



STATE OF IDAHO  
**WATER DISTRICT 130**  
C/O IDAHO DEPARTMENT OF WATER RESOURCES  
1341 FILLMORE ST., STE. 200  
TWIN FALLS, ID 83301-3380  
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**JUN 15 2006**

DEPARTMENT OF  
WATER RESOURCES

IDWR DIRECTOR  
KARL J. DREHER

WATERMASTER  
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June 14, 2006

R C STONE  
BURLEY CITY ATTORNEY  
PARSONS SMITH STONE  
PO BOX 910  
BURLEY ID 83318

Dear Mr. Stone:

Both the Idaho Department of Water Resources (IDWR) and Water District 130 (WD130) have responded to your inquiries relating to a curtailment order in 2004, and to assessments made against the City of Burley (City) by the Magic Valley Ground Water District (MVGWD). Please refer to the enclosed letters dated March 30, 2004, and April 5, 2005. To summarize:

Effective March 10, 2004, the City's Well #4, situated in Minidoka County and authorized to divert water pursuant to water right nos. 36-4080 and 45-13411, was subject to curtailment under the terms of an Amended Order issued by IDWR in response to the Rangen, Inc. call for distribution of water in the Eastern Snake Plain Aquifer (ESPA). At that time, you sent a request for exclusion from curtailment to IDWR. IDWR responded (3/30/2004 correspondence from Gary Spackman) that the City's diversion of water from Well #4 was in fact causing material injury to senior priority rights in the Thousand Springs Reach of the Snake River, and that pursuant to 2004 House Bill 848 the City was deemed a non-member participant for mitigation in the MVGWD. Mr. Spackman's letter clearly states that assessment charges would be required to be paid to MVGWD.

On February 24, 2005 the City received an assessment invoice from MVGWD in the amount of \$480.60 for the City's portion of 2004 mitigation activities carried out by MVGWD. Your response to the MVGWD was that the City's Snake River Basin Adjudication (SRBA) claim to right no. 36-4080 had been amended to show a date of priority of 1960 and that the City was therefore "not subject to" the Rangen call. You did not address permit no. 45-13411, which includes City Well #4 as an authorized point of diversion, and which carries a priority date of 2001.

On April 5, 2005 I sent you a letter responding that, until such time as a partial decree was issued, WD130 would be administering right no. 36-4080 based on the SRBA Director's report recommendation which was on file at the time that authority for interim administration of Basin 36 was granted to IDWR. That recommendation includes a date of priority of 11/01/1962 for water right 36-4080.

On May 19, 2005 IDWR issued a Second Amended Order which denied the Rangen call.

**The City's objection to the SRBA recommendation for 36-4080, the petition for amendment of the SRBA claim, and the Second Amended Order denying the Rangen call in 2005, do not relieve the City of its obligation to pay the MGVWD 2004 mitigation assessment charges.** The 2004 curtailment Order was based on the best available information and science at that time. As a result, mitigation activities were carried out, ground water districts incurred expenses, and junior priority rights were ordered by the legislature to share in those expenses. The City made consumptive diversions from Well #4 during 2004. Those diversions were required to be mitigated, and the mitigation charges were lawfully assessed.

The curtailment ordered in my recent May 29, 2006 letter is related directly to the non-payment of the 2004 mitigation charges, and is authorized pursuant to Idaho Code Section 42-5244. When the outstanding charges are paid, diversions under right 36-4080 may resume.

Subsequent assessment charges made by MGVWD to the City for year 2005, based on right no. 36-4080, should be waived. The recommended priority date of right 36-4080 (November 1, 1962) is senior to the curtailment dates resulting from each of three calls for water distribution in the ESPA that were received by IDWR in 2005 (2005 calls)<sup>1</sup>. The 2004 non-member participation requirement with MGVWD expired on March 15, 2005, and renewal would have been at the City's discretion.

The same cannot be said for Permit 45-13411, priority October 22, 2001. This permit is junior to all three 2005 calls. Curtailment orders pursuant to the 2005 calls are still active and mitigation is ongoing. To the extent that City Well #4 was used during 2005 to divert any portion of Permit 45-13411, a mitigation assessment is due to MGVWD.

Effective in 2006, mitigation may again be mandatory for Permit 45-13411 and for certain water rights at the J R Simplot industrial complex at Heyburn, which was recently acquired by the City. Water right nos. 36-2648A, 36-2729 and 36-8154, diverted at the main plant wells, and water right no. 36-2648B, diverted at the ethanol plant well, are junior in priority to one or more of the 2005 water calls.

If an ESPA mitigation plan is approved for 2006, the City will be obligated to pay an assessment to MGVWD and participate in the mitigation plan, in order that diversions may occur from City Well #4 under permit 45-13411, and from wells under junior rights at the Heyburn industrial complex. If an ESPA mitigation plan is *not* approved or is approved only in part, some or all of the junior priority consumptive diversions from Minidoka County wells, including those for industrial use, will be curtailed. Failure to pay required mitigation charges based on junior priority diversions in WD130 will also result in full or partial curtailment of the diversion(s).

You pose a final question regarding the authority of WD130 to order curtailment of a municipal right. All water rights in Idaho are subject to priority regulation under the prior appropriation doctrine. Idaho Code Section 42-607 authorizes watermasters of state water districts to carry out this distribution in times of water shortage, and makes no statutory exception for either domestic or municipal rights. IDWR's Amended Order of March 10, 2004 in Rangen does reference "**consumptive** ground water rights in Water District 130 ... including **consumptive** ground water rights for agricultural, commercial, industrial, and **municipal** or other uses." (Emphasis added). WD130 was specifically instructed that in-house culinary uses of water (the non-consumptive portion) would not be curtailed, and this instruction remains consistent in the administration of the three 2005 curtailment orders.

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<sup>1</sup> Surface Water Coalition, February 27, 1979; Blue Lakes Trout, December 28, 1973; Clear Springs Foods (Snake River Farm), February 4, 1964.

It is of interest to note that in Judge Barry Wood's recent Gooding County decision the court considers this in-house exception, as well as a general single-family domestic exemption provided in later IDWR Orders, as contrary to the prior appropriation doctrine. The court points out that the Idaho Constitution gives preference to domestic uses during times of shortage, but that preference is subject to the following language: "the usage by subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use" (Idaho Const. Art. XV Sec. 3). Municipalities and other domestic users are granted rights of condemnation, provided that the holders of the senior rights are justly compensated.

In conclusion, my letter of May 29, 2006 ordering curtailment of all consumptive uses pursuant to water right no. 36-4080 for failure to pay applicable assessment charges, is authorized, and the 2004 mitigation charges to MVGWD are a "lawful obligation". **Please remit payment of \$480.60 to MVGWD immediately.** Otherwise, please prepare a report for submittal to WD130 which details how consumptive uses of water under right 36-4080 from City Well #4 are being curtailed, and how such curtailment may be monitored by WD130.

Also, please submit to WD130 information relative to the present or planned use of City Well #4 for diversions under water right Permit 45-13411. WD130 will instruct MVGWD to calculate future assessments based on a pro-rata use of this well. Failure to notify WD130 of the proportionate use of Well #4 may result in a mitigation assessment against the entire 7.8 cfs authorized under Permit 45-13411.

If your questions are not all answered, please contact me at the address above. Thank you in advance for your cooperation.

Regards,

Cindy Yenter, Watermaster  
Water District 130

cc: Magic Valley Ground Water District  
Idaho Department of Water Resources  
City of Burley Water Department