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Date: 9/13/00

Time: 9:50 AM

Number of Pages (incl. Cover): 5

From: Steve Spencer

Subject: Settlement Document

Message: This is the 2nd edition. I hope it captures the items we discussed a couple weeks ago. It is also coming via U.S. Mail. I'll call you in a while to confirm receipt and coordinate schedules if you'd like me to come out again.

Thank you. Steven M. Spencer

Boise Adjudication Team

U.S.D.A. Forest Service

Intermountain Region

380 Parkcenter Blvd, Suite 330

Boise, Id. 83706

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SEP 18 2000

Department of Water Resources
Southern Region

*Rec'd 9/13/2000
from
RSorenson*

45-07745

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SEP 18 2000
Department of Water Resources
Southern Region

Names of Parties Filing Document:

UNITED STATES OF AMERICA

MARSH CREEK WATER
DISTRICT 45 F

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF THE
APPLICATION FOR PERMIT NO. 45-
07745 IN THE NAME OF THE UNITED
STATES FOREST SERVICE**

STIPULATION TO RESOLVE PROTEST

DESCRIPTIVE SUMMARY

This is a stipulation between the United States of America, acting on behalf of the United States Department of Agriculture, Forest Service (hereinafter "Forest Service"), applicant and Marsh Creek Water District 45 F (hereinafter "District") to resolve their protest to water right application number 45-07745.

STIPULATION

WHEREAS, it is Forest Service policy to file application for and secure water rights in the name of the United States in accordance with state law for water used by permittees on National Forest System Lands; and

WHEREAS, Pomerelle Ski Area (hereinafter "Pomerelle") is authorized by a special use permit on the Sawtooth National Forest as a recreation resort; and

WHEREAS, the Forest Service filed claim number 45-04114 for water use at Pomerelle in 1980; and

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WHEREAS, the Forest Service approved a Master Development Plan in 1997 authorizing new developments at Pomerelle, including snow making that could include three new storage reservoirs with a combined storage capacity of 16.3 acre feet; and

WHEREAS, in the Master Development Plan the Forest Service restricted water diversions from existing surface sources to those already in use and claimed as water right no. 45-04114; and

WHEREAS, the Forest Service filed application no. 45-07745 for a new water use related to snow making at Pomerelle as described in the application; and

WHEREAS, Marsh Creek Water District #45-F filed a protest to application no. 45-07745; and

WHEREAS, the parties recognize that Pomerelle Ski Area, as authorized by the Forest Service, is an important use of the National Forest System Lands and that continued availability and use of water at Pomerelle in accordance with State Law is in the best interest of the Forest Service, the District and the local community; and

WHEREAS, the possible increases in water available as a result of snowmaking activities at Pomerelle cannot occur if proposed development does not occur; and

WHEREAS, the water users within District would be the primary beneficiaries of any increases in water production and that if the estimated benefits do not materialize, water rights would continue to be administered according to state law; and

WHEREAS, the District and the Forest Service wish to resolve the protest to the above referenced application for a water right without litigation expense and delay.

THEREFORE, the parties stipulate and agree as follows:

1. The use of water at Pomerelle must be in accordance with applicable state law and federal policy and that such water rights be held by the United States for use at Pomerelle.

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2. The United States has complied with State Law by filing claims, applications for permit and applications for transfer with the Idaho Department of Water Resources for water uses at Pomerelle.
3. Domestic water use at Pomerelle during the summer at a caretakers residence and a bunkhouse be recognized as domestic and administered under state law as any other domestic water use at a residence. This includes that use would not exceed 13,000 gallons per day.
4. That for purposes of administration, Pomerelle Spring (aka Ski Run Spring) be considered the primary source of water used at Pomerelle and that Bennett Spring be considered a secondary, backup or supplemental source.
5. The developments approved by the Forest Service in the Master Development Plan for Pomerelle involve water use for snow making as anticipated in application no. 45-07745, specifically the construction of 3 storage reservoirs whose primary source of water will be surface water from melting snow.
6. The existing diversion of water under claim no. 45-04114 from Bennett Spring to the planned storage reservoirs shall be coordinated with and in accordance with the normal District irrigation season of March 1 to October 31 and existing water right priority dates.
7. With respect to number 6 above, when water is available or becomes available during the irrigation season the Water Master of the Water District will administer water rights and water deliveries making water available for approved uses at Pomerelle in accordance with 45-04114 and 45-07745.
8. The Forest Service and Water District agree to coordinate and improve communications for their mutual benefit with respect to all existing and future (including new plans and proposals) water uses and water supply directly tributary to or effecting water sources within Marsh Creek Water District 45F.

9. The District agrees to withdraw with prejudice its protest to the United States application no. 45-07745.
10. This stipulation was reached through negotiations for the purpose of resolving legal disputes, including pending litigation. All parties agree that no offers and/or compromises made in the course of the negotiations shall be construed as admissions against interest or be used in any legal proceeding.
11. All parties agree to bear their own costs and attorney fees in connection with this matter.
12. This stipulation was entered into and executed voluntarily by all parties in good faith, and without any fraud, misunderstanding, overreaching, misrepresentation, duress, or undue influence.

PROTESTANT:**CLAIMANT:**

Marsh Creek Water District 45F Date

RANDALL J. BRAMER Date
United States Of America



State of Idaho
DEPARTMENT OF WATER RESOURCES

1341 Fillmore Street, Suite 200, Twin Falls, ID 83301-3380

Phone: (208) 736-3033 FAX: (208) 736-3037

SOUTHERN REGION

DIRK KEMPTHORNE
GOVERNOR

KARL J. DREHER
DIRECTOR

September 6, 2000

Norm Semanko
410 S Orchard, Suite 144
Boise, ID 83705

RE: Pomerelle Diversion

Dear Norm:

Although we talked on the phone regarding your August 1, 2000 letter, I thought it best to also respond in writing to provide a record. In your letter you identify three items which require explanation or follow-up.

Item 1 involves the inclusion of all protestants at meetings and on-site field visits.

As you know in past meetings called by others, the department has participated through my presence. My participation was for the purpose of answering general questions about water rights, operation of water districts, etc. Since these meetings were called by others, the department was not in control of the invitations. In the future if the department calls a meeting where these protested matters are specifically addressed all parties will be informed and invited to attend.

You are probably aware the department generally conducts matters in as open arena as possible. We respect the rights of all individuals and wish to continue the practice of conducting matters openly, yet keeping in mind that ex parte communication must be avoided between a hearing officer for a protested matter and the parties to the contested case. Although a hearing officer has not been identified, I do not expect to be a hearing officer for these matters and I am not prohibited from meeting with parties to discuss general water rights issues. If in the future the department calls a meeting for water district issues, although the water district is a party in this protested matter, the watermaster and his advisory board and other possible involved waterusers will be invited as the issues dictate.

As for site visits, the department does have the authority pursuant to Section 42-1701(5) of the Idaho Code to make reasonable entry upon any lands in the state for the purpose of making investigations and surveys; however, this authority is limited to the director and employees of the department. This authority does not extend to private individuals. As for the exclusion of Mr. Warthen to the Pomerelle Ski area during the May 22nd site visit, it was not my call. In light of the apparent conflict between the operators of Pomerelle Ski area and your client, I do not see it possible to force the presence of your client onto the Pomerelle property anytime the department visits the property on official business.

Item 2 involves the measuring device location.

Section 42-701 of the Idaho Code in pertinent part indicates: "*Each such appropriator shall construct and maintain, when required by the director of the department of water resources, a rating flume or other measuring device at such point as is most practical in such canal, ditch, wellhead or pipeline for the purpose of assisting the watermaster or department in determining the amount of water that may be diverted into said canal, ditch, wellhead or pipeline from the stream, well or other source of public water.*" Given the fact that the Pomerelle diversion is in a closed conduit, that diversion occurs during cold weather conditions requiring the meter to be in a heating building, and that provisions have been made to allow access by the watermaster to the meter and the meter records; it appears the current measuring point is reasonable and practical. If conditions change that would limit access to the watermaster then another measuring point would be required to be established.

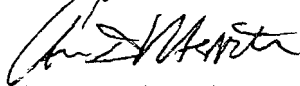
Item 3 involves the need to expedite the protested matters and the need to review recent developments on site.

I agree that these matters need to be resolved. I offer to schedule a pre-hearing conference as soon as possible if the Forest Service wishes to pursue the pending applications. As you know in my November 7th, 1996 letter to the Forest Service I wrote of the potential for a violation of state law if water is used without a water right. The letter prompted the Forest Service to amend existing SRBA claim A45-04114, file application for transfer 5194 and application for permit 45-07745. As you know these applications were both protested by your client Mr. Warthen. Aside from possible SRBA field visits to investigate claim A45-04114, I do not presently plan to conduct another site visit unless a renewed written complaint about ongoing illegal water use is filed. If water is determined to be used without a water right the department has the discretion to issue a notice of violation pursuant to Section 42-351 of the Idaho Code.

If it is your desire to discover facts involving these protested matters which may involve "hauling of pipe" you may consider filing a motion with the director to allow discovery pursuant to the rules of procedure of the department.

I look forward to working with you and the other parties to facilitate resolution of these matters, if possible; or to work toward scheduling a hearing. If you have further questions, please feel free to contact me at this office.

Sincerely,



Allen Merritt, PE
Southern Region Manager

Cc: Steve Spencer, USFS
Andrwood, Inc.
Roger Ling

Fred Hawker
James Annest
Earl Warthen

Ron Sorenson
Don Gunderson