

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