



State of Idaho

DEPARTMENT OF WATER RESOURCES

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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.

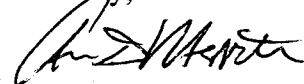
Item 3 involves the need to expedite the protested matters and the need to review recent developments on site.

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
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