



State of Idaho

DEPARTMENT OF WATER RESOURCES

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

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

December 23, 2005

TRAVIS L THOMPSON
BARKER ROSHOLT & SIMPSON LLP
PO BOX 485
TWIN FALLS ID 83303-485

Disposition of Petition for Reconsideration

RE: Petition for Reconsideration of the Preliminary Order Issuing Permit 45-13852

Dear Travis:

The Department of Water Resources (IDWR) received your petition for reconsideration of the preliminary order issuing Permit 45-13852 to Six S Ranch LLC. In your petition, you ask IDWR to remove two approval conditions that are intended to protect the public interest in maintaining Marsh Creek as suitable habitat for fish and wildlife. The conditions are:

Condition No. 8

The channels, ponds and conveyance works authorized by this permit and any subsequent license shall be constructed and maintained to provide fish passage in Marsh Creek between the lower and upper ends of the proposed project to the satisfaction of the Idaho Department of Fish and Game.

Condition No. 9

The Director retains jurisdiction to require a bypass flow for maintenance of fish, wildlife, riparian and aquatic habitat.

In response to your petition, IDWR has withdrawn its approval of Permit 45-13852 so that you have time to submit additional information in support of your petition. IDWR grants you 60 days to support your petition by providing information showing that condition nos. 8 and 9 are not necessary to protect the public interest. IDWR will evaluate your information when determining whether to re-issue Permit 45-13852. If you do not respond in writing within 60 days, IDWR will act on the application based on the current record.

As you consider how to proceed, it may be useful to have some insight into IDWR's reasons for including the conditions you want removed. The application requested the diversion of 30 cfs of water from Marsh Creek. Information supporting the application suggests that the applicant intends to divert all the water out of Marsh Creek when flows are 30 cfs or less. Diverting all the

Travis L. Thompson
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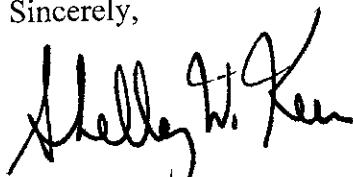
water out of a natural channel could severely impact the fish and wildlife living in the stream and the adjacent riparian zone.

IDWR often consults the Department of Fish & Game when evaluating the potential for a proposed diversion to harm fish and wildlife. Before issuing Permit 45-13852, IDWR consulted IDF&G officials, who responded that they are not opposed to the project if the construction allows fish to pass freely through the proposed artificial channel and constructed ponds. IDWR noted the applicant's statement that the existing diversion structure has been a barrier to fish passage on Marsh Creek for many years. However, IDF&G indicated to IDWR that it would like to see free passage around the diversion structure, and Idaho Code § 36-906(c) authorizes IDF&G to require the installation of fishways in existing dams and diversion structures. Because IDF&G has the authority to require fishways and the expertise to determine when fishways should be required, IDWR added condition no. 8 to the permit as a direct response to IDF&G's preference.

IDWR intended condition no. 9 to be additional insurance against unforeseen and/or unintended consequences of the diversion of the entire flow of Marsh Creek from the natural channel. Because the applicant did not provide documentation predicting how fish and wildlife would be impacted by the diversion of the entire flow of Marsh Creek from the natural channel, IDWR imposed condition no. 9 so that it could take additional measures to protect the public interest if fish and wildlife are severely harmed by the proposed diversion.

IDWR suggests that you and your client discuss your project with IDF&G before responding to this request for additional information. If you have any questions, please call me at 208-287-4947, or email me at skeen@idwr.idaho.gov.

Sincerely,



Shelley W. Keen
Water Rights Supervisor

Cc:Corey Skinner, IDWR Southern Region