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DEPARTMENT OF
WATER RESOURCES

Director David R. Tuthill, Jr.
State of Idaho
Department of Water Resources
322 East Front Street
Boise, Idaho 83720

May 15, 2008

Re: License 23-11333 and 23-2071

Dear Director Tuthill:

I have reviewed your May 5, 2008 response to Ron Carlson. I appreciate this response because I have suspected that the Departments understanding of the history and the facts were inaccurate or at least incomplete.

First, I would like to point out that there are hundreds of tributary streams that are under the control of the Snake River Watermaster. Little Pine Creek is no different. If the permit were regulated according to water right priority exactly like every other stream in water District 1, we would be treated like every one else, which is all we ask.

Second, Water right 23-2071 was the only irrigation water right on Little Pine Creek (LPC). Forfeiture should have never been an issue because there were no subsequent or intervening water rights that relied on the LPC water. All of the water flowing in LPC is used by crops or native plants. It terminates just beyond my property. The attempt to characterize our actions, which simply were intended to determine what specific plants get to use and benefit from this water, as some kind of new or additional beneficial use not only is wrong, it borders on the humorous.

Third, my father Tom Summers, Sr. was in direct control of License 23-2071 until his death in January 1993. He transferred the license to Antelope Creek following a division of property with his brother, as required by IDWR. An effort to establish the new point of diversion is evidenced by my brother hauling sprinkler pipe, setting up a pump and tractor to irrigate a field of barley that ultimately was lost because of frost. This use of water from the new point of diversion was discounted by IDWR employees because they had not observed the system in operation. This barley crop was the last opportunity we had to use the new point of diversion because Fosters built a dam on Antelope Creek which stopped the contribution of water from Antelope creek at our diversion point. Absent the Antelope Creek flows LPC simply did not provide enough water for us to pump water at the new point of diversion. Consequently, we spread the water out over upper meadows where it had previously been licensed and used.

Fourth, the water was subsequently diverted at a lower point of diversion for riparian restoration under a 15 year USDA contract. Under this contract the water was used to provide buffer zone vegetation along LPC. Water from LPC was used to irrigate trees, alfalfa and grain. Mr. Nick Olson alleged that 1989 was the year that forfeiture had taken

place. He did not recognize the water diverted for riparian restoration even though he had actually observed the use of license 23-2071 adjacent to road on which he lives. During the IDWR arbitration meeting held in March 2005, IDWR attorney Candice McHugh advised that the IDWR authorization of the transfer of the water right from LPC to Antelope Creek acknowledged and made valid License 23-2071. Ernest Carlsen discounted the validation inasmuch as IDWR records failed to reflect our payment for the transfer. Mr. Carlsen has since been provided with the receipt verifying the payment of \$50.00. by check #478 to (FNU) Thompson. The bottom line is: we lost our right because of IDWR record keeping.

Fifth, Attorney Jerry Rigby was never authorized to forfeit our water right. Nor were we advised that he had agreed that permit number 23-2071 had been forfeited, although he may very well have believed that non-payment of the statutory fee was fatal to our argument. In reality he represented the interest of IDWR not ours.

While the 1964 priority date on license 23-2071 is relatively late in time, LPC served as the life line for my homesteading grandfather who lived in a house he built on its banks in 1911.

There can be no question that the error that resulted in a finding of forfeiture resulted from an error in the IDWR records. Had IDWR not lost the receipt for check #478 with which we paid the application fee none of this would have occurred.

In your letter you invited us to propose an alternate plan. You understand that Ron Carlson, while he was Watermaster and Regional Manager did a field inspection and advised us that because we were the only irrigation users on LPC and given the fact that LPC did not reach Snake River that a 2005 permit would be as dependable a water right as the 1964 right IDWR took away from us. Based upon his analysis and advice we applied and received permit 23-11333. Nick Olson was advised to leave our diversion alone at that time. Subsequently, after Ron Carlson retired, we were forced to pay \$1040.30 for rental water because of the conditions the state office imposed on permit 23-11333. It was pay the fee or fail in our commitment under the USDA contract. This bordered on extortion simply because no one was deprived of natural flow because of the water being used by the trees we were attempting to establish. We were forced to pay simply because of an arbitrary condition the water rights staff in the Boise office had inserted on our permit.

We appreciate being allowed to submit an alternative to the conditions imposed on our water right. Our proposal for a change in conditions is simple: treat LPC like any other tributary stream in Water District 1. Mitigation would be imposed in a manner that is consistent with mitigation on every other tributary streams. We believe that a condition requiring us to rent stored water any time LPC is flowing into Snake River would be an administerable and consistent condition.

Because the imposition of a penalty in 2007 was at best arbitrary, and likely capricious, we request that \$1040.30 be returned to us from the \$100,000 fund Water District 1 maintains for correcting these kinds of errors.

We do not believe that it is in the best interest of your agencies to force residents of this State to litigate every action of the department. We believe the equities here are quite clear. Our mitigation proposal and the change in language conditioning our permit should be done not only because it is the correct action for IDWR to take, it would likely be consistent with a directive of the court if this matter were to be litigated. Obviously an administrative modification will be less distasteful and cheaper for everyone than having to pursue the district court alternative

I appreciate your kind attention to this most important matter.

Sincerely

A handwritten signature in cursive script that reads "Tom Summers Jr." The signature is written in dark ink and is positioned below the word "Sincerely".

Tom Summers Jr.

cc: RONALD D CARLSON