

May 8, 2003

KENNETH HEINLEIN
1940 BARTON RD
POCATELLO ID 83204

RE: NOTICE OF ERROR FOR WATER RIGHT CLAIM NO. 29-12873.

Dear Mr. Heinlein:

Thank you for taking the opportunity of returning the "notice of error" reply for the above referenced water right. Upon it you indicated that you had requested a livestock water right. You also indicated that you (or your predecessor) filed for an irrigation water right and that an irrigation water line existed in the 1950's/1960 that delivered water from nearby Chinks Peak. In addition, you supplied a notarized letter from Paul and Jane Vitale recognizing the historic presence of stock on your property.

I have reviewed the available information. Unfortunately, the working file for your water right is unavailable. However, research of our database has yielded some useful information including the following:

Mr. Kevin Koboski filed the original SRBA claim. Our records indicate that he paid a fee of \$75.00. Our standard filing fee for either domestic or stockwater right was/is \$25.00. Our standard filing fee for irrigation water was/is \$50.00 plus \$1.00 per acre. Our late fee for filing after the deadline was \$50.00. From this information, it appears that Mr. Koboski filed for a domestic water right (\$25.00) and paid a late fee (\$50.00).

You expressed your desire for stockwater right. Apparently, you have been recommended stockwater just not in the form that you were expecting. Idaho Statute 42-111 defines "domestic" as equal to "stockwater." I was not aware of this in our previous communication. New appropriations (water rights) for stockwater (as a domestic right) continue to be issued even today. I have included the most recent version of this statute for your convenience (see highlighted area). However, if you still would like your water right to include "stockwater" in addition to "domestic" you could submit an amended claim for such. IF, you decide that this is an option that you wish to exercise, I have included an amended claim form that would require that you sign in the presence of a Notary Public and return. However, by statute, this appears to be unnecessary but may provide you peace of mind.

You indicated that your property was irrigated (pasture) via pipeline from Chinks Peak but that source has since been abandoned. I don't recall whether or not

irrigation from your domestic well is occurring or has occurred in the past. Under Idaho statute 42-111 (a copy included), you are allowed up to ½ acre of land and not in excess of 13,000 gallons per day. The only manner which more than ½ acre may be legally irrigated (by well), is possession of a valid water right. If in the past a well has been used to irrigate pasture areas, a claim for a water right under the basis of "beneficial use" may be considered to be valid if evidence is submitted that demonstrates that the well was used to irrigate the pasture lands prior to March 25, 1963 or that following that date a permit was obtained for a water right or a water right was purchased and transferred to the property.

For your convenience, I have included forms to make a new claim for an irrigation water right. The cost for making the claim is \$50.00 plus \$1.00 per acre of irrigated lands (\$55.00 total?). Evidence **MUST** be submitted with the claim and received by our office in a timely manner to be considered before the Director's Report is sent to the courts in July 2003. Following this time, all objections and/or communications in this regards are made only to the adjudication court.

You mention that waters from upslope areas (not of your ownership) naturally irrigate your property area. This type of water called "diffused surface water" was addressed in Adjudication Memo #11. It states:

The landowner has the right to use diffused surface water occurring upon the landowner's property before it joins a natural stream, lake, or other public source. King v. Chamberlain, 20 Idaho 504, 118 P.2d (1099).

However, it is a well settled rule that a prior appropriator of water is entitled to enjoin the use of water by others that depletes the source of supply to the watercourse and thereby interferes with the appropriator's use. It has also been held that, in an action by a senior appropriator against a junior appropriator for interference with the senior appropriator's rights, the burden of proof is on the junior to show that the water in the junior's ditch is not tributary to the source of the senior's appropriation. Martiny v. Wells, 91 Idaho 215, 419 P.2d 470 (1970).

So, the landowner is entitled to use diffused surface water occurring on the landowner's property before it enters a natural channel, but the use may be enjoined if the diffused surface water is a source of supply to a natural watercourse. The big question is where exactly is the line drawn. The one clear rule is that the diffused surface water must be a significant source, so that interception results in substantial injury to a prior appropriator. "Significant" or "substantial" probably means "measurable". See Franklin Cub River Pumping Co. v. Le Fevre, 79 Idaho 107, 311 P.2d 763 (1957).

According to this discussion, you would be capable of using diffused surface water that occurs upon your property and that which incidentally flows upon your

property without a water right so long as it does not injure a senior water right holder of a natural waterway of which the diffused surface water would naturally flow. However, I am unaware of any mechanism to obtain a water right to any diffused surface water that flows upon your property from an offsite (non-landowner) source.

If you have any questions regarding this matter, please feel free to call me at 525-7161.

Respectfully submitted,

W. Roger Warner
Adjudication Specialist

Enclosure(s) Copy of Idaho Statute 42-111.
 Amended claim for a water right 29-12873.
 Forms for claiming water right

NOTICE OF ERROR
REPLY

02/25/2003

RECEIVED
APR 21 2003
Department of Water Resources
Eastern Region

Please type or print clearly, fill out this form completely and mail.

Return this reply form to IDWR by the deadline date printed below if you want IDWR to change your recommendation or you want to let IDWR know that you agree with its recommendation.

YOUR DEADLINE FOR RETURNING A NOTICE OF ERROR REPLY IS: April 21, 2003

RECEIVED

APR 15 2003

Water right number: 29-12873

KENNETH HEINLEIN
1940 BARTON RD
POCATELLO ID 83204
Telephone Number: (208) 232-2877

313-1393

Department of Water Resources

1. Describe the portion of the proposed recommendation with which you disagree (e.g. priority date, period of use, source):

THERE HAS ALWAYS BEEN HORSES AND LIVE STOCK ON THIS PROPERTY. I SUBMITTED YEARS AGO A REQUEST FOR LIVESTOCK WATER RIGHT WHICH YOU INTUIN TOLD ME YOU LOST AND CANNOT FIND. I ALSO

2. Describe the changes you wish to make in the proposed recommendation:

PUT IN A REQUEST FOR AN IRRIGATION RIGHT WHICH YOU LOST. THE OWNER WHO OWNS THIS LAND BACK IN THE 1950/1960S SAID THAT HE HAD A

3. Give a brief explanation as to why you disagree with these portions:

IRRIGATION LINE THAT CAME ALL THE WAY DOWN FROM CHINIKS PEAK.

I STRONGLY DISAGREE

I AGREE with this proposed recommendation: no changes need to be made.

DATE:

Kut

4/12/03

SIGNATURE:

[Signature]

Please print your name:

KENNETH HEINLEIN

IDWR Regional Office, 900 N Skyline Dr Ste A, Idaho Falls, ID 83402, 2085257161

IN ADDITION TO THIS. PREVIOUS LAND OWNERS HAVE IRRIGATED THIS LAND TO SUPPLY FEED FOR THEIR GOATS AND HORSES FROM THE EXISTING WELL. I RESUBMITT TO YOU AGAIN MY REQUEST FOR STOCK AND IRRIGATION WATER RIGHT FOR MY FIVE ACRES. IF YOU SEE A PROBLEM WITH THIS PLEASE LET ME KNOW A.S.A.P SO I MAY SEEK COUNSEL. ENCLOSED IS A NOTARIZED LETTER OF SUPPORTING EVIDENCE FROM ONE OF MY NEIGHBORS. ~~THANK YOU~~ OVER

SCANNED
APR 15 2003
SCANNED
APR 15 2003

THERE HAS ALSO BEEN ~~THE~~ AND STILL IS
IRRIGATION FROM THE NATURAL LOCATION OF THIS
PROPERTY BEING SITUATED AT THE BOTTOM OF
THE HILL WHICH I WANT PROTECTED AND GIVEN
A WATER ~~IF~~ RIGHT. EVER SINCE THERE HAS BEEN
A ROAD ON THIS HILL THE DRAINAGE HAS COME
OFF THE ROAD FROM UP THE HILL AND HAS
IRRIGATED THIS LAND. THIS HAS BEEN PERPETUAL
FOR AT LEAST THE LAST 30 YRS. I WANT A
RIGHT TO PROTECT THIS JUST IN CASE THE CITY
DECIDES TO PUT IN CURBS AND SEWER.

THANK YOU.

A stylized handwritten signature, possibly reading "J. H. C.", written in dark ink.

State of Idaho
Department of Water Resources
Eastern District Office
900 North Skyline Drive, Suite A
Idaho Falls, ID 83702-1718

Dear Mr. Warner:

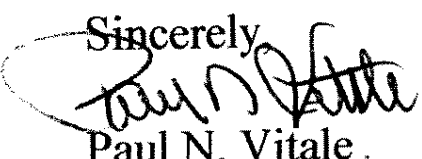
Our neighbor, Ken Heinlein, at 1940 Barton Road, Pocatello, tells us that your department has no record of his filing for a water right in 1995. At your suggestion that a neighbor might supply some historical information, he asked us to do so. Hence this letter.

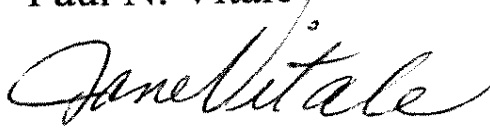
We have lived across the road from his residence for thirty years and have known the various owners and their animal operations. In the mid 1960's, Mr. Russ Mager kept two horses on the property. Mr. Mager sold the property to Richard and Carla Miller and they kept two horses and a donkey.

In the late 1970's and early 80's, Susan and Larry McPherson maintained a small goat herd of ten animals. This herd was kept for a period of five to seven years.

We hope that this provides the necessary history for water use on the Heinlein property. If you need further information, feel free to call us at 208-232 5998.

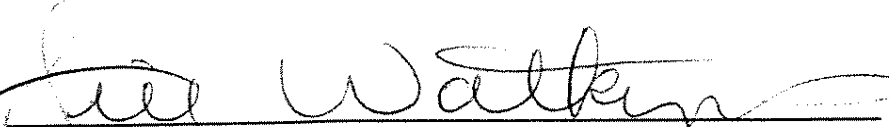
Sincerely,


Paul N. Vitale


Jane Vitale

1969 Barton Road
Pocatello, ID 83204

SCANNED
APR 15 2003


NOTARY PUBLIC RESIDING IN POCATELLO ID. 83201

~~MY COMMISSION EXPIRES 11-2-2004~~

JILL WATKINS

NOTARY PUBLIC
STATE OF IDAHO

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 29-12873 V1

WATER RIGHT NUMBER: 29-12873 V1

<u>Owner Type</u>	<u>Name and Address</u>
Original Owner	KEVIN A KOBOSKI 1940 BARTON RD POCATELLO, ID 83204 (208)232-1476
Current Owner	KENNETH HEINLEIN 1940 BARTON RD POCATELLO, ID 83204 (208)233-3877

Priority Date: 01/01/1964

Basis: Beneficial Use

Status: Active

SourceTributary

GROUND WATER

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
DOMESTIC	1/01 to 12/31	0.040 CFS	
	<u>Total Diversion:</u>	0.040 CFS	

Location of Point(s) of Diversion

GROUND WATER	NW1/4SE1/4	Sec. 31, Twp 06S, Rge 35E, B.M.
BANNOCK County		

Place of Use

DOMESTIC

Twp	Rge	Sec	NE				NW				SW				SE				
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
06S	35E	31														X			

Conditions of Approval:

1. C18 This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.
2. N13 THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.
3. N11 THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

Remarks:

1. Explanatory PARCEL NO. RPCPP113000

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF TWIN FALLS

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576

Ident. Number 29-12873
Date Received: 1/19/1995
Receipt No: E020629
Received By:

**NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW**

1. Name of Claimant(s)

KENNETH HEINLEIN Phone: (208)233-3877

1940 BARTON RD
POCATELLO ID USA 83204

2. Date of Priority: 01/01/1964

3. Source: GROUND WATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County	Type
06S	35E	31	SE SE	BANNOCK	

5. Description of diverting works:

WELL, PUMP AND PIPELINES TO SINGLE FAMILY DOMESTIC HOME.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
DOMESTIC	1/01	12/31	0.04	

7. Total Quantity Appropriated is:
0.04 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4 of 1/4 Lot	Use	Acres
06S	35E	31	SE SE	DOMESTIC	

11. Place of use in counties: BANNOCK

12. Do you own the property listed above as place of use? Yes

13. Other Water Rights Used:

14. Remarks:

THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.

CHANGE OF OWNERSHIP DONE 11/28/97 DMS

THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

15. Basis of Claim: Beneficial Use

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): _____ Date: _____

_____ Date:

State of Idaho)
County of _____) SS.

Subscribed and sworn (or affirmed) before me this

of _____ 20____

Notary Public

Residing at _____

My commission Expires _____