



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

July 23, 2008

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*Re: 63-5112, 63-5114, 63-5221, 63-19875, 63-21602,
63-21924, 63-32166 & 63-32348*

Dear Al:

Something that I thought had been resolved several months ago with regard to the SF-5s you guys are preparing to resolve wastewater objections in Basin 63 Part 3 has come to my attention again. We are holding the listed above SF-5s because each of them contains the following remark, which you are using to settle objections involving access to the drain:

Water shall not be diverted under this permit until an easement or right of way with the owner of the drain providing for access to the drain is filed with the Department.

Earlier I had alerted you to the fact that the use of the word "permit" caused confusion because the remark was being applied to rights that were not in the permit stage, and that ultimately would be decreed rights. I had suggested that the term "water right" be substituted for "permit". IDWR changed several SF-5s to use that term. Additionally it looks like several SF-5s with that remark have slipped through and made it unchanged to the Court.

On reflection the use of the remark causes additional problems that I had not initially recognized. First, it imposes upon IDWR the burden of keeping a repository of access agreements. That can be a problem because IDWR doesn't really have a place to file them. Since the agreements will be legally significant contracts I would think the irrigation districts themselves would want to keep them in their own records so they would have easy access to them.

Additionally, my understanding is that the same remark is being used to resolve two different situations, but does not make this clear. In some cases the irrigation district wants an agreement authorizing the appropriator to access the drain to divert the water; in other cases the irrigation district wants what Paul Arrington is calling a “crossing” agreement, whereby the appropriator grants to the irrigation district a right of way to cross the appropriator’s property in order to get to the drain to maintain it. This is not in itself a problem, but I think it would help if the situation were clarified, since even we at IDWR did not initially understand the remark was doing double duty.

However, the remark creates a much more significant problem: it can be construed as placing upon the watermaster, and therefore by extension, IDWR the responsibility for policing the situation with regard to these agreements and shutting off the water of appropriators who have not entered into them. I do not think IDWR has legal authority to do this. Moreover, I would think that the irrigation districts would not want the watermaster or IDWR to be the arbiter of the meaning of private easement and right of way agreements. That is a responsibility for the courts.

For these reasons IDWR will not be able to sign off on any more SF-5s containing that remark. But in order to help keep the pace of settlement of this type of objection moving along, I have tried very hard to come up with a substitute remark that I believe more accurately describes what you are trying to accomplish in this type of situation. The remark is as follows:

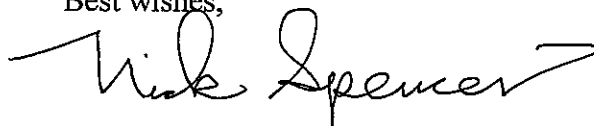
An easement or right of way agreement providing for access to the drain by its owner and those responsible for maintaining it—and/or for access to the drain by the appropriator to divert water pursuant to this right—must be executed among the appropriator, the owner of the drain, and, if appropriate, those responsible for maintaining the drain. Failure to execute such an agreement will constitute grounds for legal action to prevent water from being diverted under this right.

Please ponder this and let me know what you think. I have tried to make it cover both of the situations you are dealing with, and to apply irrespective of whether the drain is owned by the Bureau of Reclamation or the irrigation district itself. I am not wedded to the language and would welcome any suggestions for improvements.

Assuming we can soon reach agreement on a substitute remark, IDWR will prepare substitute SF-5s for the group enumerated above and get them into circulation for re-signing. Also, in the future IDWR will gladly undertake the responsibility for preparing any additional SF-5s you wish to send out to claimants.

Thank you for your consideration. I look forward to hearing from you.

Best wishes,

A handwritten signature in black ink, appearing to read "Nick Spencer", with a long horizontal flourish extending to the right.

NICHOLAS B. SPENCER
Deputy Attorney General

Cc: David Gehlert
Gail McGarry