



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

May 14, 2004

Penny North Shaul
PIKE & SMITH, P.A.
151 N. Ridge Ave, Suite 210
Idaho Falls, ID 83403-2949

**RE: APPLICATION FOR TRANSFER NO. 70627 IN THE NAME OF ROBERT OR
DONNA BYBEE**

Dear Ms. Shaul:

This letter follows up several phone conversations with you in connection with a long standing water right controversy between your client Paul Gunderson ("Gunderson") and Robert Bybee ("Bybee"). As we discussed, we both would like to resolve this controversy, but so far the matter seems to exist without a resolution in sight. The purpose of this letter is to advise you how I intend to proceed toward resolution.

Simply stated, there appear to be two (2) separate issues although the issues are related. The first issue is the protest of Gunderson against Application for Transfer No. 70627 ("application") filed by Bybee. The application seeks to change the place of use of water right 31-11443 decreed to Bybee by the SRBA court on February 22, 2002. The other issue is the right of Gunderson to irrigate 33 acres of land located in the NW1/4SW1/4 Section 25, T7N, R35E, B.M. I will address these issues separately.

Gunderson protested Bybee's application stating that water right 31-11443 is not owned by Bybee citing an order in Case No. CV-98-177 that dismissed the case for lack of subject matter jurisdiction. This dismissal order did not address or supercede the February 22, 2002 order of the SRBA court decreeing water right 31-11443 to Bybee. Gunderson has not shown that that he owns the water right, as inferred in his protest, and has not shown a sufficient basis for his protest. IDAPA Rule 37.01.01.304 provides that insufficient or defective pleadings may be dismissed. If Gunderson can show within 14 days of this letter that his pleading is not defective, I will schedule a hearing in connection with Bybee's application. If Gunderson can not timely provide adequate information, I plan to issue a Notice of Proposed Default Order as provided in IDAPA Rule 37.01.01.700 dismissing his protest and will follow up with a Default Order, if appropriate.

In connection with the second issue, Department files do not show that Gunderson is authorized to irrigate the 33 acres located in the NW1/4SW1/4 Section 25, T7N, R35E, B.M. from which Bybee seeks to transfer water. The mitigation offered so far by Gunderson is not acceptable, since it does not mitigate the depletion associated with a new appropriation of water. Alternatives that Gunderson could consider include annual rental of water as described in my letter to you dated April 7, 2004 or acquisition of all or part of an existing ground water right seeking transfer of the right to the 33 acres.

Section 42-1701B, Idaho Code, provides that unauthorized irrigation of land is subject to a penalty of \$300 per acre. I don't know if Gunderson is irrigating the 33 acres or not this season, but if he is and can not show a right to irrigate the land, the civil penalty sought by the Department could be a maximum of \$9,900. The Department does not want this matter to go this far and prefers an alternate solution.

If you have questions, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Glen Saxton". The signature is fluid and cursive, with the first name "L." being small and the last name "Saxton" being larger and more prominent.

L. GLEN SAXTON, P.E.
Administrator
Water Management Division

c: Paul Gunderson
Robert Bybee
Ron Carlson – IDWR
Roger Warner – IDWR
Gary Spackman – IDWR
31-7338