

Robert M. Wardle
2652 S. Marsh Creek Road
McCammon, ID 83250

June 2, 2004

Special Master Bilyeu
P.O. Box 2707
Twin Falls, ID 83303

Re: Subcase No.: 29-7647
Subcase No.: 29-7479

Ms. Bilyeu,

This letter is in response to the District Court SRBA Order Setting Deadlines and Status Conference on the water right subcases listed above.

At the initial hearing for the above subcases held before Special Master Brigitte Bilyeu on April 20, 2004. Mssrs. Wise and Wardle were instructed to prepare more information on their individual protests and also explain why the Court should consider their request to submit a late protest on the Curtis Dunn water claim number 29-4101A.

At the hearing Mssrs. Wise and Wardle were advised by Deputy Attorney General Candice M. McHugh that any request for an increase in quantity of water per acre issued on a Water Right license has little or no chance of being granted.

Mssrs. Wise and Wardle felt that their reasons for requesting an increase from .02 CFS per acre to .03 CFS per acre as explained on their respective Standard Objection Form was not given a complete and proper review.

We are requesting the Court again, review the reasons listed under Section E of our Standard Objection Form 1. In addition, there are a number of other factors involving the Walker Creek Irrigation Rotation Agreement executed in 1989 between the Idaho Department of Water Resources (Norman C. Young, Administrator) and seven (7) Walker Creek water users that need to be addressed before the Court or Deputy Attorney General McHugh decide that our request for additional water volume per acre be denied.

Mssrs. Wise and Wardle's request that the Court allow a late protest on the Dunn Claim 29-4101A is based on the following:

The Dunn claim and the Wise and Wardle licenses share the same water source and have the same soil type. Allowing the Dunn claim .03 CFS per acre at this late date is inconsistent with the IDWR's position on the Dunn's claim in the past. The letter from the Soil Conservation service dated March 14, 1988, supporting an increase of water

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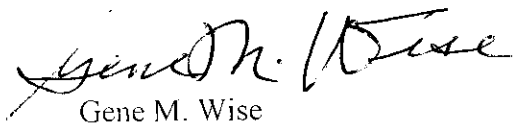
volume for the Dunn acreage was considered by the IDWR and denied. The IDWR also advised the previous owner of this acreage (Keith Henrichs) on several occasions, verbally and by letter, that their acreage required only .02 CFS per acre (see enclosures 1, 2, and 3).

In addition, the Dunn claim originally requested .02 CFS per acre and on all subsequent amendments to this claim, the amount of water requested per acre was .02 CFS per acre. In fact, the Walker Creek Irrigation Rotation Agreement executed in 1989 was based on .02 CFS per acre. For over two (2) decades the licensed Walker Creek Water Users have been denied their full water rights because of incorrect and excessive claims filed by Keith Henrichs (father-in-law to the Dunns) on claim number 29-4101A. Now that the adjudication process has finally corrected the amount of acreage irrigated on this claim, the Court has decided to reverse course and provide an increase in volume of water per acre.

We respectfully ask the Court to honor our request for consideration and further review of the above-mentioned water right issues.



Robert M. Wardle



Gene M. Wise

Enclosures

✓ cc: Candice M. McHugh
Deputy Attorney General

WALKER CREEK IRRIGATION ROTATION AGREEMENT

The undersigned water users of Walker Creek, located in Bannock County, Idaho, hereby agree to distribute the water of Walker Creek until such time as the rights and priorities of the parties have been formally adjudicated. The agreed distribution shall be as follows:

(A). If the flow of Walker Creek exceeds .36 cubic foot per second ("cfs"), the waters of Walker Creek shall be distributed by the undersigned users on a 10-day rotation period. The order of delivery and number of hours of use per rotation for each user shall be:

Keith Henrichs - 96 hours

Raymond Girard - 36 hours

Gene Wise - 31 hours

Bob Wardle - 31 hours

Chuck Thompson - 16 hours

John Shultz - 10 hours

Norman Rademacher - 20 hours

(B). If the water flow of Walker Creek falls below .36cfs, as measured as set forth below, then the above stated 10-day rotation period shall be modified and the undersigned users shall go to a 20-day rotation period. The modification from the 10-day rotation period to the 20-day rotation period will be based on the same acreage as the 10-day rotation period and on the same water allotment of .02cfs/acre/user. The number of hours of use per rotation credited to each user under the 20-day rotation period shall be:

Keith Henrichs - 192 hours

Raymond Girard - 72 hours

→ SOIL CONSERVATION LTR OF 3/14/88
CONSIDERED BY FIDWR BUT .03 CFS
PER ACRE DENIED CLAIM 29-4101A.

Gene Wise - 62 hours

Bob Wardle - 62 hours

Chuck Thompson - 32 hours

John Shultz - 20 hours

Norman Rademacher - 40 hours

The reason for the modification from a 10-day rotation period to a 20-day rotation period when the flow of Walker Creek falls below .36cfs is to allow the parties longer periods of time to irrigate so that they may preserve, in times of low water, their pastures and other appurtenant property. Any of the undersigned users may use the water during their stated turn on each rotation or may pass their turn to another user they so designate. Any such designation shall not effect the designating party's use of the water on the next rotation.

For a determination of which rotation period to use at any particular time, the measurement of the flow of water in Walker Creek shall be done at such time as the water level appears to be approaching .36cfs. Any of the undersigned users may request the Portneuf River water master, if he or she so consents, or some other third person mutually agreed upon by all of the undersigned users to measure the water. If a disagreement arises as to measurement, any of the undersigned users may request that a Department of Water

Resources official measure the flow of water in Walker Creek. Such measurement by a Department of Water Resources official shall be deemed conclusive as to the level of flow in Walker Creek.

All measurements of the flow of Walker Creek used to make any determination under this agreement shall take place at the point of diversion used by water users Wardle, Wise and Girard. Any such measurements shall take place at a consistent hour at each time of measurement. An hour agreed upon by the parties is 10:00 a.m. on the day of measurement, or such consistent time as is convenient to the Portneuf River water master, the mutually agreed upon third party, or the Department of Water Resources official.

This agreement shall take effect on January 1, 1989, and continue in effect until an adjudication of the rights of the undersigned water users of Walker Creek is finally and fully completed. All prior agreements among the Walker Creek water users are superceded by this agreement. This agreement is binding on heirs, personal representatives, successors and assigns of any of the undersigned water users.

All of the undersigned, including the Department of Water Resources, agree that no adjudication has been completed on Walker Creek and that this agreement does not have any binding effect on any of the undersigned

parties on any future adjudication. This agreement is solely a compromise agreement of a continuing controversy as to the rights and priorities of the parties to the use of Walker Creek and shall be considered solely in that regard. It shall not be considered as an admission in any regard by any of the undersigned parties as to their claims, licenses, permits or other arguments they may have in a subsequent adjudication. It shall not be considered binding, and shall not be used by any of the parties, including the Department of Water Resources, in any adjudication and shall not be considered by any Court in any hearing or other proceeding on an adjudication. All of the parties hereto reserve their objections to the various claims of the other users. The Department of Water Resources acknowledges and understands that the purpose of this agreement is solely for the purpose of a settlement of an on-going controversy. This agreement is a temporary, interim agreement until an adjudication of the rights of the parties can be formally determined.

The Department of Water Resources agrees that any cease and desist order issued to any of the undersigned users is hereby terminated. It is further understood that the parties who received cease and desist orders do not admit that the Department of Water Resources had any legal authority to issue the cease and desist orders.

The Department of Water Resources agrees to recognize this agreement and not to intervene in the agreement or interfere with any of the use of the undersigned unless such parties do not abide by the rotation agreement set forth above. The undersigned users understand that the Department of Water Resources cannot view the agreement as revising any water rights the parties may be determined as having in an adjudication, but is solely an interim agreement.

IN WITNESS WHEREOF the undersigned hereby execute this agreement and acknowledge that each clearly understands the terms and conditions stated herein.

Dated: _____

Keith Henrichs

Dated: _____

Raymond Girard

Dated: _____

Gene Wise

Dated: _____

Bob Wardle

Dated: _____

Chuck Thompson

Dated: _____

John Shultz

Dated: _____

Norman Rademacher

Acknowledged and Approved by
the State of Idaho, Department
of Water Resources

Dated: _____

By _____
Norman C. Young
Administrator
Resource Administration Div.
Department of Water Resources

BMCLOSURA (2)

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State of Idaho

DEPARTMENT OF WATER RESOURCES

Eastern Region

CECIL D. ANDRUS
Governor

Mailing Address:
150 Shoup Ave., Suite 15
Idaho Falls, Idaho 83402
(208) 525-7161

R. KEITH HIGGINSON
Director

December 10, 1987

Keith V. Henrichs
2527 S. Marsh Creek Rd.
McCammon, Idaho 83250

CLAIM 29-4101A

THIS CLAIM NEVER IRRIGATED
MORE THAN 14 ACRES. ACREAGE ON
CLAIM INFLATED.

Dear Mr. Henrichs:

There are a couple of aspects regarding your amended claim #29-4101 you need to be aware of.

One item of concern is the quantity of water diverted in comparison to the acres irrigated. State law specifies 0.02 cfs/acre (1 miners inch) as the maximum allowable for irrigation. This standard is applied to all permits issued by the Department of Water Resources and is also the recognized standard for adjudications sought through the civil courts. The rate of diversion for irrigation on your amended claim equates to 0.0645 cfs/acre. This is triple the normal amount. To perfect a water right for the amount claimed, you will be expected to show that it is required in order to satisfy the irrigation needs for the crop being raised and not in excess of the quantity of water required for beneficial use.

Another factor considered in determining beneficial use is the volume of water needed per annum. For the type of crops grown in the Portneuf River Drainage the recognized standard is 3 acre feet/acre of irrigated land. For 31 acres of pasture, the maximum volume of water needed to satisfy crop demands would be 92 acre feet/annum. This amount of water can be applied in approximately 76 days, diverting it at a rate of 0.02 cfs/acre or 0.62 cfs. Therefore, it should not be necessary to divert water 24 hours per day for the entire growing season. With the rate of diversion listed on your amended claim, the 3 acre feet/acre would be diverted in only 23.4 days.

Mr. Henrichs, if the irrigation practices you're using require a continuous diversion of 2.00 cfs for the irrigation of 31 acres, then the above analysis for both rate of diversion and volume per annum indicates only a small amount of the water you divert is being beneficially used. With the increasing emphasis on efficient use of water and the certainty that water rights in the Portneuf River Drainage will be adjudicated in the near future, you should start examining ways to increase the efficiency of your irrigation practices.

Mr. Henrichs
December 10, 1987
Page 2

Another item that needs to be addressed concerns regulation of diversions from Walker Creek. The doctrine of appropriation is founded on the principle that first in time is first in right. This is the basis for the distribution of water in a water district; which employs a water master to regulate all diversions. Unfortunately, Walker Creek is not within a water district. Consequently, the water users must rely on cooperation among themselves for equitable distribution of the water. No water user, irregardless of his entitlement or priority of his right, has the self appointing authority to regulate diversions by other water users. Since Walker Creek will be included in the Snake River Adjudication, it will eventually be incorporated into a water district and diversions from the creek will be subject to control by a water master. Until this occurs, if the users cannot agree among themselves on distribution of water, they should consider pursuing a private adjudication for the purpose of forming a water district, which would be limited to the Walker Creek Drainage.

If you have any questions concerning the above items, feel free to contact me.

Respectfully submitted,



Ernest Carlsen
Water Rights Supervisor

EC/dg

FINAL CLOSURE (3)



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

May 25, 1993

775-3723

9/7/22

Keith Henrich
2526 S. Marsh Creek Road
McCammon, Idaho 83250

RE: WATER DISTRIBUTION ON WALKER CREEK

Dear Mr. Henrich:

This letter is in response to your letter dated May 15, 1993 and a follow up to discussions during your visit to this office on May 18, 1993. I will respond to the issues in the same order as listed in your letter. The response is not intended to be a legal interpretation of the rotation agreement, but it is premised upon IDWR having signed the rotation agreement as an acceptable interim procedure for administering diversions from Walker Creek. To the extent that diversions are made that do not comply with the agreement or the agreement does not address a situation, IDWR has a responsibility to administer diversions to comply with general state water law.

a. IDWR has no authority concerning how the costs of replacing or repairing a headgate, diversion, or ditch will be allocated between users.

b. Your concern is that IDWR approved a change in location of a diversion for your neighbors which gives that diversion the most downstream location on the creek and allows a flow restricting culvert to be avoided. This allows your neighbors to take high flow rates making less excess water available for you. You report that your neighbors have also agreed to allow each other to share flows during each others rotation agreements. This indicates that this also prevents you from sharing in excess water, and you question why the rotation agreement allows the sharing of rotations.

The rotation agreement includes the following provisions (Page 2, second para)

Any of the undersigned users may use the water during their stated turn on each rotation or may pass their turn to another user they so designate. A such designation shall not effect the designating party's use of the water the next rotation. Each of the undersigned users is responsible for regulating their headgate at both the beginning and end of their respective turn.

Keith Henrich
Page 2
May 25, 1993

WE ARE NOT TALKING ABOUT HIGH WATER.
WE ALL TAKE THE FULL CREEK CH
OUR TURNS. — NO WASTE WATER

This language allows a rotation turn to be passed to another user. The passing of a turn doesn't mean that the user can continue to divert the water and also pass it to other users. If the rotation is being used, then only one user at a time can divert water. If the rotation is not being used, all the users on Walker Creek, including yourself, should share in the high water. The rotation agreement does not authorize division of a rotation or for any user to designate other users allowed to divert water in the creek in excess of that needed or useable by the holder of the turn. The agreement provides for rotation of the water rights held by the signatories to the agreement. It does not expand the amount of water allowed to be diverted beyond the rate authorized by the total of the rights. The rotation agreement indicates that the flow rate is based upon 0.02 cfs per acre. Whether or not a diversion is being made under the rotation, the rate and volume diverted must not exceed that needed for the authorized purpose.

c. You express your concern that the rotation agreement was premised upon the conditions existing at the time it was negotiated and that changes are not to occur while the agreement is in place. That may have been the understanding at the time the agreement was signed, but I do not know that to be the case. The agreement itself does not address or prohibit changes. Based upon your description of the changes that have occurred, it is apparent that the other users on the creek do not agree that changes are prohibited and have made changes allowing the amounts and rotation times provided in the agreement to be more fully used.

Perhaps you can make changes to your diversion/delivery system to allow more of the water available during your turn to be used. If the changes involve relocating the diversion point or adding a diversion point, an application for transfer needs to be filed with IDWR to allow the affect on other users to be reviewed. Any changes to the creek other than authorized diversion points require approval under the Stream Protection Act. Changes to culverts or ditches may require rights-of-way or other approvals by landowners or local government.

d. IDWR does not have any authority concerning private agreements for repairing or replacing headgates and delivery systems.

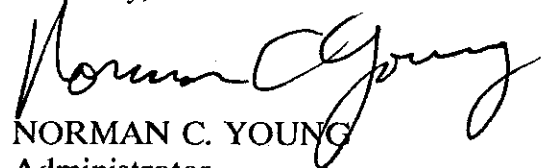
e. My response in Paragraph b. addressed the issue of excess water. Use of excess water, i.e., water in excess of the amount needed to fill valid water rights calling for water, is not covered under your water right. IDWR usually condones diversion and use of excess (also called "high") water if no other rights are injured, the water is beneficially used, and the use does not injure the local public interest.

Keith Henrich
Page 3
May 25, 1993

The last paragraph of your letter questions a relocation of the creek as a part of a repair to the natural gas line. Enclosed is a copy of the permit issued under the Stream Channel Protection Act authorizing the repair work.

I am scheduled to be in the Pocatello area on June 2, 1993, and plan to look at Walker Creek at 7:00 p.m. I am providing a copy of this letter to the other water users to advise them of our correspondence and give each of you an opportunity to discuss these matters that evening.

Sincerely,



NORMAN C. YOUNG
Administrator

NCY:dc

Enclosure: Permit copy

c.: Chuck Thompson
Robert Wardle
Gene Wise
Norman Rademacher
John Schultz
Raymond Girard
IDWR Eastern Region