



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

Norman M.
David R. Tuthill, Jr.
72A

June 12, 2007

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

NORMAN M SEMANKO
ATTORNEY AT LAW
1010 W JEFFERSON ST STE 102
PO BOX 2139
BOISE ID 83701-2139

Re: April 27, 2007 to John R. and Patricia W. Challis

Dear Mr. Semanko:

I received your letter dated May 17, 2007 via fax on June 1, 2007. I did not recall receiving the original letter. As a result, I checked with the Director of the Idaho Department of Water Resources and Department employees listed as having been mailed copies of the letter to determine whether they received copies. No Department employees received an original or copy of the letter as indicated.

Your letter identifies errors in my writing for which I apologize. In his review of the draft of the April 27, 2007 letter to Jack Challis, Allen Merritt caught the reference to a well, and I thought I had corrected the mistake.

When I met with you, Gary Chamberlain, Jack Challis, and Nick Miller on April 12, 2007, I agreed, based on the information presented, that Wegner had constructed a pond that was illegally storing water and from which illegal use might be occurring. I also agreed that Jack Challis, as watermaster, has the authority to regulate the use, and that the Department should do a better job of coordinating with the watermaster about possible regulation. I also said that I didn't have a problem issuing a notice of violation to Wegner. At the meeting, we also discussed Jack Challis' pond and related storage, particularly of ground water, and that the storage was not authorized by a water right. Jack represented that he had taken several actions to insure he didn't exceed his authorized irrigation use.

In preparing documents to send to Wegner, I conversed with staff in Salmon, Twin Falls, and in the state office. The response I unanimously received from all staff was that if one of the ponds was in violation of the law, both were in violation. Staff acknowledged Jack Challis' efforts to insure irrigation use of water did not exceed water right limits. Staff also acknowledged there had been some contact with Wegner about the Wegner pond prior to its construction. Wegner, through Gary Thor, has alleged that these conversations with Department staff led her to believe that all Department processes had been satisfied.

Mr. Semanko
June 12, 2007
Page 2 of 2

I decided to write a letter to each of the pond owners because, as you state in your letter, it was important to be even-handed with those in somewhat similar circumstances. The Department and the watermaster cannot credibly regulate water unless all are treated fairly.

As a result of discussions with Jack Challis and also with Department staff, I was aware of the measuring devices that measure inflow into Challis' reservoir and his method of measuring the flow rate of water lifted from the pond. In fact, I called Jack Challis before sending him his letter, read through each of the measurement and accounting provisions with him, and we determined at the time the methods of measurement would be acceptable to the Department.

There was another reason for sending Wegner a letter instead of issuing a notice of violation. A notice of violation would have started an administrative enforcement action without the active involvement of the watermaster. The letter to Wegner established a deadline for compliance and reconfirmed that the watermaster would regulate Wegner's use of water after the deadline without the need for threatened civil penalties, compliance conferences, and possible suits seeking enforcement of cease and desist orders.

Because of the past disputes between Wegner and Challis, I suspected regulation by the watermaster would be the most troublesome part of the letter to Wegner. In a follow up conversation with Gary Thor, he confirmed my suspicion. Water users within a water district need to know that a watermaster will be held to the same standards the water users are being held to. It is for this reason that the language about swift enforcement for nonadherence was included in Jack Challis' letter. I believe that Jack Challis is a man of integrity and is sensitive about his responsibility to adhere to the law.

Disclosure will diminish discontent and promote greater trust. I sent copies of the letters to both pond owners to openly inform them about Department activities.

Notices of the pending applications filed by Wegner and Challis are being published in the Challis Messenger on June 7 and June 14, 2007. The protest deadline is June 25, 2007.

I am disappointed anyone feels the contents of my letters are sufficiently controversial or raise sufficient issues to merit consideration by the Director. I provided him a copy of the April 27, 2007 letters to Challis and Wegner, and a copy of your letter dated May 17, 2007. The Director also reviewed a draft of this letter.

Sincerely,

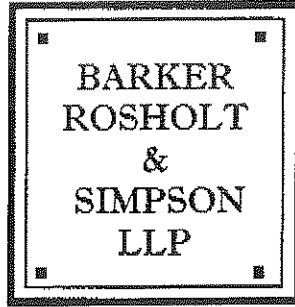


Gary Spackman

cc. Robin Wegner
Gary Chamberlain
Jack Challis
David R. Tuthill, Director
Bob Foster
Southern Region
Nick Miller

Letter from Semanko

John A. Rosholt
Albert P. Barker
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington



1010 W. Jefferson, Suite 102
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

133 Main Avenue West, Suite 303
Post Office Box 485
Twin Falls, Idaho 83303-0485
(208) 733-0700 telephone
(208) 735-2444 facsimile

FACSIMILE COVER SHEET

DATE: 6/1

Recipient's Fax: 287-6700

RE: Challis

TO: Gary Spackman

FROM: Norm Semanko

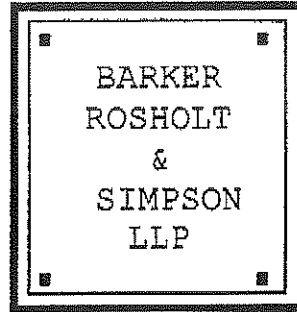
NUMBER OF PAGES INCLUDING THIS COVER SHEET: 5

- Original ^{has been} will not be sent.
- Original will be sent by first class mail.
- Original will be sent by Federal Express.

MESSAGE: This is the letter that we
mailed on May 17. Thank you

CONFIDENTIALITY NOTICE - THE INFORMATION CONTAINED IN THIS FACSIMILE COMMUNICATION IS ATTORNEY-CLIENT PRIVILEGED AND/OR CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS COVER PAGE IS NOT THE INTENDED RECIPIENT, OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER IT TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION OR THE INFORMATION CONTAINED HEREIN IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY CALL (208) 336-0700 AND RETURN THIS FACSIMILE TO US AT THE ABOVE ADDRESS. WE APPRECIATE YOUR COOPERATION.

John A. Rosholt
Albert P. Barker
John K. Simpson
Travis L. Thompson
Shelley M. Davis
Paul L. Arrington



1010 W. Jefferson St., Suite 102
Post Office Box 2139
Boise, Idaho 83701-2139
(208) 336-0700 telephone
(208) 344-6034 facsimile
brs@idahowaters.com

113 Main Avenue West, Suite 303
Twin Falls, Idaho 83301-6167
(208) 733-0700 telephone
(208) 735-2444 facsimile
jar@idahowaters.com

Norman M. Semanko
Of Counsel

May 17, 2007

Gary Spackman
Administrator, Water Management Division
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: April 27, 2007 Letter to John R. and Patricia W. Challis

Dear Gary:

Having been directly involved in the discussion that occurred at the April 12 meeting at the IDWR State Office between yourself, Jack Challis, Nick Miller and Gary Chamberlain, I requested that Jack and Patricia Challis allow me to respond to your letter dated April 27, 2007, rather than seeking to take it up immediately and directly with Director Tuthill. As you know, I have represented the Challis' on their individual water rights matters for a number of years.

Your letter notes that application for permit no. 72-16686 has not been approved and that water is being stored without a valid right to do so. You further set forth four conditions to ensure compliance with the law. These are set forth below (in italics), followed by our response.

1. *You must not beneficially use stored water while it is in the pond. Beneficial uses within the pond include stocking with fish, recreation, aesthetics, etc.*

Response: The pond will not be used for these purposes until the application is approved. Following the indication by Jim Stanton of IDWR that this permit application should present no problem, and IDWR's initial timely advertisement of the application in the Challis Messenger, the Challis' did, in fact, seek and receive authorization from the Idaho Department of Fish & Game to introduce hybrid Grass Carp into the pond. This was done to control moss and algae build up that was and continues to cause problems with the irrigation pumping system. When IDWR subsequently withheld its second advertisement, the Challis' thereafter ceased further action in this regard. Due to Blue Heron and winter kill, these fish are no longer an issue.

Gary Spackman
May 17, 2007
Page 2

2. Pursuant to Idaho Code Sec. 42-701, on or before May 25, 2007, you must: (a) install a measuring device or other means of measurement approved by the Department that will accurately measure the flow from your rediversion pump; (b) install a locking control valve or other locking controlling mechanism at the rediversion pump; and (c) install/maintain measuring devices for inflow from wastewater or water delivered to storage pursuant to natural flow rights.

Response: Apparently, you failed to recall the conversation relating to this subject that occurred during our aforementioned meeting. Further, your telephone conversation with Jack Challis prior to sending your letter also covered this subject. Finally, you seemingly failed to research your own files before sending out this letter. Specifically, Jack Challis sent a letter to Allen Merritt of IDWR on June 29, 2006 which included the following:

Based upon relevant information provided by Jeff Peppersack (with whom I met in this regard on a trip to Boise) we subsequently installed a Parshall Flume in the collection ditch that brings the majority of our waste water to the pond. We have another "V" Notch Weir that allows measurement of flow of additional waste water coming through our spring, 72-16563, and, in turn, to the pond.

Knowing the GPM output of our "Big Gun" in our east pasture being fed via pump from the pond, we maintain an ongoing computer record of this output plus all aforementioned flows. Thus we are able to document with extreme accuracy that only waste water, none of the ground water and/or spring flows covered by this non-consumptive permit, are used in our irrigation system. For those times when more waste water is flowing to the pond than being used in our irrigation operation an overflow (screened in accordance with IF&G guidelines) from the pond returning those flows to Challis Creek is functional.

We believe this is more than sufficient, particularly given the prior consultation with Jeff Peppersack and subsequent detail provided to Allen Merritt, not to mention personal observation of the system by IDWR personnel on two separate occasions.

3. Pumping from your well cannot exceed the rate of surface water inflow into your reservoir from a combination of wastewater and flow diverted under other water rights. Alternatively, you may balance the daily volume of water pumped with the combined daily volume of wastewater and water delivered to the pond from natural flow water rights. You must maintain records of the daily accounting of inflow and outflow, and must submit them to the Department upon request.

Gary Spackman
May 17, 2007
Page 3

Response: Again, it doesn't appear that your letter was prepared with the benefit of first reviewing your own files. The Challis' do not pump from any "well" (other than their domestic well, for domestic use only). The remainder of this condition is addressed in the response to condition no. 2 above.

4. *At the end of the irrigation season (October 15, 2007), unless the Department has approved permit No. 72-16686, you must lower the level of water in the pond to the natural ground surface. This would include breaching any berms surrounding the pond.*

Response: The Challis' can, and given no other legal option, will plan to do this. However, given that this is still five months away (and acknowledging the end of the irrigation season in Custer County is October 31st, not the 15th), we request that IDWR finish processing the Challis' application for this permit and approve it, forthwith. The application was filed on November 22, 2005. The required approvals have been obtained from the Idaho Department of Fish & Game and the Idaho Department of Environmental Quality, as documented in IDWR's files. All additional information requests have been fully satisfied. The Water District 170 Watermaster has given his approval and Jim Stanton's comment/analysis concludes that "the permit should be approvable with standard conditions." There is no reason for further delay and we request immediate approval, or a firm timeline as to when we can expect such approval, along with an explanation as to why the application has not been approved yet.

The admonishment of Jack Challis as the Watermaster for Water District No. 72-A, stating that his position places an extra burden upon him and stating that "swift enforcement action" will be taken by the Department if the measuring device and controlling works are not installed by May 25, strikes us as both unnecessary and hastily conceived. Again, these works have already been installed, pursuant to Jack Challis' consultation with Jeff Peppersack, and as fully reported to Allen Merritt and observed by IDWR staff. We request an immediate written acknowledgement that the works have been installed, that you failed to note this from your own files and conversations with Jack Challis, and that your letter mistakenly chastises Jack Challis for failure to do something that he has in fact already done, most notably, with IDWR's knowledge and consultation. This seems to us the proper and professional thing to do. We request that your written acknowledgment be copied to the same parties to whom your previous letter was sent.

Finally, we would like to know what prompted your letter. Please indicate whether the letter was the result of a complaint lodged with IDWR or whether the agency issued the letter on its own initiative. We suspect that you, and perhaps others at IDWR, felt compelled to send a "companion letter" to accompany the "Illegal Storage Pond" letter that you also sent to Robin Wegner on the same day. Perhaps this was done in an effort to appear fair and even-handed. We assume this is why you provided a copy of your letter to Robin Wegner; there is no other

Gary Spackman
May 17, 2007
Page 4

explanation. However, there are some key differences between these two situations, which are worth noting:

- Challis' have responded to and satisfied all requests for additional information to process their application for permit; Wegner has not.
- Challis' filed their application for permit on November 22, 2005 and it is ready for approval; Wegner's is not.
- Challis' have installed the necessary measuring and controlling works; Wegner has not.

In the future, we suggest that "enforcement" letters be issued on a case-by-case basis, with some review of the respective file, rather than appearing to be issued as a "tit-for-tat".

To sum up, we believe we have adequately responded to the four conditions set forth in your letter. If not, please let us know immediately. Also, as requested above, please provide us with a written acknowledgement that Jack Challis has indeed installed the necessary measuring and controlling works, with IDWR's advance knowledge and written after-the-fact confirmation, and that your chastisement was therefore unwarranted. We would also like to know what prompted your letter, in light of the concerns expressed above. Finally, we request approval of application for permit no. 72-16686 or a written explanation of why the permit has not been approved, notwithstanding that all required information has been submitted to IDWR, along with a timeframe for completing the approval process. Alternatively, we will request that any and all of these issues be taken up directly with Director Tuthill.

Thank you for your cooperation in this matter and we look forward to hearing from you soon.

Sincerely,



NORMAN M. SEMANKO
Attorney at Law

cc: David Tuthill, Director
Gary Chamberlain, Idaho Water Resource Board
Bob Foster
Allen Merritt
Nick Miller
Jack and Patricia Challis