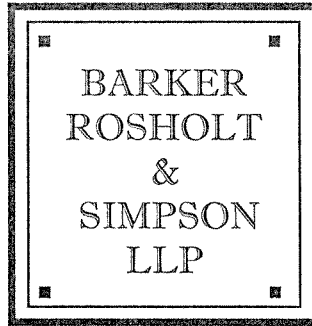


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December 16, 2003

RECEIVED

DEC 19 2003

Department of Water Resources
Eastern Region

Randall C. Budge
Racine, Olson, Nye, Budge & Bailey
PO Box 1391
Pocatello, Idaho 83204-1391

Re: Protest to Application for Transfer No. 70663, Andrew Povey

Dear Mr. Budge:

In response to your letter and additional information sent November 25, we have the following concerns with the mitigation plan and supporting documentation.

(1) *Analysis by Rocky Mountain Environmental*: The analysis presented by the Applicant's consultant provides information regarding depletion in the Neeley to Minidoka reach and the Milner to King Hill reach. However, there is not any information pertaining to the Minidoka to Milner reach. As required by the Transfer Policy Guidelines, "...the applicant must submit an attachment to the application that sets forth the time history of calculated depletions (transient to steady-state) to reaches of the Snake River that are hydraulically-connected to the ESPA using or based on the department's current ground water model for the ESPA, or other equivalent analysis acceptable to the department." *Transfer Policy Guidelines*, at p10.

(2) *Mitigation Plan*: Overall, the plan does not appear to comport with the transfer policy guidelines. These guidelines require that "Unless agreed to in writing by the holder of an existing right, the only mitigation that can be considered acceptable by the department is the provision of replacement water in the full amount of the injury, at the same time injury would otherwise occur, and of acceptable water quality at the point of diversion for the existing right."¹ *Transfer Policy Guidelines*, at p19.

¹ The Conjunctive Management of Surface and Ground Water Resources, IDAPA 37.03.11, Rule 43, provides similar guidance as to factors pertaining to mitigation plans. Such factors include consideration of

The amount of mitigation proposed is based upon crop ET rather than depletions as calculated in the model. The guidelines require mitigation based on increased depletions to the reaches as determined by the model. Additionally, the proposed accounting of the mitigation appears to compare two different variables. The proposal is that the Applicant would obtain storage water in the amount equal to a percentage of the crop ET. However, the water right accounting program would then implant fake pumps from the river to simulate the impact to downstream senior water users by determining the additional amount of storage those users required due to these fake withdrawals. The withdrawals would be based on the volume as determined by the model. Does this mean that model will determine the depletion and the amount of storage to be purchased is only based on crop ET? Are these values equal? What occurs at the end of the year if the amount of storage purchased does not equate to the simulated impact on senior users?

An additional limitation on the mitigation plan that does not appear to be valid is the fact that mitigation will not be required when there is spill from Milner due to flood control operations. Is the assumption that injury will not occur to senior users since there is spill past Milner? It is stated in the mitigation plan that the depletive effect will reduce the waste past Milner so, essentially, mitigation is not required. However, this spill is due to operations and has no bearing on whether or not mitigation is required. It is unclear how these operations mitigate for the depletive effect of this application, especially during the irrigation season. The depletions are still occurring even if there is a wet year versus a dry year.

The timing of when mitigation water, in the form of storage water, is also an issue. As required by the transfer policy, the mitigation has to occur at the time the injury would occur. The proposal uses an end-of-the-year accounting while depletions occur throughout the irrigation season.

Another assumption of concern is the statement that the sum of the depletion to the impacted reaches will be zero. This statement does not appear to consider the cumulative impact and depletion that still occurs.

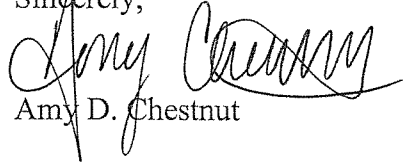
Consideration should be given to resolving these issues and developing an adequate mitigation plan that complies with the transfer policy guidelines. One such consideration is that Mr. Povey reduces the ground water withdrawal to mitigate for the depletion that is determined for that year based upon application of the ESPA model and, then, rents storage water from the water bank to cover the remaining acreage. A schedule could be developed for adjusting the reduced withdrawals, as is suggested in the transfer processing guidelines.

Please feel free to contact us to further discuss these issues. We look forward to working towards an acceptable resolution to this matter.

whether or not the plan provides mitigation water at the time and place sufficient to offset the depletive effect of ground water withdrawal and the reliability of the source of replacement water. See 43.03(a)-(o).

Randall C. Budge
12/16/2003
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Sincerely,



Amy D. Chestnut

cc: Roger Warner, IDWR, Eastern Region Office
Ron Carlson, Water District 01
Ted Diehl
Vince Alberdi