

February 22, 2008

Dr. David Tuthill
Director
Idaho Department of Water Resources
322 E. Front St. PO Box 83720
Boise, Idaho 83720-0098

RE: Pepersack 2/8/08 letter - License 23-11333

Dear Dave:

I obtained a copy of the enclosed letter in draft form nearly three weeks ago. Many years ago I made it a rule to wait a week before responding to letters that made me angry. The policy then was to prepare the response after the appropriate amount of time had lapsed and then wait two days before rereading the letter and mailing it. In this case I have followed all of my rules. As a result this letter has been toned down significantly in the process, which I am sure is a good thing.

This paragraph is all that remains, and at the risk of philosophizing too much I am only going to suggest that, given the fact that the current decision-making structure in the department, vests, by definition, all intelligence in the Water Rights Bureau in Boise, I would recommend that regional offices have become superfluous appendages so far as providing any legitimate public service is concerned. Unfortunately serving the public appears to be a completely foreign concept in the State office.

I have personal knowledge about the history of 23-11333 since I was Regional Manager and personally recommended that it be filed to resolve the issues I have outlined in this letter. Historically Little Pine Creek was a tributary of Antelope Creek. Tom Summer's father had a water right and applied to the department for a transfer to move the point of diversion downstream to a point on Antelope creek after the two streams joined. However, in the meantime Foster Agro built a dam on Antelope Creek and without the contribution of Antelope creek the water supply at the new point of diversion was not adequate to justify the installation of the pump. Summers continued to spread the water on a meadow as they had in the past. Water that was unused by them simply flowed onto their dry farm where any water not used by the vegetation in the water way was used by the crops planted on their farm. There was no longer any defined channel to Snake River. For reasons still not clear to me, the department, on the representation of Nick Olson, found that the water right had been forfeited. In the mean time Tom Summers had applied for a USDA program that provided him trees for riparian improvement if he would keep them irrigated until they were established. The trees were planted and a small ditch was ditch from Little Pine Creek was constructed to provide water to them. For some reason that I still do not understand, Nick Olson, who was my deputy in that area shut off the water to the trees in 2005 because he based upon his representation that the water right had been forfeited. Rather than deal with Nick, I decided the more appropriate thing to do was to try to reestablish the 1963 licensed right Tom Summers

apparently had lost. However, after reviewing the situation in the field, and in view of the fact that the water was not tributary to the Snake River and was essentially being used up by grasses and crops on the Summer's farm, I recommended, because time was of the essence, that instead of trying to resurrect a right the department had (incorrectly) determined was forfeited, that he simply apply for a new permit. Upon receipt of the application I immediately allowed the diversion to the trees to be reopened. The thought of renting storage or "mitigating" some hypothetical impact would have been addressed for what it was – nonsense. Tom Summers watered his trees in 2005 and did not have to rent stored water.

In 2007 Tom Summers was forced by Nick Olson to pay \$1100 for rental water. I want to make it clear that the storage rented was paid for but never delivered to anyone. It simply represented a fine imposed by the Department and the Water District. The Water District has a \$100,000 contingency fund to address these kinds of errors. My first request is that the total amount of the money Tom Summers paid in 2007 be refunded.

I find Jeff's representation that the letter dated January 15, 2008 cannot be considered as a petition for reconsideration to be at best, reprehensible. Most of the conditions the department is currently imposing on water rights serve no public purpose and have no benefits to the resource. This case makes that very clear to anyone who would take the time to look. I opposed these conditions while I was Regional Manager and correcting department errors should never be subject to a time limit. My second request is that the conditions limiting the use of this right or requiring mitigation be removed.

I have attached a memo I wrote in 2003 and should be part of the IDWR files. I am not saying anything new in this letter that I did not make very clear while I was Snake River Watermaster and Manager of the Eastern Region.

Very truly,



Ronald D. Carlson P.E..

Enclosures

MEMORANDUM

DATE: February 6, 2003

SUBJECT: AN ANALYSIS OF IDWR TRANSFER AND PERMITTING
CONDITIONS

FROM: Ronald D. Carlson

For nearly three decades I have objected to the general conditions of approval that are imposed on permits and transfers. My objection actually goes beyond the simple fact that, the conditions imposed frequently make no sense, and are almost without exception unadministerable. In my more cynical moments I have argued that the department has created a water rights system that should ultimately save the state a lot of money. Since the system we are establishing no longer requires any human intelligence it would make a lot of sense to eliminate all of the people involved in water right processing through an on line transfer process. The way I envision it, the applicant would simply enter his credit card number to access the on-line transfer form. If he can make it through the form, (which could take many days to complete) the computer kicks out the transfer. The entire transaction could be accomplished without any need for IDWR staff. With moratoriums and a computerized transfer process everything else remaining for IDWR to do could be easily be transferred to DEQ and the legislature will be able to brag that they have eliminated one unnecessary state agency!

My first objection to pick-and-choose condition process is that the conditions that ultimately get included with approvals support the public opinion that, "government is run by mindless bureaucrats." Since I personally do not want to be characterized in that classification, I tend to take the conditions of approval on transfers (and permits) as a personal affront. I think there is a huge distinction between "a public servant" and "a mindless bureaucrat". Each day, because of the policies that are being adopted by the department, we are moving farther and farther away from providing any level of public service, but that is another memo. I will first argue that conditions of approval are at best, misnamed. Many of them are not "conditions of approval." A condition of approval implies that the water right is limited in some way by the condition. For

example, the statement, "the use of water under this right is subject to control of the Watermaster of Water District _" *is not* a condition of the water right. The requirement that a measuring device be installed *is not* a condition of the water right. These may be regulatory realities but the important fact is, the requirement is not changed in any way by the language. Some will argue that, IDWR will cancel the transfer if the applicant does not comply with all of the "items" listed on the transfer. This is a red herring if not bureaucratic *Bug Soup*. IDWR will not and cannot cancel an approved transfer, which, of course points out how ludicrous that condition is! A real condition of approval is something that would affect the right in a way the watermaster can address. For example, ***"water shall be injected at the same time it is being diverted and the injection rate may not be less than the diversion rate."*** (While, from an administrative perspective I hate these kinds of multiple measurement requirements, they at least qualify as legitimate "conditions of approval.")

There are conditions of approval that do qualify as conditions of approval that simply make me mad every time I see them. I suspect that some day I may be an expert witness for a plaintiff when the department gets sued over these kinds of conditions. Conditions can represent an administrative taking and I am not sure Risk Management can handle the downside. For example, ***"this right when combined with (all other rights diverted at this point) shall not exceed 0.02 cfs per acre."*** On the Snake River most canals have multiple water rights that are available for diversion to the irrigated service area for that canal. Typically we may start out in the spring of the year with a canal having available water rights totaling several inches per acre. In some cases they do divert well over an inch per acre because the manager knows that everyone needs to irrigate while the water is available since later on, when the rights are cut they may have no natural flow and will have to deliver their available storage at a rate that is much less than one inch per acre. I have seen transfers where, if I followed the conditions imposed by department in delivering the water rights, the transfer would have effectively eliminated up to half of the canal's water supply for the season. Which, of course gets us to the heart of the issue. If conditions of approval are intended to be the instructions to the watermaster and they are unadministerable (or worse, stupid!) the watermaster is going to simply look at the described point of diversion, determine how delivery of the

right will need to be measured and will ignore everything else. The problem is, we live in a world that is full of lawyers. Lawyers are not bothered by realities like unadministerable and stupid. They tend to read the written words. "Conditions of Approval", to a lawyer, probably means *this is a condition of this water right*. The fact that it came from a mindless selection process is immaterial to him, if he thinks there is legal advantage in taking that position.

I could go on and critique all of the conditions of approval that IDWR now have to choose from, but I doubt that that would be particularly productive. Most of the "conditions of approval" on transfers and permits are unnecessary, or wrong. My suggestion always has been – if we need to add new restrictions to the delivery of a water right we should have compelling and defensible reasons. Things like, *"this right when combined with rights _____ shall not exceed 0.02 cfs are simply bad conditions*. On the other hand a combined volume limit may be an appropriate condition in some cases where groundwater rights have been combined, however I think this is the exception rather than the rule. The fact is the only thing we need to be concerned about generally is the consumptive depletion. If we ever start managing groundwater correctly a condition setting the allowable annual depletion may be a necessary administrative tool. Non-conditions like those requiring measuring devices and specifying watermaster control should not be called conditions of approval. They could be added as advisory statements, but in the case of measuring device requirements, this should be sent to the water user as an order that addresses his diversion, not one specific water right.

My final criticism of conditions of approval takes me back to Swan Falls and the subordination issue. Had the department taken the position that all the authority it needs to regulate, measure, and in the case of hydropower rights, subordinate, arises from the Idaho Constitution and subsequent legislation. Had IDWR relied upon the statutes and provisions in The Constitution, the Swan Falls issues of the 1980's would have been less problematic. By trying to add every conceivable condition as "conditions of approval", including those related to proper administration, the department just sets itself up for omission arguments. For example, if someone does not have a condition on a transfer does that represent a prohibition should it be found that a measuring device, watermaster regulation, subordination be necessary in the future? We would say no but let's suppose

two transfers in the same area are conditioned differently. We know we would hear arguments like; "my neighbor's transfer says it is subject to watermaster control, mine does not therefore the department is precluded from, after the fact imposing additional conditions so I am not subject to regulation by the watermaster. Or, "I am only required to measure at the new (transferred) point of diversion but there is no such language on my original water right therefore the old point of diversion does not require a measuring device. Perhaps the argument is more of a nuisance than legitimate, but it does create an argument that we need not raise.

There are conditions that are simply obnoxious in every respect. There is not justification in today's environmentally conscious world to have unintelligent mandates like, **"Surface water available for this place of use must be used before groundwater under this transfer can be used."** There could be situations where this condition may be legitimate, but I have never seen it. It simply expresses administrative ignorance.



State of Idaho

DEPARTMENT OF WATER RESOURCES

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February 8, 2008

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

THOMAS J SUMMERS JR
5055 JUPITER HILLS DR
IDAHO FALLS, ID 83401

Re: License 23-11333

Dear Mr. Summers:

The Department has received your letter requesting removal of a condition of the license referenced above. You requested that the following condition be removed from the license.

Prior to diversion of water each year, the right holder shall obtain the expressed written certification of the Water District No. 01 watermaster that the right holder has rented and assigned stored water for release by the watermaster into the Snake River or a tributary to mitigate for depletion of river flow resulting from diversion of Little Pine Creek under this right. The amount of stored water required for mitigation shall be determined by the department based on the anticipated consumptive use for the year. Diversion and use of water without the written certification of the watermaster shall be a violation of Section 42-351, Idaho Code.

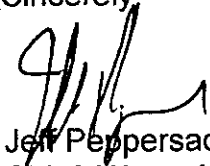
This condition was required under the permit to mitigate for the consumptive use associated with irrigation use. In 1993, a Moratorium Order was issued by the Department for the non-trust water area of the Snake River Basin that prohibited new appropriations of surface or ground water for consumptive uses. The moratorium order was issued to protect existing water rights and establish minimum stream flows. It is important to note that the surface and ground water sources are interconnected, so any consumptive use of water, even from a stream that sinks, will reduce the total water supply in the basin and ultimately reduce flows in the Snake River.

The water supply concerns that resulted in the moratorium order have not been alleviated, so new applications to appropriate water in the area must provide mitigation in order to be processed. Your permit was processed and approved on the basis that mitigation water would be provided. The mitigation requirement remains necessary in order to divert and use water under the developed water right.

Your letter, received by the Department on January 15, 2008, cannot be considered as a petition for reconsideration, exception or brief because it was not filed timely. The license has become a final order of the Department. Nevertheless, the Department is willing to consider alternate mitigation plans that you may propose. Any plan must fully compensate for the consumptive use associated with your irrigation use under the license. Water cannot be diverted and used under the license without mitigation under the existing condition of the license or an alternate plan approved by the Department.

Please feel free to contact the Department if you have questions related to this matter.

Sincerely,



Jeff Peppersack
Chief, Water Allocation Bureau

cc: Eastern Region, IDWR