

# MEMORANDUM

**DATE:** June 2, 2006

**TO:** Water Right File 34-13838

**FROM:** Shelley W. Keen *SWK*

**RE:** Permit Holder's Questions about the Permit

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On May 30, 2006, ranch manager Jon Manetta called on behalf of Antelope Valley Ranch, LLC, to discuss the approval conditions on Permit 34-13838. Mr. Manetta had two questions:

- Does the mitigation requirement described in Condition No. 12 duplicate the six-acre reduction in irrigation that occurred under Transfer 4903? In other words, has IDWR doubled the mitigation requirement?
- Should IDWR require the reservoir outflow to equal or exceed the inflow during the irrigation season, or should there be an allowance for replacing evaporation losses from the reservoir?

In 1998 IDWR approved Transfer 4903 and Permit 34-7580 as a package. Permit 34-7580 authorized the diversion of 1.0 cfs of water from Cherry Creek during the non-irrigation season to fill a 50 acre-foot reservoir and to cycle 1.0 cfs of water through the reservoir during the non-irrigation season. Transfer 4903 mitigated for the evaporation losses that would occur from the reservoir surface by reducing the irrigation under Rights 34-513B, 34-514B, 34-515B, and 24-560B by six acres. The transfer also authorized the diversion of 0.17 cfs, up to a total of 15 af, into and/or through the reservoir for recreation purposes during the irrigation season. Neither Permit 34-7580 nor Transfer 4903 expressly authorized the diversion of water to storage during the irrigation season.

Permit 34-7580 lapsed in 2004. Antelope Valley Ranch, LLC, filed Application 34-13838 to replace Permit 34-7580. The applicant did not state on the application that mitigation for evaporation losses would be provided in accordance with Transfer 4903. The application was protested, and in a protest settlement document dated November 14, 2005, the applicant agreed to "dry up" six acres of irrigation in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 5, T4N, R24E. In the same document the applicant also agreed that "all waters flowing into the pond shall flow out of the pond to the creek bed and ultimately to Cherry Creek."

IDWR responded to the applicant's agreement to "dry up" six acres by stating on permit 34-13838 that six acres of irrigation under Rights 34-513A, 34-514A, 34-515A, and 24-560A shall be changed to mitigation purposes. There is no indication in the water right file that IDWR knew

or understood that Transfer 4903 had already addressed the mitigation requirement. Transfer Processing Memo No. 26 allows a one-to-one exchange of acres for reservoir surface area. Retiring six acres of irrigation more than compensates for the evaporation losses from a reservoir with a five-acre surface area. Therefore, the mitigation requirement for the reservoir authorized by Permit 34-13838 is satisfied by the reduction of acres under Transfer 4903 (Rights 34-513B, 34-514B, 34-515B, and 24-560B). The additional mitigation requirement stated in Condition No. 12 of the permit is not necessary and should be removed.

Diverting water and impounding it in the reservoir to replenish evaporation losses is normally described as "storage" because the water is being retained, not released to the source stream or used immediately for some beneficial purpose. Impounding a portion of the water usually would require "diversion to storage" and "recreation storage" components on the water right. Neither Rights 34-513B, 34-514B, 34-515B, and 24-560B nor Permit 34-13838 expressly authorize the diversion of water from Cherry Creek for storage purposes during the irrigation season. Rights 34-513B, 34-514B, 34-515B, and 24-560B state that they are for recreation purposes. Today when we draft "recreation" rights without a storage component, we authorize diverting water from the stream, routing it through a channel that may or may not include a reservoir, and returning all of the flow not lost to seepage back to the stream without impounding it. However, standards were somewhat different in the past. Rights 34-513B, 34-514B, 34-515B, and 24-560B began as irrigation rights with consumptive use components, and there is nothing on the partial decrees for the rights saying that they cannot be used consumptively. Therefore, they should be viewed as authorizing the diversion of water that may be used within the reservoir to replace evaporation losses.

On Application 34-13838, diversion to storage was requested only during the non-irrigation season. Applying to store water during the irrigation season would likely have been injurious to senior surface water right holders, and it would have been contrary to the permit holder's agreement to protect prior irrigation rights by ensuring that water diverted into the reservoir during the irrigation season will be returned to Cherry Creek. Therefore, the permit requirement that from April 1 to October 31 the outflow from the reservoir into Cherry Creek shall equal or exceed the inflow to the reservoir from Cherry Creek is appropriate.

The permit holder's ability to "top off" the reservoir during the irrigation season is currently limited to the 15 af that he can divert pursuant to Transfer 4903. If he needs more water to keep the reservoir full, he must obtain another water right authorizing the storage of water during the non-irrigation season. Condition No. 6 on the permit is a blanket statement that does not seem to contemplate the use of another storage right for the reservoir. Therefore, it should be changed to clarify that the condition applies to Permit 34-13838 only and not to other rights. I suggest:

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From 4/1 to 10/31, the outflow from the reservoir into Cherry Creek shall equal or exceed the flow of water diverted from Cherry Creek into the reservoir under this right.

One item IDWR did not address with the issuance of Permit 34-13838 was mitigation for the loss of water during the initial fill of the reservoir. By filling the reservoir, the right holder will "consume" 50 af of water by removing it permanently from the overall quantity of water available to senior water right holders. To mitigate for this consumption of water, either the right holder should rent or lease water from the Water Supply Bank or some other source, or he should temporarily cease irrigating 20 acres under Rights 34-513A, 34-514A, 34-515A, and 24-560A. IDWR should require similar mitigation in years that Rights 34-513B, 34-514B, 34-515B, and 24-560B are not sufficient to keep the reservoir full. I discussed this requirement with Jon Manetta, and he told me that he understood the need for it.

Rule 760 of IDWR's Rules of Procedure allow the agency to modify a preliminary order within fourteen days of issuance of the order. To make the changes described in this memo, IDWR should simply issue a new permit as a revised preliminary order by June 8, 2006.

STATE OF IDAHO  
DEPARTMENT OF WATER RESOURCES

**TRANSFER OF WATER RIGHT**

TRANSFER NO. 4903  
WATER RIGHT NO(S). 34-00513B/34-00514B/34-00515B/34-00560B

This is to certify that: **A GORDON PLAYER**  
**PO BOX 266**  
**SUN VALLEY ID 83353**

has requested a change to the above captioned water right(s). This change in water right(s) is authorized pursuant to the provisions of Section 42-222, Idaho Code, provided the conditions listed below are met.

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>
Right No. 34-00513B :		
RECREATION	05/01 to 10/15	0.04 CFS
Priority: 09/03/1888		
Right No. 34-00514B :		
RECREATION	05/01 to 10/15	0.05 CFS
Priority: 09/03/1882		
Right No. 34-00515B :		
RECREATION	05/01 to 10/15	0.04 CFS
Priority: 07/01/1904		
Right No. 34-00560B :		
RECREATION	05/01 to 10/15	0.04 CFS
Priority: 05/01/1905		
	<b>TOTAL:</b>	<b>0.17 CFS</b>

SOURCE

CHERRY CREEK

TRIBUTARY OF

ANTELOPE CREEK

LOCATION OF POINT(S) OF DIVERSION:

NWSW , Sec. 32, Township 05N, Range 24E  
CUSTER County

PLACE OF USE: RECREATION

TWN RGE SEC

04N 24E 5

NWSE

TRANSFER NO. 4903  
WATER RIGHT NO(S). 34-00513B/34-00514B/34-00515B/34-00560B

CONDITIONS OF APPROVAL AND REMARKS

1. Use of water under this water right will be regulated by the watermaster of State Water District No. 34.
2. The right holder shall maintain a measuring device and lockable controlling works of a type approved by the Department in a manner that will provide the watermaster suitable control of the diversion.
3. The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
4. Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
5. Approval of this transfer does not preclude the opportunity for review of the validity of the water right(s) in the ongoing Snake River Basin Adjudication.
6. Rights 34-00513B, 34-00514B, 34-00515B and 34-00560B when combined shall not exceed a total annual diversion volume of 15.0 af.

Dated this 21<sup>st</sup> day of January, 1998.

  
Chief, Water Allocation Bureau

State of Idaho  
Department of Water Resources  
**Permit To Appropriate Water**

NO. 34-07580

Proposed Priority: August 21, 1996      Maximum Diversion Rate: 1.00 CFS

This is to certify, that **GORDON FLAYER**  
PO BOX 266  
SUN VALLEY ID 83353-0266  
has applied for a permit to appropriate water from:  
**CHERRY CREEK** tributary of **ANTELOPE CREEK**

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
RECREATION	10/16 to 04/30	1.00 CFS	50.0 AF
RECREATION STORAGE	01/01 to 12/31		
DIVERSION TO STORAGE	10/16 to 04/30	1.00 CFS	
	Totals	1.00 CFS	

LOCATION OF POINT(S) OF DIVERSION:      NWSW , Sec. 32, Township 05N, Range 24E  
CUSTER County

PLACE OF USE: RECREATION  
TWN RGE SEC  
04N 24E 5      NWSE

**CONDITIONS OF APPROVAL AND REMARKS**

1. Proof of construction of works and application of water to beneficial use shall be submitted on or before February 1, 2000.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which permit holder had no control.
4. Use of water under this water right will be regulated by the watermaster of State Water District No. 34.
5. Prior to diversion of water under this right, the right holder shall install and maintain a measuring device and lockable controlling works of a type acceptable to the Department as part of the diverting works.
6. Recreation use and recreation storage use are for a private fish pond.
7. Rights 34-00513B, 34-00514B, 34-00515B, and 34-00560B are also diverted through the point of diversion described above.

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FEB 11 1998

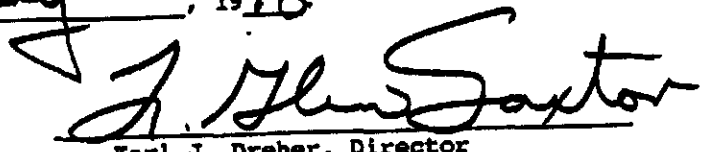
State of Idaho  
Department of Water Resources

# Permit To Appropriate Water

NO. 34-07580

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code.  
Witness the signature of the Director, affixed at Boise, this

27 <sup>~~th~~</sup> day of January, 1998

  
Karl J. Dreher, Director  
*for*

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FEB 11 1998