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Department of Water Resources
Eastern Region

August 12, 2011

Michael Bennett
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Idaho Falls, Idaho 83401

State of Idaho
Water Resource Program Manager
Department of Water Resources
Eastern Region
900 North Skyline Drive, Suite A
Idaho Falls, Idaho 83402-1718

Dear Mr. James Cefalo:

The purpose of this letter is to respond to your letter of May 9, 2011 asking for an update on my request to divert water from Miner's Creek (permit application No. 31-7656).

Idaho Law suggests my request to divert water from Miner's Creek should be granted for two principle reasons: 1) the Idaho Constitution (Article XV Section 3) gives priority to domestic use over other uses of any natural stream and 2) IDAPA 37.03.1.04 (Futile Call for the Delivery of Surface Water).

Article XV Section 3 of the Constitution of the State of Idaho states that Priority of Appropriation shall give the better right as between those using the water: but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose.

No impact is expected to Mud Lake Water Users or downstream point's-of-diversion of water from Beaver Creek by granting this request for the diversion of water from Miner Creek. In years with average to below average snowpack Miner's Creek ceases to flow a few hundred yards below my property line (several miles above Miner's Creek confluence with Beaver Creek). A delivery call made by the holder of a senior-priority surface water right could not be satisfied by curtailing diversion of my junior-priority right since no water is physically capable of reaching Beaver Creek or a point-of-diversion of a senior-water right holder.

This is consistent with IDAPA 37.03.1.04 (Futile Call for the Delivery of Surface Water). This rule states "When curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to senior rights." It could be argued that in the few years when water does reach Beaver Creek and the downstream diversion points, the senior-water right holders would have priority and water delivery could be curtailed. However, unless the demand is for domestic purposes the Constitution of the

State of Idaho would prevail with domestic purpose having preference.

Long term average Snow Water Equivalent data for the period 1971-2000 for the Crab Creek SNOWTEL located in Clark County are 16.4 inches. For the ten year period 2000 to 2009 only two years, 2005 and 2006 (17.2 in. and 19.2 in., respectively) were above average. Thus, eight out of the past ten years, the evidence would suggest water did not flow from Miners Creek to Beaver Creek and a futile call for delivery of water would have been made.

It should be noted the flow above my property boundary during this time period has been sufficient to meet the request in my permit application.

Should you want to discuss this with me please call, 208-403-1597 or 208-523-9691

Sincerely,

A handwritten signature in cursive script that reads "C. Michael Bennett". The signature is written in dark ink and is followed by a horizontal line that extends to the right.

C. Michael Bennett