is processed to provide that agency a final chance to register any specific concerns. This is particularly important for Sand Hollow Creek proposals since IDFG holds senior rights near the mouth of that creek (Fort Boise Wildlife Management Area).

Tree Top Ranches Applications

Application 63-32462 remains protested. The protest process might result in useful information for revisiting Permit 63-32067, Obendorf's creek permit.

The other three applications were not protested.

The following key documents help frame an understanding of the four applications:

- 3/2/07 IDWR letter seeking information
- 4/5/07 applicant's response – note the weak reply linking the amounts of water with the proposed beneficial use
- 6/11/07 IDWR comment letters to key public agencies
- and for Application 63-32462 – 6/22/07 protests, 8/22/07 conditional withdrawal of IDFG protest.

Revisiting Iest Permit 63-32066 (river) and Obendorf Permit 63-32067 (creek)

These two approvals started this overall wildlife process.

Permit 63-32066 for Iest included a condition about possible future use of a measuring device. This requirement should be activated. All the wildlife projects within the scope of this process should include measuring devices and controllable diversion works to minimize possible problems. IDWR should also consider subordinating this permit to junior consumptive uses in addition to requiring a credible link between the amount of water diverted and the specific benefit to wildlife.

Permit 63-32067 for Obendorf has a more complex history. Obendorf applied for the entire flow of Sand Hollow Creek.¹ The owner provided credible data from the stream gage to justify the proposed rate of flow. As the primary reviewer, I erred in not realizing the location of the gage several miles downstream from Obendorf's land, therefore calling into question data about available flow upstream from the gage. Additionally, Application Processing Memo #62 concludes that an application "drying up" a stream is not in the public interest. Approval of 63-32067 included a caveat condition about possible bypass flow to be left in the creek for habitat maintenance.

Tree Top Ranches petitioned the department to invoke the bypass and measurement conditions of 63-32067 (letter received 1/11/06). Western Region requested additional information in that regard from the permit holder and the petitioner (letters dated 1/26/06). The petitioner did not reply. The permit holder replied with a letter received on 2/14/06. IDWR did not receive any reply from IDFG in this matter (letter to IDFG 6/12/07).

Perhaps it is acceptable to dewater the creek during winter months for the short reach of the creek along Obendorf's property (about ¼ to ½ mile) as noted in the 2/14/06 response. IDWR lacks a sound scientific basis to invoke the bypass flow condition. However, we should consider subordinating this permit to junior consumptive uses in addition to requiring a credible link between the amount of water diverted and the specific benefit to wildlife. Additionally, we should invoke the measuring device requirement. Ideally, any approvals for the wildlife projects would require measurable and controllable diversion works as well as measurable return flow works for short and long term administration of the permits/rights. Note the previous comment that the protest process for Tree Top Ranches Application 63-32462 might shed some light on revisiting the Obendorf permit.

If approved, any of the pending wildlife applications should include conditions of approval capturing the following thoughts.

1. Lockable and controllable diversion works subject to IDWR approval and inspection prior to diverting water – existing Water District 63 and possible future

¹ Listed in the permit as Sand Run Gulch Creek, apparently the proper name identified by IDWR at that time. Subsequent to that, IDWR revisited the source name during SRBA work. The result was a decision to list the source as Sand Hollow Creek for all SRBA recommendations and for any future approvals issued by IDWR. The source name for Permit 63-32067 can be corrected later as needed.

water district(s) for Snake River &/or Sand Hollow Creek, concerns about over-diverting or dewatering some sources etc.

2. Acceptable measuring devices at the points of diversion and points of return flows subject to IDWR approval and inspection prior to diverting water – again, concerns about possible dewatering of some sources, injury issues etc.
3. Subject to Boise River Watermaster control except applications proposing only Sand Hollow Creek as a source (tributary to Snake River and not part of a water district at this time).
4. Upon filing proof of beneficial use, must submit credible information establishing a link between the amount of water diverted and quantifiable benefits to wildlife – otherwise could be considered speculative.²
5. Subordinated to junior consumptive uses.
6. Subject to water quality standards of the State of Idaho.
7. For Boise River source, see Permit 63-32066: This right does not authorize the diversion and use of water released from Lucky Peak Reservoir for stream flow maintenance purposes in connection with Water Right 63-3618.

² Tree Top Ranches applications – response to this question, simply stated by attorney, is that the amount of water applied for is the amount needed to provide open water channels/ponds for wildlife. No supporting technical/ biological information from a qualified party was submitted. The question of speculation is hard to avoid in this case. Any decision in this regard will have implications for other applications processed later.