



State of Idaho
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 - (208) 327-2900

WD67 File

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AUG 31 1994

WATER RESOURCES
WEISER RIVER REGION

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON

DIRECTOR

August 29, 1994

Mr. Kelly Cole
2583 Council Cuprum Road
Council, ID 83612

RE: Water Diversion from Lakey Creek, Water District No. 67

Dear Mr. Cole:

I am responding to your letter dated August 14, 1994, in which you raised several considerations regarding your diversion from Lakey Creek tributary to Hornet Creek in the Weiser River basin.

Your letter raises four basic issues. The first is whether Article XV, Section 3 of the Constitution of the State of Idaho entitles a user of domestic water to receive water from a stream where all water in the stream is being called by a senior decreed water right for irrigation purposes. As you have correctly described, this article identifies a preference for those using water for domestic purposes. However, the article goes on to include the following language:

But the usage of such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.

The effect of this provision is to require that any subsequent domestic user who wishes to pre-empt senior irrigation water rights can do so by condemning the water and compensating the holder of the irrigation water right accordingly. This condemnation process must be conducted in a court of law.

The second issue that you raise is whether the authority of the water district and the watermaster, as identified in Chapter 6, Title 42, Idaho Code, extends to delivery of domestic water. We do not find any limitation in Chapter 6 as to the delivery authority of a watermaster based on type of use. In fact, watermasters throughout the state have delivered water for a wide variety of uses, including domestic, for scores of years in Idaho.

Your third issue regards the acquisition of a water right by adverse possession. This is not applicable in the Hornet Creek basin due to the following language in §42-607, Idaho Code:

So long as a duly elected watermaster is charged with the administration of the waters within a water district, no water user within such water district can adversely possess the right of any other water user.

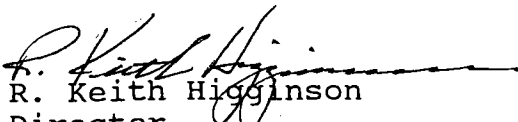
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Your fourth issue regards the domestic use exemption from the requirement to file water right claims. This exemption exists because most domestic water rights are from wells or springs and watermaster delivery is seldom necessary for these sources. However, if there is a situation where delivery from a source within a water district is disputed and water must be delivered to one location or another, the watermaster must deliver to decreed, licensed or permit water rights and cannot honor water rights that have not been verified in this manner by either the court or IDWR.

It is my understanding that the watermaster, Mr. Gerry Myers, conducted a test recently by sending water down the creek for about two weeks, and concluded that Lakey Creek water would not reach Hornet Creek through the stream channel due to the dryness of the year. Thus Mr. Myers, in consultation with Mr. Tuthill from our Western Regional Office, has again allowed the water to be diverted to the only known decreed water rights from Lakey Creek, presently owned by the Wallings. This letter affirms the action taken by Mr. Myers.

I recognize that this is a dry year and that you are seeking authorization to divert Lakey Creek water this year and in the future. Based on the Department investigation to date, it does not appear that there is a decreed, licensed or permit water right by which you can call for a delivery of water from Lakey Creek. At this time my recommendations are for you to (1) pursue the identification of a decreed water right through the Snake River Adjudication process, or (2) seek other sources of water for your uses, or (3) seek to obtain a portion of the senior irrigation water rights through a condemnation procedure. If you desire to explore any of these avenues, feel free to contact our Western Regional Office for water right identification assistance.

Sincerely,


R. Keith Higginson
Director

cc: Gerry Myers, Watermaster, Water District 67
Western Regional Office