

Cefalo, James

From: Cefalo, James
Sent: Friday, August 25, 2023 2:55 PM
To: 'john.wilkes@idahomaterials.com'; TJ Budge
Cc: Lafortune, Thomas
Subject: Application for Permit 29-14509, Application for Transfer 87779 (Staker & Parson Companies)
Attachments: 35-14402 Memorandum Decision and Order.pdf

John and T.J.,

This email is meant to provide a status update for Application for Permit 29-14509 and Application for Transfer 87779 filed by Staker & Parson Companies (SPC). The cover letter included with Application 29-14509 states that the proposed permit will be non-consumptive. The arguments about non-consumptive use are not persuasive. Existing industrial water right 29-10994 used on the site is limited to a diversion rate of 0.13 cfs. Therefore, any water diverted at a rate above and beyond the 0.13 cfs would necessarily be a diversion under the proposed permit. Similarly, any volume produced through pumping at a rate higher than 0.13 cfs would necessarily be volume diverted under the proposed permit. The beneficial uses identified on the permit (mining, dust suppression, and related purposes) are usually consumptive. Therefore, some portion if not all of the water diverted under the proposed permit will be consumed. Pursuant to the 2022 Snake River Basin Moratorium, the consumptive use associated with the proposed permit must be fully mitigated.

Application 25-14509 is very similar to Application for Permit 35-14402 filed in August 2014, which was protested. In that case, Jeffrey Cook, a water user who held an existing ground water irrigation right, sought a permit to increase the diversion rate for his existing irrigation system. The proposed point of diversion and place of use were within the ESPA moratorium area. Cook proposed to use his existing irrigation right to mitigate for the new permit. After conducting an administrative hearing, the Department approved the permit, but limited the new permit, in combination with the existing right, to a combined annual volume equivalent to the maximum historical volume pumped under the existing right. The combined annual volume limit was not the annual volume listed on the face of the existing water right. The Cook decision was appealed to Idaho District Court (5th District). Judge Wildman issued a Memorandum Decision and Order on December 14, 2015, affirming the Preliminary Order of the Department and the Department's decision to limit the proposed and existing water rights to the historical diversion volume. Attached is a copy of that order. The Preliminary Order can be found on the Department's website under water right 35-14402.

SPC is essentially proposing to do the same thing. The company wants to increase the authorized diversion rate at an existing industrial facility. SPC proposes to use its existing water right (29-10994) to mitigate for the new permit. Consistent with the Cook decision, the new permit and the existing water right must be limited to the historical annual diversion volume under the existing system. Thomas Lafortune from our office has made multiple requests for information to help him calculate the volume historically diverted under water right 29-10994. SPC has been unwilling to provide that information.

At this point, the mitigation proposed for Application 29-14509 is insufficient. Consistent with the Cook decision, SPC's proposal to simply adopt the volume on the face of water right 29-10994 (42 acre-feet) must be rejected. SPC has not provided enough information to calculate the proper combined annual volume limit. Therefore, the Department will suspend processing Application 29-14509 and add the application to the collection of applications being held under the 2022 Snake River Basin Moratorium.

For Application for Transfer 87779, I have concerns about enlargement of water right 29-10994. The information provided suggests that SPC is already diverting at the proposed diversion rate (0.40 cfs). Therefore, the diversion rate

already exceeds the 0.13 cfs authorized under water right 29-10994. The second point of diversion will only exacerbate the existing enforcement issue. I plan on issuing an order denying Application 87779 in the coming weeks.

James



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