

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION FOR)	
PERMIT TO APPROPRIATE WATER,)	ORDER DENYING
PERMIT NO 74-15613, IN THE NAME OF)	PETITIONS FOR
F. JAMES AND PAULA J. WHITTAKER)	RECONSIDERATION
_____)	

F. James and Paula Whittaker (“Whittakers”) filed application to appropriate water no. 74-15613 with the Idaho Department of Water Resources (“IDWR” or “Department”). The application was protested by the Lemhi Irrigation District, Ellsworth Angus Ranch, the Idaho Department of Fish & Game (“Fish & Game”), and the United States Department of Interior, Bureau of Land Management (“BLM”). BLM subsequently withdrew its protest.

On February 6 and 7, 2007, IDWR conducted a hearing for the protests. Kent Foster, Attorney at Law, appeared on behalf of Whittakers. David Barber, Idaho Deputy Attorney General, appeared on behalf of Fish & Game. Carl Ellsworth appeared on behalf of the Lemhi Irrigation District and Ellsworth Angus Ranch.

On September 11, 2007, the hearing officer issued a Preliminary Order.

On September 26, 2007, Fish & Game petitioned the hearing officer to reconsider the Preliminary Order.

The hearing officer did not address the petition for reconsideration. On October 18, 2007, the petition for reconsideration was deemed denied by operation of law.

On October 24, 2007, Fish & Game filed exceptions to the Preliminary Order with the Director.

On May 10, 2011, the Director issued a *Final Order* in the above titled matter.

On May 23, 2011, Whittaker filed *Whittaker’s Petition for Reconsideration*.

On May 24, 2011, Fish & Game filed its *Petition for Reconsideration*.

ANALYSIS OF PETITIONS FOR RECONSIDERATION

The issues raised by each petition for reconsideration will be restated below. The issue will be analyzed directly following the issue restatement.

Whittakers' Petition for Reconsideration

Whittakers raise three issues:

1. A condition requiring a 13.0 cfs bypass flow from the confluence of Little Timber Creek and Big Timber Creek down to the confluence of Big Timber Creek and the Lemhi River violates Idaho's minimum stream flow provisions and other laws.
2. The Director lacks the authority to require Whittakers to maintain a fish screen at his point of diversion.
3. The condition requiring a datalogger to record measurements of his diversions of water under the water right.

Whittakers' objections to conditions one and three relate directly to the required bypass flow and will be discussed together. The condition requiring a fish screen at the point of diversion will be discussed last.

Does the requirement of a flow below a permitted point of diversion result in a minimum stream flow?

Whittakers' are correct that a minimum stream flow can only be appropriated by the Idaho Water Resource Board under chapter 15, title 42 of the Idaho Code. If the standard proposed by Whittakers is rotely applied, however, it would eliminate the Director's authority to weigh whether a proposed use of water is in the local public interest.

There is local public interest value in granting a right for Whittakers to appropriate water for irrigation. The final order identified other local public interest values in maintaining the anadromous fisheries in Big Timber Creek and in the Lemhi River drainage. The local public interest value of allowing Whittakers to divert all additional unappropriated water from Big Timber Creek is outweighed by the public interest value in maintaining flow in Big Timber Creek from Whittakers' proposed point of diversion to the confluence of Big Timber Creek with the Lemhi River for anadromous fisheries protection.

A minimum stream flow water right would protect a flow in a reach of a river/stream from all future water right appropriations. In contrast, the Director's requirement that Whittakers not divert water from Big Timber Creek if the flows decline below 13.0 cfs is specific to Whittakers' proposed use of water. The decision does not

prevent further proposals for appropriation of water that might satisfy the local public interest standard.

The Director has invoked the local public interest in other factual settings requiring maintenance of flows. For example, IDWR has required bypass flows in natural channels below large permitted diversions of water for ostensibly nonconsumptive uses of water, such as hydropower or aesthetic flows. Another example of limitations imposed to protect other local public interest values is the subordination of large, permitted aesthetic diversions in the lower end of a river system to future upstream appropriations for consumptive use. The very large downstream appropriations might have prevented many smaller future upstream appropriations for significantly more valuable public uses of water.

The Director will not amend the requirement that 13.0 cfs be maintained from the confluence of Big Timber Creek and Little Timber Creek down to the confluence of Big Timber Creek and the Lemhi River.

As demands for use of water increase, the requirement for measurement and accounting for water use also increases. Whittakers should be responsible for insuring that their diversion of water does not exceed the flow rate that is authorized. Because Whittakers' proposed point of diversion is in a remote location and water could easily be diverted in excess of the quantity authorized, Whittakers are required to install a measuring device and the necessary electronic hardware to ensure compliance with the limitations of their water right.

Fish Screen Requirement

Fish screens are systematically installed at points of diversion for water rights in the Lemhi River and in the larger Salmon River basin. Idaho Code § 42-906 states that “[n]o person shall . . . operate any ditch, flume, or canal . . . taking water from any stream . . . without first installing and maintain a suitable screen or other device to prevent fish from entering therein; While the enforcement of the law is vested in the Director of the Department of Fish and Game, the Director of the Department of Water Resources should not ignore that express statement of law when approving a new water right, leaving remedial enforcement to the Director of the Department of Fish and Game. Whittakers should be required to install a measuring device as required by Idaho Code § 42-906 and to also address the local public interest of protecting the anadromous fish.

Fish & Game's Petition for Reconsideration

Fish & Game's petition for reconsideration raises the following issues:

1. The May 10, 2011 Final Order misstates the terms of the Nez Perce Agreement, and should quote the Nez Perce Agreement language verbatim.
2. The May 10, 2011 Final Order should not refer the agreement by the state and the federal government to determine Wild and Scenic Rivers Act claims filed by the federal government.
3. Finding of Fact no. 24 describing the pattern of water diversions by holders of junior/senior priority water rights from Big Timber Creek should be eliminated because it is "overly-broad, simplistic, and potentially unsupported by the record."
4. Conclusion of Law no. 6 does not accurately describe the "Salmon and Clearwater Habitat Management and Restoration Initiative."

Prior to discussing these issues, the Director is left with the distinct impression that these issues were largely addressed in the May 10, 2011 Final Order, or that the arguments now being tendered by Fish & Game are inconsistent with proposals offered by counsel for Fish & Game in its previously filed exceptions, and largely incorporated by the Director in the May 10, 2011 Final Order.

Nez Perce Agreement and the Wild & Scenic Rivers Agreement

Fish & Game asserted in its previously filed exceptions that, in executing the Nez Perce Agreement, the state "voluntarily agreed to develop Section 6 agreements and approved instream flows." Based on this recommendation, the Director amended Finding of Fact no. 23 to refer to the obligations of the state "to develop the Section 6 agreements" and establish minimum stream flows for the purpose of protecting anadromous fish. Now Fish and Game is dissatisfied with its own recommended language and is asking for some seemingly more accurate statement of fact. The discussion about the Nez Perce Agreement is how the Director recalls the discussion of the subject during the hearing and the language will not be amended.

Wild and Scenic River Water Rights Agreement

Fish & Game asserts that the Wild & Scenic Agreement was not executed for the purpose of promoting recovery of anadromous fish and argues that any reference to anadromous fish be stricken. Fish & Game further asserts that the agreement did not expressly mention anadromous fish, a reference to the Wild & Scenic Agreement as supporting the maintenance of anadromous fish. The Director recognizes that the designation of the Salmon River as a wild and scenic river was not expressly for the purpose of protecting anadromous fish. Nonetheless, the Wild and Scenic Rivers Act states one of the purposes of the act is to protect rivers with fish and wildlife values. *See*

16 U.S.C. § 1271. The Wild and Scenic Agreement protects flows in the Salmon River for the purposes of the Wild and Scenic Rivers Act. The reference will remain in the findings as a state and local activity that assists in the recovery of anadromous fish.

Pattern of Water Diversion in Big Timber Creek

Fish & Game asserts that Finding of Fact no. 24 is “overly broad, simplistic, and potentially unsupported by the record.”

Finding of Fact no. 24 describes a pattern of diversion for water rights in the Big Timber Creek drainage where junior water right holders divert water early in the year and senior water right holders forestall diversion until later in the year, knowing water will be available for diversion for the senior rights.

In Fish & Game’s previous exceptions, the “overly broad” and “simplification” assertions were made without identifying a factual basis for these assertions and without discussing if there were a different pattern of diversion than that described by the findings. In fact, the exceptions stated that “while IDF&G does not recall any evidence that would support the statements made in Finding of Fact No. 24, IDF&G recommends Finding of Fact No. 24 be deleted. Now, in its assertion of error, Fish & Game states the finding of fact is “potentially unsupported by the record.” The hearing officer concludes from this discussion that the original author of the exceptions did not review the record, and the now-author of the pending petition for reconsideration is not acquainted with the record, but instead floats out the ghostly, fearful “potential” that the record might not support the finding. This is legal work not worthy of consideration.

In contrast the Director recalls testimony at the hearing regarding the pattern of diversion by junior/senior priority water right holders. Finding of Fact no. 24 will remain as written.

Section 6 Cooperative Conservation Agreement Protection - Salmon and Clearwater Habitat Management and Restoration Initiative

Fish & Game asserts that Conclusion of Law no. 6 inaccurately represents salmon recovery efforts in the Salmon River and Clearwater River Drainages and proposes elimination of any reference to Section 6 Cooperative Conservation Agreements and the protection an agreement would afford the local users. By so arguing, Fish & Game is expressing its own proposed amendments offered in its previously filed exceptions, which were largely adopted in the Director’s May 10, 2011 Final Order. The language of Conclusion of Law no. 6 will not be amended.

ORDER

IT IS HEREBY ORDERED that *Whittaker's' Petition for Reconsideration* is **Denied**.

IT IS FURTHER ORDERED that Fish & Game's Petition for Reconsideration is **Denied**.

IT IS FURTHER ORDERED that the Final Order, previously issued on May 10, 2011, is reaffirmed by this order.

DATED this 13th day of June, 2011.

A handwritten signature in cursive script, reading "Gary Spackman", written over a horizontal line.

Gary Spackman
Interim Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2011, a true and correct copy of the document(s) described below were served by email to the following:

Document(s) Served: ORDER DENYING PETITIONS FOR RECONSIDERATION and Explanatory Information to accompany this type of Order

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FURTHERMORE, I HEREBY CERTIFY that on this 14th day of June, 2011, a true and correct copy of the document(s) described below were served by placing the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: ORDER DENYING PETITIONS FOR RECONSIDERATION and Explanatory Information to accompany this type of Order

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