



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

November 26, 2004

Josephine Beeman, Esq.
Beeman and Associates PC
409 W Jefferson St.
Boise, ID 83702-6049

Re: *Basin 29 City of Pocatello SRBA Claims*
Separate Streams Request for Gibson-Jack Creek, Mink Creek and
Pocatello Creek

Dear Jo:

This letter is in response to your request that the Department recommend that Gibson-Jack Creek, Mink Creek and Pocatello Creek be designated as separate sources from other sources in Basin 29.

You had inquired about what has changed since you worked for the Department as an attorney on the Lemhi and Payette Adjudications conducted in the 1970s and the 1980s, regarding the designation of separate streams. In the Lemhi and Payette Adjudications, the Department based its designation of separate streams on the existence of water districts. The streams within a water district were listed as separate from the mainstream of the Lemhi and Payette Rivers.

Several circumstances have changed since the Lemhi and Payette Adjudications warranting a change in how the Department recommends a water right to be considered separate in the Snake River Basin Adjudication (SRBA). The primary reason for the change is the advent of conjunctive administration, more specifically in the SRBA, Basin Wide Issue 5, the conjunctive administration general provision and the findings of the court during those hearings. The SRBA District Court held that all sources tributary to the Snake River are connected. "At present, all water sources within the Snake River basin, unless otherwise recommended by IDWR are presumed to be from a common source." In Re SRBA Subcase 91-00005 (Basin-Wide Issue 5) ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT; ORDER ON MOTION TO STRIKE AFFIDAVITS p. 18 (July 2, 2001). Further, the third paragraph of the general provision for conjunctive administration sets the presumption that every water right is connected. "...[A]ll other water rights within Basin 29 will be administered as connected sources of

water in the Snake River Basin in accordance with the prior appropriation doctrine as established by Idaho law.” In addition to Basin-Wide Issue 5, there have been several advances in water management techniques and technology allowing more sophisticated administration by the Department, which also contribute to the reason for the change in IDWR’s policy regarding recommending water rights on separate streams since the 1980s.

For a water right to be listed on the Separate Administration General Provision, the Department considers the following: 1) was there a prior decree designating the source as separate, or 2) is the source in fact physically separate and not tributary to other water sources in the basin.

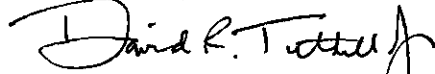
The Department has recommended water rights on a stream as separate in two instances that do not fall clearly into the two general circumstances set forth above. The first case is Cassia Creek in Basin 43. Cassia Creek is tributary to lower Raft River, and these two sources were decreed in *Albion Idaho Land Co. v. Adams*, Decree No. 992 (D. Idaho 1928). District court and supreme court decisions in the 1940s prevented transfer of senior Raft River water rights into the Cassia Creek system, effectively separating the two streams. See *Beecher v. Cassia Creek Irr. Co.*, Decree No. 4070 ¶ III, Pg. 5 (11th Jud. Dist. Idaho 1943) and *Beecher v. Cassia Creek Irr. Co.*, 66 Idaho 1, 154 P.2d 507 (1944). As a result, Raft River users have never made a call on Cassia Creek. Raft River water rights are administered under two entities: Water District 43-A for the lower segment of Raft River and Water District 43-B for the upper segment. Cassia Creek has its own, separate water district, Water District 43-C. The Department decided to include Cassia Creek as separate from other sources in Basin 43 in the Director's Report based on the facts.

The second case is Smith Creek in Basin 63, Part I. Although Smith Creek is tributary to the Boise River, the Department designated Smith Creek as a separate source from other sources in Basin 63 for administrative purposes in Water District 63. Lower basin water users had made a call on the upper Boise River. However, those water users never called out Smith Creek but rather focused their call on Thorn Creek. See *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973). When deciding to include Smith Creek water rights on the separate stream list, the Department looked at historical practice along with equitable and practical considerations and determined that given the history of calls on the Boise River and specifically the lack of calls on Smith Creek, Smith Creek warranted being separate.

The Department has reviewed your request and has determined that both Cassia Creek and Smith Creek differ factually from Gibson-Jack Creek, Mink Creek and Pocatello Creek. There are only 4.67 cfs of licensed or beneficial use water rights diverting from the Portneuf River with points of diversion below the mouth of Mink Creek, which is upstream from Gibson-Jack Creek and Pocatello Creek, that were recommended in the Director's Report in Basin 29. For comparison, the 96-year record

mean daily flow at the U.S. Geological Survey gage in the Portneuf River at Pocatello (No. 13075500) is 79.4 cfs on July 19, the lowest flow day of the year. Thus, water delivery appears to have never been an issue on this reach of the Portneuf River. Accordingly, water users on these tributaries have not been called out and are not likely to be called out to satisfy senior water rights by users on the main stem of the Portneuf River. There is no historical practice of separate delivery for these tributaries while senior downstream water rights are unfilled, unlike Cassia Creek and Smith Creek. The factual situation on Gibson-Jack Creek, Mink Creek and Pocatello Creek differ from Cassia Creek and Smith Creek, and these streams do not warrant separate stream designation.

Sincerely,

A handwritten signature in black ink, appearing to read "David R. Tuthill Jr.", with a stylized flourish at the end.

David R. Tuthill, Jr., Ph.D., P.E.
Chief, Adjudication Bureau

cc: Peter Monson
Larry Brown
David Barber
Susan Hamlin Nygard
Candice McHugh