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February 5, 2003

Shelley Keen

Idaho Department of Water Resources

1301 North Orchard Street

Boise, Idaho 83706

Draft Draft Draft

No "final" version
submitted.
S. Keen
3/27/03

Re: Application for Amendment, Water Right 37-8720
Response to letter of December 5, 2002

Dear Shelley:

We are concerned that the language in the Conditions of Approval does not adequately represent the beneficial use established under Permit 37-8720. The following changes are proposed:

Condition #2: Add sentence to state, "The present combined diversion system for these five water rights has a capacity of 6.68 cfs (7.09 cfs with a booster pump)."

Conditions #4 and #8: Delete

Argument in support of the proposed changes. As we discussed in our meeting on November 6, 2002, a water right pending the in SRBA cannot be forfeited (*see Wood v. Troutt*). Water Right 37-8720 currently is diverted from the same well as 37-8005B, 37-8005D, 37-8702, and 37-8812. These rights provide 8.95 cfs for the irrigation of 494 acres. The present diversion system has a physical limit of 6.68 cfs (7.09 cfs with a booster pump).

At the time that Faulkner Land & Livestock perfected its Water Right 37-8720, there was no legal obligation to use the full extent of 37-8005B, 37-8005D, and 37-8812, once the transfers of these water rights were perfected.

At the time that 37-8720 was perfected, Faulkner was diverting no more than 6.68 cfs from the ground water diversion system. However, pursuant to the precedent of *Wood v. Troutt*,

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Faulkner could preserve 8.95 cfs of ground water rights for the irrigation of 494 acres while diverting no more than 6.68 cfs from the ground water diversion system.

According to the IDWR field examination conducted on October 27, 2000, the combined system of canal shares and ground water was irrigating over 700 acres. The field exam reported that 375 shares of North Side Canal Company stock were being used, in addition to ground water, to irrigate the 700+ acres. The number of acres irrigated solely by ground water at the time of the field exam was at least 325 acres (700 acres less 375 NSCC shares). Permits 36-8720 (3.2 cfs/160 acres) and 36-8702 (2.5 cfs/139 acres) totaled 5.7 cfs for the irrigation of 299 acres. Under the principles of *Wood v. Troutt*, licenses 37-8005D (.41 cfs/31 acres), 37-8005B (2.02 cfs/111 acres), and 37-8812 (.82 cfs/53 acres) are exempt from forfeiture during the pendency of the SRBA and thus did not have to be fully diverted or used to remain valid water rights. As we discussed in November, the three license transfers were perfected prior to 2000.

Again, based on the October 27, 2000, IDWR field examination, the number of acres irrigated solely by ground water was at least 325. Since 37-8702 and 37-8720 account for 5.7 cfs and 299 acres, .98 cfs of ground water was also available for the irrigation of at least 26 acres, and possibly more, given the statement in the field exam ("over 700 acres"). Under the combined diversion system, the .98 cfs and the 26+ acres could have been used for 37-8005D, 37-8005B, or 37-8812, or some combination of all three. Under the principles of *Wood v. Troutt*, these three rights are protected in their entirety while 37-8702 and 37-8720 are used to the full extent of their rates of diversion and places of use.

Proposed Conditions #4 and #8 reflect IDWR's understanding that the five ground water rights are supplemental ground water rights, and are thus restricted to a rate of diversion of 7.09 cfs (rather than 8.95 cfs) and are also restricted in any future transfers. The following information, based on the IDWR files, and relevant SRBA files, for the five affected ground water rights supports Faulkner Land and Livestock's understanding that each of the five ground water rights is a primary water right.

Water Rights 37-8005D and 37-8702: Permit 37-8702 was applied for and approved as a primary ground water right for 139 acres. The application, permit, and license for 37-8005 were for a primary ground water right for 264 acres. The subsequent transfer of a portion of 37-8005 (which became 37-8005D), in conjunction with an application to amend Permit 37-8702, stated that the 31 acres from 37-8005D and the 139 acres from 37-8702, in combination with 90 shares of North Side Canal Company water, would provide for irrigation of 260 acres. These are the 260 acres identified on the permit amendment for 37-8702, the license for 37-8702, the transfer application and the approved transfer associated with 37-8005D. The SRBA claim and the IDWR recommendation to the SRBA court for 8005D also identify the same 260 acres.

The application to amend Permit 37-8702 specifically states, "I want to move 90 shares of NSCC and 170 acres of ground water to" the 260-acre permissible place of use. The transfer application affecting 37-8005D also stated, "Permit 37-08702 is also being amended to provide

water for this system. Well was developed under amended permit 37-08720. Land will have 170 acres of ground water rights and 90 shares of NSCC water." Each of these rights is a primary ground water right: License 37-8702 for 139 acres and license 37-8005D for 31 acres. They are used on a 260 permissible place of use with 90 NSCC shares.

License 37-8005B: The application, permit, and license for 37-8005 were for a primary ground water right. There is no mention of associated surface water use. The application to transfer 37-8005B and the approval of that transfer contain no evidence or statements that surface water was or is to be used with 37-8005B for irrigation of the 111 acres. The SRBA claim and the IDWR recommendation to the SRBA court for 37-8005B identify the same 111 acres with no reference to any associated surface water use. License 37-8005B has always been a primary ground water right.

License 36-2504 (which became License 37-8812): The application sought 1 cfs for the irrigation of 74 acres and stated that existing water rights appurtenant to the lands to be irrigated included "80 shares of water in the North Side Canal Company." A license was issued for .82 cfs for the irrigation of 74 acres. (November 15, 1962). The license contains no mention of the North Side Canal Company shares. December 5, 1992 Darwin R. Yoder, DVM, authored a letter stating "I have agreed to sell irrigation well permit 36-02504 to Faulkner Land and Livestock, Gooding, Idaho. This agreement is for the amount of water-212 acre feet per year that is allowed to be diverted from the Snake River Aquifer by the use of a deep well. The North Side Canal Company shares for the property are not being sold." The Faulkner transfer is dated December 24, 1992. The IDWR transfer analysis sheet (undated) states, "no expansion of ground water." The approved transfer states that the authorized place of use for license 36-02504 has changed from 74 acres shown on the license to 53 acres shown on both the transfer application (transfer 4063) and the approved transfer, dated May 28, 1993. This right was subsequently decreed in the SRBA as 37-08812 for .82 cfs for 53 acres. The original SRBA claim for 36-2504 (by Darwin R. Yoder) refers to 51 North Side Canal Company shares under the category "other water rights used." IDWR records indicate that Mr. Yoder's claim for 36-2504 in the SRBA was in 1988, prior to his sale of this water right, without canal shares, to Faulkner Land and Livestock in 1992. Neither the license, the subsequent transfer, nor the recommendation and decree of 37-8812 in the SRBA contain any statements or evidence that 37-8812 is a supplemental ground water right..

Permit 37-8720: The original application for this ground water right states the ground water "will supplement surface rights as needed." The surface water rights were for the Big Wood Canal Company. The application for 240 acres was granted with the rate of diversion of 4.8 cfs. The only condition on the permit which might relate to the combined use of surface and ground water stated, "the rate of diversion of water for irrigation under this right and all other water rights on the same land shall not exceed .02 cfs per second for each acre of land." (Condition 9 on permit 37-08720.) In 1992 Jerry Nance, the permit holder, applied to amend the permit to 3.2 cfs for irrigation of 160 acres. The permit amendment was approved in 1992. The new location for the 160 acres shows no surface water rights on the property in 1992. One of the conditions of approval for amended permit 37-08720 states, "the previous conditions as set forth

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in permit 37-08720 must be met." December 29, 1992, Jerry Nance assigned amended permit 37-8720 to Faulkner Land and Livestock. Faulkner Land and Livestock then applied to amend the permit a second time to move the 160 acres and the point of diversion from Lincoln County to Gooding County. The amendment was approved May 26, 1993. The only conditions on the amendment of permit 37-08720 in the name of Faulkner Land and Livestock were the conditions set forth in the Memorandum, Decision and Order in the IDWR proceeding entitled, "In the Matter of Application for Transfer 4062 of Licensed Right 37-8005B, Application for Transfer 4063 of Licensed Right 36-02504 and Amendment of Permit 37-08720 in the name of Faulkner Land and Livestock Company. The nine conditions in that order do not impose limitations on the full use of permit 37-8720 as a primary right on the 160 acres identified in the approved amended permit. The rate of diversion of 3.2 cfs is the same amount as in the previously approved amended permit sought by the original owner, Jerry Nance. IDWR twice approved amendments of permit 37-8720 with no conditions identifying permit 37-8720 as a supplemental ground water right. In fact, the first amendment was to a location where there were no surface water rights for the 160 acres of ground water use. The record supports Faulkner Land and Livestock's understanding that permit 37-8720 is a primary ground water right for the irrigation of 160 acres.

We appreciate your consideration of this information which is provided to support additions to proposed condition #2 and deletion of proposed conditions #4 and #8 for the amendment of permit 37-8720.

Sincerely,

BEEMAN & ASSOCIATES, P.C.

Josephine P. Beeman

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