



State of Idaho

DEPARTMENT OF WATER RESOURCES

1341 Fillmore Street, Suite 200, Twin Falls, ID 83301-3380

Phone: (208) 736-3033 FAX: (208) 736-3037

SOUTHERN REGION

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

January 21, 2000

Don Gunderson
Watermaster, Marsh Creek Water District 45F
PO Box 125
Albion, ID 83311

RE: Your Request for Cease and Desist Order for US Forest Service Diversion on Howell Creek
(Bennett Springs)

Dear Don:

As you know you have written two letters requesting that the department issue a "Cease and Desist Order" to the US Forest Service to stop diversion of water from Bennett Spring for use at the Pomerelle Ski Lodge. On receipt of your first letter dated November 17th you may recall I phoned you and discussed with you my understanding of the situation. I indicated that the US Forest Service may have a water right from Bennett Spring although the exact extent of the right has not been determined but would be in the SRBA process. I indicated that it may be premature to issue a "Notice of Violation" or a "Cease and Desist Order".

On receipt of your second letter dated January 7th requesting that again the department issue a "Cease and Desist Order" I must conclude that I have not clearly communicated why I do not believe it appropriate to issue a "Notice of Violation" or a "Cease and Desist Order". In reading your letter I must also conclude that I have not clearly described to you the various types of water right records that can exist and how a watermaster should treat these various types of records.

In Idaho there are several types of water right records. There are:

-DECREED rights that are described by court decree. These are rights that you may also consider "adjudicated". After the Snake River Basin Adjudication (SRBA) is concluded all water rights (except some domestic and stockwater rights) with priorities earlier than November 19, 1987 will be "adjudicated" or "decreed". Also note that in the SRBA the old decreed rights will be re-decreed.

-LICENSED rights that are confirmed by IDWR. These are rights that start out as permits issued by IDWR and then after development and inspection by IDWR, IDWR issues a certificate of LICENSE that describes the water right. Note that in the SRBA many of the older Licenses will be Decreed.

-PERMITTED rights are those that IDWR has issued authorization to develop. On completion of development these rights will become Licensed.

-BENEFICIAL USE CLAIMS are those that are recorded but have not been scrutinized by the courts or by IDWR. The records for these rights may have been created during an old statutory claim process or in the SRBA process. The validity of these claims has not yet been determined. Once the SRBA process is complete many of the BENEFICIAL USE CLAIMS will become DECREES and many others will be disallowed or not become valid water rights.

As watermaster you are responsible to deliver the rights in the Marsh Creek Drainage to the water users based on the priority of their respective water rights. Section 42-607 of the IDAHO CODE indicates in times of scarcity of water the claimed or BENEFICIAL USE CLAIMS shall be held to be subsequent or junior to all DECREED, LICENSED or PERMITTED rights. That means if a call for delivery of any right recorded as a decree, license or permit is made, you may shut off any water right recorded as a beneficial use claim. This curtailment can be made regardless of the priority claimed under the beneficial use right as long as the curtailment of the beneficial use right actually supplies additional water to the system that is necessary for delivery of the right that is being called for.

It is my understanding your basis for requesting a "Cease and Desist Order" is that the US Forest Service has no valid water right. I must again emphasize that the validity of the US Forest Service right has not yet been determined. I point your attention to the enclosed Memorandum dated May 26th, 1992. This memo describes the IDWR policy.

In reviewing the particular situation at hand, the US Forest Service right to the use of Bennett Spring is recorded as a beneficial use claim. Please find enclosed a printout of the current record for A45-04114. To add to the confusion regarding this right, the claim has been modified or amended over the years. I believe you have copies or printouts of earlier versions of the US Forest Service claim. There was once an SRBA recommendation regarding an earlier version of the right that recommended the right be denied. Since that time the SRBA recommendation has been withdrawn and the claim amended. The current status is that the right will be reviewed again in the SRBA process and recommended in a future Director's Report for Basin 45.

Adding to the dispute, right A45-04114 is subject of a transfer application that is protested. Also adding to the dispute is the recent application for permit 45-07745 proposing to add uses at Pomerelle; this application has also been protested. As you know Water District 45F is a party to both of these protested matters. The difficult issues to consider about this right are the consumptive, non-consumptive or deminimus nature of this water use and it's impact on other rights further down the valley.

It is my current understanding that the water use is currently in accordance with claim A45-04114. If this is not correct and new uses as described on the pending applications have already been developed, then I would reconsider issuing a "Cease and Desist Order". Since the use of this water continues to be contentious, by copy of this letter, I will inform the interested parties of your concern. Since there are pending protested matters regarding this water one option would be to

schedule a pre-hearing conference to air out the issues. I believe there is potential to mitigate these matters. If the parties wish to proceed with this please let me know.

If this letter has not answered your questions or has raised additional questions, please feel free to schedule a meeting in my office and we can discuss this further.

Sincerely,



Allen Merritt, PE
Southern Region Manager

CC: Woody Anderson, Andrwood Inc
Roger Ling
Earl Warthen
Norm Semanko
William La Vere, USFS
Steve Spencer, USFS
Jim Chatburn, WD45F

MEMORANDUM

To: Water Management Division
From: Norman C. Young *NCH*
RE: DEPARTMENT POLICY CONCERNING ENJOINING THE USE OF WATER
REPRESENTED ONLY BY A SRBA CLAIM
Date: May 26, 1992 Water Delivery No. 1

With the 1992 irrigation season underway and another short water year occurring, it is necessary to clarify the policy the IDWR will take concerning the use of water where the only right to use the water is represented by a claim filed in the Snake River Basin Adjudication (SRBA).

IDWR is confronted with the question of whether to seek to enjoin use of water because the validity of SRBA claims has not been confirmed by the court or to allow continued use pending action of the court. Some of these claims assert expansions authorized by Section 42-1416, Idaho Code, or changes in point of diversion or place of use authorized by Section 42-1416A, Idaho Code.

Within water districts, IDWR will instruct the watermaster to continue the delivery to a permit, license or decreed right with points of diversion not in accordance with the points of diversion recorded on the permit, license or decree if:

1. A claim has been filed with IDWR in the SRBA that correctly describes the point of diversion that is claimed as being used and the claim appears to meet the requirements of section 42-1416A, Idaho Code, and

2. The water district records indicate that the requested point of diversion has been in use prior to November 19, 1987 and each year since that date.

Similarly, IDWR will instruct the watermaster to continue to deliver to permits, licenses and decrees for which the place of use has been changed from that recorded on the permit, license or decree if:

1. The change has been claimed on a SRBA claim filed with IDWR and appears to meet the requirements of Sections 42-1416, 42-1416A or 42-1416B, Idaho Code, and

2. The rate of diversion does not exceed the rate permitted, licensed or decreed.

This policy assumes the benefits provided by Sections 42-1416, 42-1416A and 42-1416B, Idaho Code, of changed or expanded use will not injure other water rights. If IDWR has information to show that the changed or expanded use will injure other water rights, IDWR will instruct the watermaster to not deliver the right to the requested point of diversion or to the changed or expanded use until either an application for change has been filed and processed, the court has issued a ruling on the right as claimed in the SRBA, or if appropriate, an administrative hearing has been held to address the issue of injury.

Within a water district, during times of scarcity, the watermaster will shut off uses based on beneficial use whether represented by a 42-243 claim, SRBA claim or both when the claim is the only evidence of the right.

Outside a water district, IDWR policy will generally be similar to that within a water district except that where a use is represented only by a 42-243 claim, SRBA claim or both, the wateruser must be able to demonstrate use of water which is consistent with the SRBA claim since November 19, 1987 if the use is questioned.

IDWR will continue to issue administrative orders to "cease and desist" the use of water if either no water right is of record with IDWR or if the only record is an unapproved application. IDWR will seek injunctions and civil fines as necessary to enforce the administrative orders.

The policy described above is intended to provide for the "property right" nature of water rights which cannot be taken or interfered with, without due process.

Water Right Number - A45-04114

Prefix Translation: ADJUDICATION CLAIM

Old (D) Number -

+ - - - - Last Name - - - - + + - - - - First Name - - - - + - - - - Address - - - - - +

*** A - ATTORNEY ***
BRAMER

RANDALL J

1 - US DEPT OF JUSTICE
2 - ENVIRON AND NAT RESOURCE DIV
3 - 380 E PARKCENTER, SUITE 330
City- BOISE
Phone - 208-387-0835
State- ID Zip- 83706

*** C - CURRENT OWNER ***
AMERICA ACTING THROUGH

UNITED STATES OF

1 - USDA FOREST SERVICE
2 - 324 25TH STREET
3 -
City- OGDEN
Phone - 801-625-5360
State- UT Zip- 844012394

*** K - ALSO KNOWN AS ***
US DEPT OF AGRICULTURE

USFS

1 - FOREST SERVICE
2 - 324 25TH STREET
3 -
City- OGDEN
Phone - 801-625-5360
State- UT Zip- 844012394

SAWTOOTH NATIONAL FOREST

City- X
Phone - 208-000-0000
1 - 2647 KIMBERLY ROAD EAST
2 -
3 -
City- TWIN FALLS
Phone - 208-737-3200
State- ID Zip- 833017976

*** R - REPRESENTATIVE ***
BOYLE

GARY

1 - USDA FOREST SERVICE
2 - 324 25TH STREET
3 -
City- OGDEN
Phone - 801-625-5360
State- UT Zip- 844012394

+ - - Priority Date - - + + - - - Region - - - + + - - - Stage - - - + + - - - Status - - - +
05/01/1965 17 SOUTHERN J - BENEFICIAL USE

+ - - Source - - - - - + - - - - Tributary - - - - - +
SPRINGS HOWELL CREEK

+ - - - - - +
Twn Rng Sec Tract Lot Rflg County Point of Diversion Diversion Name
13S 24E 1 NW NE NW (31) CASSIA SKI RUN SPRING
11 NW NE NE (31) CASSIA BENNETT SPRING

Water right number - A45-04114 Prefix Translation: ADJUDICATION CLAIM

Code	Description	Period From	Period To	Water Use	Diversion Rate	Diversion Volume
10 - COMMERCIAL		01/01	12/31		0.060	
Total Div. Rate				0.060		
Total Div. Volume					0.0	
Total Div. Capacity						
Total Consumptive Use					0.0	
KW Usage						

Twn	Rng	Sec	Tract	Lot	Acres	Place of Use Code	Description	County
13S	24E	1	NW SW			10 COMMERCIAL		(31) CASSIA

Diversion Means - HEADBOXES, PIPES TO COLLECTION TANK, PUMPS AT 1 SPRING & TANK ETC
 Non-Irrigation Use - COMMERCIAL USE AT POMERELLE SKI AREA
 Other Rights for Same Use -

Remarks
 GEN FOREST SERVICE RECORD ID = 041417040209530013 00

 10/31/97, DJ: CLAIM AMENDED 10/28/97 DATA ENTERED THIS DAY. SEE
 FILE FOR ADDITIONAL INFORMATION RELATIVE TO USES ON SITE AND
 EVOLUTION OF SYSTEM. DJ

Old Water Right Numbers -
 No Old Water Right Numbers found.
 Conditions of Approval -
 No Conditions of Approval found.

Decree Plaintiff - +
 Decree Defendant - - +
 Decree Date - +
 00/00/0000

Audit fields - 04/23/94 AUCTR 10/31/97 DUONES
 Comments -
 No Comments Found

Adjudication Rights Dates and Flags Area
 Court Report Filing - 00/00/0000
 Objecton Filed Date - 00/00/0000
 Response Filed Date - 00/00/0000
 Claim Received Date - 03/25/1993
 Proof Due Date - 00/00/0000
 Licensed Date - 00/00/0000
 Field Inspection Made - 00/00/0000
 Field Inspection Flag -
 Verified Date - 00/00/0000
 Last Amended Date - 10/31/1997
 Proof Made Date - 00/00/0000
 Receipt Number - X111111
 POU Ownership Flag - Y
 Name Connector -
 Civil Case Number - 39576
 Old Case Number -
 Old Judicial District -
 Temporary Right - P
 Water District -
 Federal/State Indicator - S
 Presumption Flag -
 Notice of Error Flag -