State of Idaho
DEPARTMENT OF WATER RESOURCES
STATE OFFICE, 450 W. State Street, Boise, Idaho

JOHN V. EVANS
Governor

A. KENNETH DUNN
Director

Mailing address:
Statehouse
Boise, Idaho 83720
(208) 334-4440

ADMINISTRATOR'S MEMORANDUM

TO: Regional Offices and Water Allocation Section

FROM: Norman C. Young NCY

DATE: September 11, 1986

RE: Process for Voiding, Cancelling or Rejecting Applications & Permits — Application Processing No. 39, Permit Processing No. 9

Various circumstances arise in the processing of applications and permits where action is taken to reject, void or cancel a water right filing with the Department. Typically, the Department has mailed a couple of letters to the applicant, then issued a show cause order and finally issued an order of final action. Although this process graciously gives an applicant every chance to respond to Department inquiries, the process exceeds the requirements which must be afforded to an applicant to pass minimum due process standards.

The term "procedural due process" has its genesis in constitutional law which provides that no person shall be deprived of property by the state without proper constraints on how the deprivation is accomplished. Where the property right is a government grant of property to the individual citizen with restrictions or conditions attached to the retention of the property by the individual, the owner must be given notice and an opportunity to be heard prior to the taking of the property by the state.

The measure of what procedural guarantees must be given to the property owner hinges on what property right is being affected. Where there is no property right, no constitutional process need be given.

It might be argued that an application to appropriate water is not a property right at all, but is merely a request to obtain a permit, which, upon approval, ripens into personal property. The Idaho Constitution, Art. XV, Section 3, provides, however, that "[t]he right to appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . .." Whether the constitutional provision could be interpreted as an inchoate, or broad property right, is uncertain. For purposes of Department procedure, applications should be considered as an attempt by the applicant to exercise a general right given by the State Constitution. Whether a permit or an application is being processed for rejection, cancellation or voiding, the applicant should be given notice and an opportunity to be heard.

The extent of procedural formality required in the giving of notice and opportunity for hearing also depends on the nature of the property right affected. Service of an order with no prior correspondence, accompanied by a notice that the applicant can request a hearing if he desires to contest the order, may be sufficient.

It would be preferable, however, to give each applicant notice prior to the issuance of a final order because: (1) the shock of service of a final order as first notification may additionally strain an already touchy situation, and (2) pre-notice allows an opportunity for resolution without the applicant being required to petition for a hearing.

Sufficient pre-order notice can be given to an applicant by the mailing of a single letter informing the applicant of facts giving rise to the conclusions reached from the facts. A period of time for response should be imposed, accompanied by a statement of what action will be taken if the applicant fails to respond. The letter would carry greater legal emphasis if a heading was centered and capitalized, directly under the salutation, stating that the letter is "NOTICE OF _____", similar to the format currently used in the Notice of Lapsing letter. Finally, rather than send the letter by certified mail, the letter could be mailed with a mailing certificate attached, and signed by the person who sealed and mailed the letter. A copy of a sample letter is attached hereto as Exhibit "A".

By sending a letter in the above format, orders to show cause could be dispensed with, except where statutorily mandated as in Section 42-311 and 42-350, Idaho Code. In cases where an order to show cause is required, the order to show cause could replace the initial letter.

When the final order is sent, it would be advisable that the applicant be informed that he may petition the Director for a hearing if one has not previously been held. The time within which the petition must be filed should also be included.

The abrogation of the show cause order in most cases will enhance efficiency and save costs without depriving the public of courteous pre-notification and required procedural due process.

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EXHIBIT A

September 30, 1986

Speck U. Later
I-5, Exit 289
Burbank, CA 99999

Re: Application to Appropriate Water No. 65-4321

Dear Mr. Later:

NOTICE OF PENDING ORDER REJECTING APPLICATION

On October 6, 1977, you filed with the Department of Water Resources an application to appropriate water, numbered 65-4321, to irrigate 320 acres of land located in Section 21, T9S, R13E, B.M. You stated on the application that you were seeking ownership of the lands by means of a Desert Land Entry (DLE) Application.

It has recently come to our attention that Earl Y. Bird, P.O. Box 2, Hayden Lake, Idaho 83835, has been granted the right to enter and develop the lands listed in your application to appropriate water. Furthermore, we have searched the records of the Bureau of Land Management and have been unable to find any record of a DLE application in your name.

The purpose of this letter is to request that you withdraw your application or explain why the Department should not reject your application. Enclosed is a withdrawal form that should be signed and returned to me, unless you have some explanation that would prevent the Department from rejecting your application.

If you fail to respond to this inquiry within thirty (30) days of the date of this letter, the Department will act to reject your application. The application will be rejected on the grounds that it is speculative in that you do not have a possessory interest in the proposed place of use.

Respectfully,

GARY SPACKMAN
Supervisor, Water Allocation Section

I hereby certify that on this _____ day of _____, 1986, I sent the original copy of this letter, postage prepaid, to the person and address listed above.