

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF PERMIT	)	
NO. 34-13838 IN THE NAME OF	)	
ANTELOPE VALLEY RANCH, L.L.C.	)	PRELIMINARY ORDER GRANTING
_____	)	PETITION FOR RECONSIDERATION

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the issuance of a permit to appropriate water, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. On May 6, 2004, Antelope Valley Ranch L.L.C. applied to the Department for a permit to divert 1.0 cfs of water from Cherry Creek, a tributary of Antelope Creek, to a 50 acre-foot reservoir for recreation and recreation storage purposes in Custer County (application). The Department assigned identification no. 34-13838 to the application.
2. Tip Harwood and Jennie Marie Smith each filed protests against the issuance of a permit in connection with the application.
3. On November 7, 2005, Tip Harwood withdrew his protest.
4. On November 14, 2005, Jennie Marie Smith withdrew her protest subject to a set of conditions, including, "The right holder, Antelope Valley Ranch LLC, shall dry up designated six acres in Township 04N R24E Section 5 NWSE," and, "The pond and the retained waters within the pond shall not be used for irrigation purposes and that all waters flowing into the pond shall flow out of the pond to the creek bed and ultimately to Cherry Creek."
5. On May 25, 2006, the Department issued Permit to Appropriate Water No. 34-13838 (permit) to Antelope Valley Ranch, L.L.C. (permit holder) for the use of water from Cherry Creek, a tributary of Antelope Creek, for recreation and recreation storage purposes in Custer County.
6. Approval condition no. 12 on the permit required the permit holder to reduce the irrigation occurring under Rights 34-513A, 34-514A, 34-515A, and 24-560A by six acres to mitigate for the depletion of water resulting from the use of water under this right, to prevent injury to senior water right holders, and to comply with Jennie Marie Smith's conditional withdrawal of her protest.

7. Approval condition no. 6 on the permit said, "From 4/1 to 10/31, the outflow from the reservoir into Cherry Creek shall equal or exceed the inflow to the reservoir from Cherry Creek."

8. The Department issued the permit as a preliminary order (order) of the Department pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).

9. Rule 730.02.a. of the Department's Rules of Procedure (IDAPA 37.01.01.730.02.a.) provides in pertinent part as follows:

Any party may file a petition for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law.

10. Rule 760 of the Department's Rules of Procedure (IDAPA 37.01.01.760) provides in pertinent part as follows:

A hearing officer issuing a recommended or preliminary order may modify the recommended or preliminary order on the hearing officer's own motion within fourteen (14) days after issuance of the recommended or preliminary order by withdrawing the recommended or preliminary order and issuing a substitute recommended or preliminary order. The agency head may modify or amend a final order of the agency (be it a preliminary order that became final because no party challenged it or a final order issued by the agency head itself) at any time before notice of appeal to District Court has been filed or the expiration of the time for appeal to District Court, whichever is earlier, by withdrawing the earlier final order and substituting a new final order for it.

11. On May 30, 2006, the permit holder's representative, Jon Manetta, called the Department seeking to change the requirement that the permit holder mitigate by ceasing to irrigate six acres in connection with Rights 34-513A, 34-514A, 34-515A, and 24-560A. Mr. Manetta explained that rights Rights 34-513B, 34-514B, 34-515B, and 24-560B had already been reduced by six acres in accordance with Transfer 4903 to mitigate for the construction of the reservoir. Mr. Manetta also sought to change the requirement that the reservoir outflow equal or exceed the inflow during the irrigation season.

12. In 1998 the Department 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. The reservoir was to have been constructed at the same

location as the reservoir proposed in connection with Application 34-13838. 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.

13. The reservoir was not constructed, and Permit 34-7580 lapsed in 2004.

14. On June 2, 2006, Department staff reviewed Mr. Manetta's request and wrote a memorandum recommending that the approval conditions on the permit be changed.

15. Prior to June 8, 2006, Shelley Keen of the Department notified Mr. Manetta that he would not have to submit a written petition for reconsideration of the preliminary order issuing the permit to seek changes to the permit. Mr. Keen explained to Mr. Manetta that the Department could modify the order pursuant to Rule 760 of the Department's Rules of Procedure within fourteen days of issuance of the permit.

16. On August 4, 2006, the Department contacted Jennie Marie Smith by telephone to confirm that the six acres referenced in the protest agreement were the same six acres that were removed from the authorized place of use for Rights 34-513B, 34-514B, 34-515B, and 24-560B pursuant to Transfer 4903. Ms. Smith confirmed that the six acres were those addressed in Transfer 4903 and not an additional six acres.

17. On Application 34-13838, the Antelope Valley Ranch L.L.C. requested authorization to divert water to storage only during the non-irrigation season. Applying to store water during the irrigation season likely would have been injurious to senior surface water right holders, and it would have been contrary to Jennie Marie Smith's conditional protest withdrawal in which she sought to protect prior irrigation rights by ensuring that water diverted into the reservoir during the irrigation season would be returned to Cherry Creek.

18. One item the Department 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.

ANALYSIS

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

- Does the mitigation requirement described in Condition No. 12 of the permit duplicate the six-acre reduction in irrigation required by Transfer 4903 in 1998 as mitigation for Permit 34-7580, which lapsed? In other words, has the approval of Permit 34-13838 inadvertently doubled the mitigation requirement?

- Should the Department require the reservoir outflow to equal or exceed the inflow during the irrigation season, or could there be an allowance for replacing evaporation losses from the reservoir?

In 1998 the Department 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. Transfer 4903 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 in 2004 to replace Permit 34-7580. The applicant did not state on Application 34-13838 that mitigation for evaporation losses would be provided in accordance with Transfer 4903. Jennie Marie Smith and Tip Harwood each protested the application, and in a protest settlement document dated November 14, 2005, the applicant agreed to “dry up” six acres of irrigation in the NW¼SE¼ of Section 5, T4N, R24E, to mitigate for the consumption of water that would occur if the permit were approved and the 50 acre-foot reservoir were constructed. 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.”

The Department 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, which are appurtenant to the the NW¼SE¼ of Section 5, T4N, R24E, shall be changed to mitigation purposes. There is no indication in the water right file that the Department knew or understood that Transfer 4903 had already addressed the mitigation requirement.

The Department allows a one-to-one exchange of irrigated acres for reservoir surface area, in acres, as mitigation for the evaporation losses resulting from a new reservoir. 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 evaporation losses from 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.

Diverting water and impounding it in a 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 diverted into a reservoir 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 the department drafts "recreation" rights without a storage component, it authorizes 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, the Department's practice was 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 in the elements of the rights saying that they cannot be used consumptively. They should be viewed as authorizing the diversion of water that may be used within the reservoir to replace evaporation losses. The Department should not require diversions of water to the reservoir pursuant to Rights 34-513B, 34-514B, 34-515B, and 24-560B during the irrigation season to be released from the reservoir as is implied by approval condition no. 6 of the permit.

On Application 34-13838, the applicant requested to divert water to storage only during the non-irrigation season. Applying to store water during the irrigation season likely would 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 would 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 diversion to the reservoir from Cherry Creek *pursuant to the permit* is appropriate. Condition No. 6 on the permit is a blanket statement that does not seem to contemplate the use of another water right for the reservoir. It should be changed to clarify that the condition applies to Permit 34-13838 only and not to other rights.

One item the Department 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 permit holder should rent or lease water from the Water Supply Bank or some other source, or it should temporarily cease irrigating 20 acres under Rights 34-513A, 34-514A, 34-515A, and 24-560A. The Department 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.

CONCLUSIONS OF LAW

1. While the permit holder did not submit a written petition for reconsideration, the permit holder made a good-faith, timely effort to notify the Department that it wanted the Department to reconsider the permit approval conditions. The Department's suggestion that the permit would be modified pursuant to Rule 760 may have convinced the permit holder that a written petition for reconsideration would not be required. The Department's record of the permit holder's verbal expressions of concern about the permit should be construed as a timely petition for reconsideration.

2. The six-acre reduction in irrigation required by Transfer 4903 mitigates for the evaporation losses that will occur from the reservoir that will be constructed in connection with the permit.

3. 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 to protect prior surface water rights and to comply with the conditional withdrawal of protest, but the permit conditions should clearly indicate that this requirement applies to water diverted pursuant to the permit and not to water diverted pursuant to other water rights.

4. The Department should require the permit holder to mitigate for the depletion of water resulting from the filling of the reservoir.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the preliminary order issuing water appropriation Permit No. 34-13838 is **GRANTED** pursuant to Idaho Code § 67-5243.

IT IS FURTHER HEREBY ORDERED that approval condition no. 6 of the permit is **MODIFIED** to say:

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

IT IS FURTHER HEREBY ORDERED that approval condition no. 12 of the permit is **REPLACED** with the following conditions:

Mitigation for evaporation losses from the reservoir created under this right is provided by the reduction in irrigated acres under Rights 34-513B, 34-514B, 34-515B, and 34-560B in accordance with Transfer 4903. The 15 af of water authorized to be diverted from Cherry Creek for recreation purposes by Rights 34-513B, 34-514B, 34-515B, and 34-560B can be used to cycle water through the reservoir and back into Cherry Creek or to replace evaporation losses from the reservoir.

During the first year that water is diverted to fill the reservoir authorized under his right, either the right holder shall rent, lease, or otherwise acquire an alternative supply of water sufficient to fill the reservoir, or the right holder shall limit the diversion and use of water under Rights 34-513A, 34-514A, 34-515A, and 34-560A to a combined total of 419 acres, 12.05 cfs, and 1466.5 af.

During years after the initial filling of the reservoir authorized under this right, if the use of other water rights, including Rights 34-513B, 34-514B, 34-515B, and 34-560B, was not sufficient to keep the reservoir full, either the right holder shall rent, lease, or otherwise acquire an alternative supply of water sufficient to fill the reservoir, or the right holder shall reduce the diversion and use of water under Rights 34-513A, 34-514A, 34-515A, and 34-560A by a combined total of one acre, 0.029 cfs, and 3.5 af for every 2.5 af of water needed to fill the reservoir.

IT IS FURTHER HEREBY ORDERED that a revised permit document shall be **ISSUED** for Permit No. 34-13838.

Dated this 11th day of August, 2006.


GARY STACKMAN