

September 28, 2010

Dear Jan,

After stewing about it for some time we have some serious questions regarding the arbitrary closing off of the water into our pond. No one took the time to inform us, either verbally, or written(preferred), of this action. We feel that we deserved more courtesy than was shown.

Two different people from the Idaho Department of Water Resources have been contacted with two opposing solutions as to what we should do to once again have water flowing through this pond. Before we spend the time, effort and expense of trying to restore water to our pond we would like to know if there is even a chance of being successful. For at least thirty years no one has questioned this situation. Why??? There has been plenty of water for the grazing land with or without our pond. We wish that someone would visit our property to see first hand this unique situation. It is very difficult to describe over the telephone!

If you can offer any advice regarding this matter we would really appreciate it!

Regards,

Linda Bein Bill Bein

Linda and Bill Bein



Linda & Bill Bein
P.O. Box 253
Stanley ID. 83278



JAN SKRUKRUD - WATERMASTER
PO BOX 163
STANLEY ID 83278

*Made
for
Sept 28*



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098
Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

NOVEMBER 2, 2010

LINDA AND BILL BEIN
PO BOX 253
STANLEY, ID 83278

RE: PARK CREEK POND

Dear Mr. and Mrs. Bein:

Jan Skrukrud forwarded me your letter dated September 28, 2010 regarding the pond on your property in Stanley. She asked me to respond because I am an employee of the Idaho Department of Water Resources (IDWR), I am the Watermaster for Water District no. 170 (the larger water district, of which Sub-district no. 71 is a part), and I am familiar with the situation because Mr. Bein and I met on your property in 2008 to discuss acquiring a water right for the pond. Idaho Law requires that a person obtain a water right prior to diverting or using surface water¹. As Mr. Bein and I discussed in 2008, you do not have a water right authorizing you to use water from Park Creek. The purpose of this letter is to provide you with information to help you take the necessary steps to acquire a water right and resume the use of your pond so the use is legal and protected into the future.

When Mr. Bein and I met in 2008, we discussed the fact that you do not have a water right for the pond and that it was in your best interest to acquire a right, both to protect your use of the pond and to avoid being issued a Notice of Violation by IDWR. We discussed the possibility of transferring some or all of your Elk Creek Right (right no. 71-44B) and the possibility of applying for a new water right from Park Creek. In your letter, you indicate that IDWR staff have also suggested more than one course of action to resume use of the pond. Although you indicate that IDWR staff provided "two opposing solutions", they all should have had the same goal of acquiring a water right. Your options for acquiring a water right are to either apply for a new water right or obtain the use of an existing water right.

A couple of options exist for using an existing water right. A short-term option would be to lease an existing water right from the Idaho Water Supply Bank. This can be a useful way to supply water to the pond in the short-term while you pursue a more permanent solution. A more permanent solution would be to transfer an existing water right. You

¹ Idaho Code §42-201(2) states that, "No person shall use the public waters of the state of Idaho except in accordance with the laws of the state of Idaho. No person shall divert any water from a natural watercourse or apply water to land without having obtained a valid water right to do so, or apply it to purposes for which no valid water right exists."

could use either your existing water right 71-44B, or purchase a different existing water right from a private party. In either case, you would then have to submit an application to IDWR to alter the elements of the existing water right to authorize the use of that water right for the pond. This option is probably not your best solution as it may be difficult to locate and purchase a viable water right. Also, there is some risk that the transfer could be protested or denied or result in forfeiture of some of the existing water right.

In my opinion, your best course of action is to apply for a new water right. I have attached an application form and instructions. The estimated cost for the application and examination fee is \$150. The application would be advertised and could be subject to protest by parties that feel they would be injured by the appropriation. However, the risk of that is fairly low, so this remains a good option to obtain a water right.

In your letter, you ask why nobody questioned the use of the pond until now. To answer that, it is important to acknowledge that the water that is diverted from Park Creek into the ditch that you have historically diverted through your pond is diverted for irrigation under water right 71-53, held in the name of Helen Mahoney Pardoe. In the past, the diversion from Park Creek was not measured or regulated and the ranch operator for Mrs. Pardoe had always diverted the entire flow of Park Creek. At times, this was three or four times as much water as the water right authorizes. Now that the area is under regulatory control through Water District no. 170 and Sub-district no. 71, the diversion of water from Park Creek is being held to the water right and the remaining water is left in the stream channel. I spoke with Mr. Dave Muscavage (the current ranch manager for Mrs. Pardoe) regarding this situation and he indicated that, since they are now held to their water right, he had closed the gate to your pond early in the season as a precaution against evaporation and seepage losses that might occur as the water flows through your pond.

I hope the information in this letter helps put this situation into perspective and provides you the information you need to obtain a water right and resume the use of your pond. If I can be of further assistance, please feel free to contact me.

Sincerely,



Nick Miller, P.E.
Staff Engineer, IDWR
Watermaster, Water District No. 170

enclosures

cc:

JAN SKRUKRUD – SWD71 PO BOX 163, STANLEY, ID 83278

IDAHO DEPARTMENT OF WATER RESOURCES

Applying for a Permit to Appropriate Water in the Salmon and Clearwater River Basins

Idaho Code § 42-203A(5) requires IDWR to evaluate the following criteria for applications to appropriate water:

- The potential to reduce the quantity of water under existing water rights
- The sufficiency of the water supply for the proposed appropriation
- The good faith nature of the application
- The adequacy of the applicant's financial resources
- The local public interest in the public water resource
- The conservation of water resources in Idaho
- Impacts to the economy of the local area or watershed

To ensure that IDWR has sufficient information to evaluate the criteria, Rule 40.05 of the Water Appropriation Rules (IDAPA 37.03.08.040.05) requires water right applicants to submit additional information to IDWR in connection with their applications.

The additional information requirement is usually waived for applications proposing the appropriation of 5.0 cfs or less or the storage of 500 af or less. Because the waters of the Salmon River and Clearwater River drainages are habitat for fish species listed as endangered or threatened under the federal Endangered Species Act, caution is necessary to ensure that new appropriations of water do not undermine efforts to protect and restore the ESA listed fish species and other public values in the basins' rivers and streams. IDWR is, therefore, requiring that applicants submit the additional information required by Water Appropriation Rules 40.05.c through 40.05.g, even when the applications are for less than the usual 5.0 cfs/500 af threshold. Only certain applications for small domestic and stockwater uses and applications to divert ground water for domestic use in multiple homes are exempt from the additional information requirement. A copy of Water Appropriation Rules 40.05.c-g is printed on the back of this page.

Please submit the information required by Water Appropriation Rules 40.05.c-g to IDWR within 30 days from the date you are notified that it is required. IDWR will hold your application until you have submitted the additional information. If you believe that a particular piece of information is not relevant to your application, please explain why. If you do not respond within 30 days, IDWR may void your application. If you need additional time to submit the required information, please submit a written request. IDWR can grant additional time "upon a showing of good cause."

The following are agency representatives who will help you respond to the local public interest requirement of Rule 40.05.g. Please contact these agency representatives at least 15 days prior to the end of your 30-day response period.

IDFG contact list for water right applications:

Panhandle Region: Mary Terra-Berns at 208-769-1414 Clearwater Region: Ray Hennekey at 208-799-5010
McCall Subregion: Dale Allen at 208-634-8137 Southwest Region: Eric Leitzinger at 208-465-8465
Salmon Region: Tom Curet at 208-756-2271

IDEQ contact list for water right applications:

Lewiston: Kerby Cole at 208-769-4880 or John Cardwell at 208-769-4878 (Clearwater or lower Salmon basins)
Cascade: Leslie Freeman at 208-382-6808 (South Fork Salmon River basin)
Idaho Falls: Jim Johnston at 528-2659 or Troy Saffle at 528-2661 (Upper Salmon, Lemhi, Pahsimeroi basins)

Water Appropriation Rules 40.05.c through 40.05.g

c. The following information shall be submitted for applications to appropriate unappropriated water. . . .

Information relative to the effect on existing water rights, Section 42-203A(5)(a), Idaho Code, shall be submitted as follows:

- i. For applications appropriating springs or surface streams with five (5) or fewer existing users, either the identification number, or the name and address of the user, and the location of the point of diversion and nature of use for each existing water right shall be submitted.
- ii. For applications appropriating groundwater, a plat shall be submitted locating the proposed well relative to all existing wells and springs and permitted wells within a one-half mile radius of the proposed well.
- iii. Information shall be submitted concerning any design, construction, or operation techniques which will be employed to eliminate or reduce the impact on other water rights.

d. Information relative to sufficiency of water supply, Section 42-203A(5)(b), Idaho Code, shall be submitted as follows:

- i. Information shall be submitted on the water requirements of the proposed project, including, but not limited to, the required diversion rate during the peak use period and the average use period, the volume to be diverted per year, the period of year that water is required, and the volume of water that will be consumptively used per year.
- ii. Information shall be submitted on the quantity of water available from the source applied for, including, but not limited to, information concerning flow rates for surface water sources available during periods of peak and average project water demand, information concerning the properties of the aquifers that water is to be taken from for groundwater sources, and information on other sources of supply that may be used to supplement the applied for water source.

e. Information relative to good faith, delay, or speculative purposes of the applicant, Section 42-203A(5)(c), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit copies of deeds, leases, easements or applications for rights-of-way from federal or state agencies documenting a possessory interest in the lands necessary for all project facilities and the place of use or if such interest can be obtained by eminent domain proceedings the applicant must show that appropriate actions are being taken to obtain the interest. Applicants for hydropower uses shall also submit information required to demonstrate compliance with Sections 42-205 and 42-206, Idaho Code.
- ii. The applicant shall submit copies of applications for other needed permits, licenses and approvals, and must keep the department apprised of the status of the applications and any subsequent approvals or denials.

f. Information Relative to Financial Resources, Section 42-203A(5)(d), Idaho Code, shall be submitted as follows:

- i. The applicant shall submit a current financial statement certified to show the accuracy of the information contained therein, or a financial commitment letter along with the financial statement of the lender or other evidence to show that it is reasonably probable that financing will be available to appropriate the water and apply it to the beneficial use proposed.
- ii. The applicant shall submit plans and specifications along with estimated construction costs for the project works. The plans shall be definite enough to allow for determination of project impacts and implications.

g. Information Relative to Conflict with the Local Public Interest, Section 42-203A(5)(e), Idaho Code, shall be submitted as follows:

The applicant shall seek comment and shall submit all letters of comment on the effects of the construction and operation of the proposed project from the governing body of the city and/or county and tribal reservation within which the point of diversion and place of use are located, the Idaho Department of Fish and Game, the Idaho Department of Environmental Quality, and any irrigation district or canal company within which the proposed project is located and from other entities as determined by the director.