



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

August 25, 2004

Gene Wise
2712 S Marsh Creek Rd
McCammon, ID 83250

Robert Wardle
2652 S Marsh Creek Rd
McCammon, ID 83250

Re: SRBA Subcase Nos. 29-7479, 29-7647

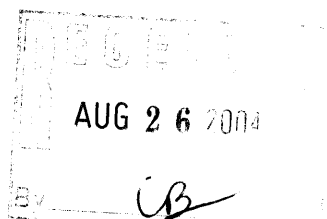
Dear Mssrs. Wise and Wardle:

This letter follows the hearing we had today in front of the SRBA Court concerning the above subcases. You had questions concerning the Department's basis for recommending 0.03 cfs per acre for claim no. 29-4101A. I have enclosed a copy of the Department's claim file on that claim that includes the Department's basis for its recommendation. As was explained to you today, if you want to object to claim no 29-4101A, you would need to file a motion to set aside the partial decree for that water right.

You also had questions concerning why the Department will not increase the quantity of water under your water rights. Water right no. 29-7647 was licensed on August 19, 1985, for 0.12 cfs with a June 15, 1982, priority date. I have enclosed a copy of the license for your reference. Water right no. 29-7479 was licensed on July 29, 1986, for 0.12 cfs with an April 3, 1979, priority date. I have enclosed a copy of that license for your reference.

Unlike your licensed water rights, water right no. 29-4101A is a beneficial use water right. Therefore, there has been no prior proceeding that has confirmed what amount of water has been historically diverted and beneficially used under water right no. 29-4101A. However, your licensed water rights went through an administrative process that binds the parties and their successors as well as the Department. Idaho Code § 42-

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220 states "Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein" Because your water rights went through a process where notice was given to the parties and any other interested persons, changing the quantity is not appropriate without another administrative process. In addition, the SRBA Court has held it is not proper to "collaterally attack" a license in the SRBA. *Memorandum Decision and Order on Challenge; and Order of Partial Decree*, Wood v. Troutt, Subcase No. 65-05663B (*Issued May 9, 2002*). In other words, changing the quantity on a license is not appropriate in the SRBA. Thus, your option to change the quantity of water under your licenses is to request that the licenses be amended.

However, as I discussed with you earlier, the Department only amends licenses if there was a clear error. In the case of your licenses, only 0.02 cfs per acre was requested in the original permits. The licenses issued were for the amount per acre requested. I do not believe that there was an error in the licenses.

Because water right no. 29-4101A was not licensed, there was more flexibility when recommending that water right. The claimant provided the Department with information that it concluded supported 0.03 cfs per acre. If you disagreed with that conclusion, it was your responsibility to file an objection to that water right. Since water right no. 29-4101A has been partially decreed, your only option to object to the Department's recommendation on that water right is to try and set aside the partial decree.

If you have any further questions, please contact me at (208) 327-5404.

Very Truly Yours,



Candice M. McHugh
Deputy Attorney General, IDWR

cc: *electronically*
Cindy Bird
Ernie Carlsen