

MEMORANDUM

DATE: February 10, 2003

TO: Norm Young

FROM: Shelley W. Keen

RE: Licensing 37-8720 (Faulkner Land & Livestock)

This memo is a summary of my thoughts on Jo Beeman's "draft" letter about the draft license for Right 37-8720. The letter was sent to IDWR on Feb. 5, 2003. At Jo's request, I have scheduled a meeting to discuss her letter on Feb. 19, 2003, at 9:00.

Jo requested two alterations to the draft license for 37-8720. First, she wants IDWR to change condition #2 so that it includes the statement, "The present combined diversion system for these five water rights has a capacity of 6.68 cfs (7.09 cfs with a booster pump)." After our meeting in November, IDWR recognized that the capacity of the diversion system is probably 6.68 cfs. That fact will be stated on the face of the license. I see no reason to repeat it in the approval conditions. IDWR has no information demonstrating that the system capacity is 7.09 cfs with a booster pump. It could be, I suppose, but no booster pump was in place during the development period or during the field examinations done for 37-8720 and 37-8702. Simply put, IDWR does not know that the system capacity is 7.09 cfs with a booster pump.

Jo also requested that IDWR eliminate approval conditions 4 and 8 from the draft license. Approval condition 4 states that Rights 37-8005B, 37-8005D, 37-8702, 37-8720, and 37-8812 are limited to a combined diversion rate of 7.09 cfs. The 7.09 cfs consists of the 6.68 cfs system capacity, plus 0.41 cfs added under a transfer of right 37-8005D after the development period for 37-8702 and 37-8720. Jo wants condition 4 removed because she asserts that Faulkner opted not to use rights 37-8005B and 37-8812 during the development period, and she says that according to the *Wood v. Troutt* decision, those rights cannot not be forfeited while they are (were for 37-8812) pending SRBA claims. In recommending a combined limit of 7.09 cfs, I have attempted to reflect the extent of beneficial use established during the authorized development period for 37-8720. Jo wants her client to be able to add more capacity in the future. Because this is a legal question, I will need to know how you want to approach this matter.

Approval condition 8 is used on supplemental water rights. It says that a ground water right can't be used if the surface water is transferred away. Because the permit conditions do not say it is a

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supplemental right, Jo does not think 37-8720 should be considered a supplemental right. However, at issue is how the right was developed and used, not how it was permitted. On the Faulkner land, ground water diverted under Right 37-8720 is commingled with surface water before it is applied to the land for irrigation. Approval condition 8 recognizes the interrelationship of the ground water and surface water to make a full supply for the lands irrigated. Condition 8 does not say that Right 37-8720 can never be separated from the surface water. It simply says that IDWR must be given the opportunity to approve or deny the proposal, via a transfer application or otherwise, if the right holder wants to separate the surface water use from the ground water use. As always, such a proposal would be evaluated on its own merits. I think the condition is important because it protects the status quo in the ESRP, where ground water use is being discouraged and surface water use it being encouraged.

Jo also spends a considerable portion of the memo explaining why she thinks Rights 37-8702, 37-8812, 37-8005B, and 37-8005D are not supplemental rights. Although those rights are related, they are not at issue. There is nothing in the draft license for Right 37-8720 that affects the supplemental/not supplemental status of any of those rights.