

4. On January 14, 2002 an objection to the permit was received from Harold Smith Jr. and Krickett Smith.

5. On March 11, 2002 a petition to intervene was filed by the Hanrahan Ditch Co. and the individual water users of the Hanrahan ditch.

6. On March 12, 2002 the Department conducted a hearing, under the provision of Section 42-1701A (3), Idaho Code, on this matter. The permit holder, Jack Harrop was present and represented himself. Protestants Harold Smith Jr. and Krickett Smith were present and represented by attorney Marvin M. Smith. The petitioners for intervention, the Hanrahan Ditch Co. and several members of the company, were present.

7. Exhibits submitted and admitted as part of the record are as follows:

a. Protestant's Exhibit 1 - a group of ten photographs, of the area of the split of Antelope Creek into the north and south channels, dated November, 2001

b. Protestant's Exhibit 1a - a group of 18 photographs of Antelope Creek channel dated November, 1997

c. Protestant's Exhibit 2 - three documents fastened together; a resolution adopted by the Hanrahan Ditch Co. at a March 2, 2002 meeting; a letter to Doug Rosenkrance, watermaster, concerning the resolution adopted by the Hanrahan Ditch Co.; and a copy of the minutes of the annual meeting of Water District #34 held on March 4, 2002.

d. Protestant's Exhibit 3 - a letter from the Custer County Board of Commissioners dated March 11, 2002.

e. Protestant's Exhibit 4 - a letter from the Butte County Clerk dated February 13, 2002.

8. Antelope Creek splits into two channels at the proposed location of the rock sill. The channels are commonly known as the north and south channels. Mr. Harrop's point of diversion for his water rights is located on the north channel while the south channel is used to convey water to the diversion points of the protestants and the Hanrahan ditch. The north channel rejoins the south channel upstream from the diversion point of the Hanrahan ditch.

9. The permit holder stated that the purpose of the sill is to prevent the south channel from head cutting past the split of Antelope Creek into the north and south channels. The permit holder is concerned that the head cutting that is occurring will lower the bottom of the south channel and the flow of Antelope Creek would be captured by the south channel leaving no water in the north channel to fill the water rights that divert from the north channel.

10. The permit holder stated that if the sill is not constructed and the head cut moves upstream past the split the cost to repair the channel so water would reach the diversions on the north channel would be several times greater than the cost of the sill construction.

11. The concern of the protestants and the parties that petitioned to intervene is that the installation of the sill will change the division of flow between the north and south channels and will reduce the amount of water available to fill their water rights at their diversions, including the Hanrahan ditch, on the south channel.

12. The protestants also claim that no head cutting is occurring in the south channel and that no emergency exists that requires the installation of a rock sill across the stream.

13. The north channel of Antelope Creek and the south channel of Antelope Creek are natural streams and any work in the channels, not associated with the diversion of water under a water right, must be done after obtaining a Stream Channel Alteration Permit.

14. There is a change in the grade of the south channel downstream from the split. The change in gradient and the increase in the velocity of the water were mentioned by several parties and are apparent in the photographs of the stream. The extent and severity of the head cutting (erosion) is difficult to determine but photograph 18 of protestant's exhibit 1 clearly shows a vertical drop in the water surface, of the south channel, which is an indication of head cutting.

15. The cost of the proposed structure will be the responsibility of the permit holder.

16. The permit holder does not own the property at the site of the proposed sill construction.

CONCLUSIONS OF LAW

1. Section 42-1701(3), Idaho Code states in part the following: "any person...who is aggrieved by a denial or conditional approval ordered by the director, who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the denial or conditional approval...".

2. Rule 352 of the Idaho Department of Water Resources Administrative Rules, IDAPA 37.01.01, Rules of Procedure, states in part that; "Petitions to intervene must be filed at least fourteen (14) days before the date set for formal hearing, or by the date of the prehearing conference, whichever is earlier, unless a different time is provided by order or notice...".

The petition is denied since it was not timely filed and also because the interests of the petitioners were adequately represented by the protestant. However, the petitioners were

considered to be Public Witnesses under Rule 355 of IDAPA 37.01.01 which allowed them to offer evidence and testimony at the hearing.

3. Section 42-3801, Idaho Code states in part the following:
The legislature of the state of Idaho hereby declares that the public health, safety and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of any stream channel shall hereafter be made unless approval therefore has been given as provided in this act.
4. A Stream Channel Alteration Permit is required for the construction of a sill in Antelope Creek.
5. Section 42-3805, Idaho Code states in part the following:
Based upon his own investigation and the recommendations and alternate plans of other state agencies, the director shall prepare and forward to the applicant his decision approving the application in whole or in part or upon conditions, or rejecting the application.
6. The department examined the plans, for the construction of the sill, and a permit was issued for construction with conditions to protect the stream values listed in the act.
7. Section 42-3806, Idaho Code states in part the following:
This act shall not operate or be so construed as to impair, diminish, control or divest any existing or vested water rights acquired under the laws of the state of Idaho or the United States, nor to interfere with the diversion of water from streams under existing or vested water right....
8. The construction of a sill at the same grade and configuration as the existing channel will not interfere with the delivery of water. To the contrary, if the channel is allowed to erode as it has in the past, the division of flow between the two channels will constantly change. These changes in the division of water at the split will require work to be done to block or open either or both of the channels in the future. Therefore, it is in the best interest of the values that must be protected that the channel be stabilized.

ORDER

IT IS THEREFORE, hereby ORDERED that the approval of Permit No. 34-S-317 in the name of Jack Harrop is CONFIRMED with the conditions and limitations required on the Permit issued January 2, 2002 and the additional conditions contained herein.

IT IS FURTHER, hereby ORDERED that the sill be constructed in a manner that will not interfere with the flow in the stream or change the division of the flow into the channels. The sill must be designed and constructed under the direction of an engineer and must conform to the shape of the existing streambed. The cross section of the streambed must be surveyed prior to constructing the sill to assure that the shape of the sill conforms to the existing streambed shape.

Signed this 19th day of April, 2002.

---Signed---

Bobby D. Fleenor, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of April, 2001, the above and foregoing document was served upon the following by placing a copy of the same in the United States Mail, postage prepaid and properly addressed to the following:

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