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WATER RESOURCES  
WESTERN REGION

June 23, 1994

David R. Tuthill, Jr., Manager  
Western Region Office  
Idaho Department of Water Resources  
2735 Airport Way  
Boise, ID 83705-5082

Re: Porter Creek water distribution

Dear Mr. Tuthill:

Thank you for conducting the May 25, 1994 inspection of the Porter Creek water district and for your efforts to initiate lawful delivery of water in accordance with the Idaho Constitution and the Idaho Code.

However Marty Broom and I have discussed the meeting we had with you, Steve Lester and Hank Berntsen following the inspection and we do not feel that the issues of concern to us were sufficiently addressed to insure that they will be corrected.

The claim by Mr. Lester that Porter Creek water has heretofore been delivered by the watermaster in the maximum quantity decreed to each senior user in order of priority based on a "standing call" is simply not true. An examination of the watermaster records and the watermaster field notes in the District 65-B file during the past five irrigation seasons (1989-1993) easily verifies this.

Since Mr. Lester became the IDWR advisor to the District in 1989 his actions have cost us many thousands of dollars in lost crops due to water being either wasted or delivered out of priority rather than being delivered to us in the correct order of priority in accordance with the Payette River adjudication and Idaho Law.

At the suggestion of my attorney, Richard Eismann, I submit the following summary of some of the incidents involving such unlawful delivery by way of response to IDWR Director Higginson's September 2, 1993 letter to Mr. Eismann:

#### 1989

In July of 1989, I requested water for 7-10 days to irrigate my alfalfa crop which was burning up for lack of water. When watermaster Elizabeth Pattee advised me that Mr. Lester would not approve returning wasted unused water to me, and following a week of requests to the Department, Mr. Lester finally conducted an inspection of the #2 diversion and use.

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Although he determined that none of the water being diverted to the #2 priority could be used beneficially since the valve at the collection box was locked in the fully closed position to prevent mixing Porter Creek and Payette River water, he did not direct Mrs. Pattee to shut off the #2 diversion and deliver the water to us.

Instead, Mr. Lester gave them still another week to erect a higher barrier at the overflow end of the collection box despite the fact that no Porter Creek water could enter their pipeline through a closed and locked gate valve regardless of the height of the overflow.

By the time Mr. Lester finally instructed the watermaster to shut down the #2 diversion and deliver the water to us, we had lost most of the alfalfa and had been forced to harvest the rest prematurely to keep it from burning up. The existence of the locked gate valve and the guaranteed waste of all of the water diverted under the #2 priority during that period can be easily verified by reading Mr. Lester's 7/12-14/89 and 7/20/89 Field Inspection Reports in the 1989 District 65-B file.

### 1990

Immediately upon assuming the duties of watermaster in 1990, Mr. Lester shut both our irrigation and domestic or "courtesy" water completely off and opened the Double Diamond #4/#15 priority headgate wide open permitting them to divert the pipeline capacity of 60-65 inches of water instead of the 45 inches adjudicated for the #4 right. This deprived us of 15-20 inches of water that was lawfully ours since we were the next wateruser in order of priority.

Due to faulty installation of the #4/#15 pipeline, which we had discussed earlier and which still exists, the air must be forced out and the debris must be flushed out of their gravity pipeline (which actually runs uphill initially from the inlet) before the full flow can pass through or be measured. Mr. Lester did not wait around to see what effect opening their headgate wide open would have, and instead recorded only the small quantity of water which flowed through the restricted pipeline initially as if it were their diversion later once the air and debris were expelled.

At the same time Mr. Lester ignored the carefully predetermined headgate setting required to deliver exactly one inch of domestic or "courtesy water" through the Dovel headgate and claimed that he delivered 2 inches when in reality the headgate remained closed sufficiently that not one drop of water could pass through it.

When I called Mr. Lester and explained what had occurred with both of the headgates, he waited several days and then returned to the district without my knowledge. In his field inspection notes for that visit he claimed that he had re-set my headgate to deliver two inches of water and wrote a lengthy explanation claiming incorrectly that my pipeline system was faulty and refusing to adjust it further with the claim that it was "a personal problem."

In reality, Mr. Lester still did not leave my headgate open at the minimum setting, a fact that was verified by two witnesses a week later on his next visit to the district. And during that same period, Mr. Lester diverted from 13 to 22 inches of water to Arlie Woods' house allegedly to satisfy Mr. Woods' so-called "courtesy water." Mr. Woods' #9 priority irrigation right was junior to our #6 priority and was decreed for only 3-1/2 inches yet he was delivered from four to six times that amount while we were completely shut down.

Although Mr. Lester's field notes for that period record the delivery of 13 inches of water to Mr. Woods, that delivery is not included in his sworn watermaster records and we were also charged with two inches of courtesy water that was not delivered to us. That unlawful alteration of watermaster records to reflect legal delivery rather than what actually occurred has also occurred in subsequent years despite Mr. Lester's denials.

Because Double Diamond has never installed a screen at their #4/#15 diversion to prevent sand and gravel from entering their pipeline, their pump would run for only a few minutes before it shut off for the remaining 23-1/2 hours each day. After several days, instead of returning the water to Porter Creek, Double Diamond employees blocked the return ditch and ran the water in a ditch which is parallel to and south of the Porter Creek road while cutting a series of holes in the sides of that ditch so as to create lateral ditches to flood irrigate their creek bottom land which has no Porter Creek water right.

Despite our oral and written requests to return the water that was being diverted and used unlawfully to us, Mr. Lester refused to comply or even investigate the misuse and waste. When I stood in the middle of the road and stopped Mr. Lester two weeks later to show him the flagrant misuse and waste while my headgate was locked shut, he wrote a field inspection report claiming that the illegal irrigation by Double Diamond was acceptable since the water was "hydraulically connected" to Porter Creek.

If such an excuse had any validity, none of our irrigation should ever be shut down since the Dovel irrigated lands are also "hydraulically connected" to Porter Creek in exactly the same fashion.

In that same field inspection report, Mr. Lester claimed that the Double Diamond pump had only been shut off one hour before his inspection, yet that pump had not run for several days and there was no evidence of moisture in the #4 priority fields.

Although Mr. Lester shut down the illegal diversion and also returned my domestic or "courtesy water" to me, he refused to restore my irrigation water and instead diverted all of the remaining water in Porter Creek to the other courtesy water users in the guise that some of it was being used by the #1 priority irrigation user.

At that time, the Double Diamond mainline at Jackass Creek was leaking so badly that a substantial quantity of Payette River water was also being wasted there. Instead of shutting down the Double Diamond Porter Creek diversion which was simply wasting water, Mr. Lester gave them another week to correct the leaks until I was once again forced to write a formal letter of complaint to the Department.

That was the second year in a row in which I was denied water that was being entirely wasted or delivered out of priority for a two week period when the other senior appropriator could not utilize the water due to crop removal. The evidence, including photographs and the subsequent videotape, is in the 65-B file unless it has been removed. If it has, I'll supply copies on request.

### 1991

Shortly after Mr. Berntsen assumed the duties of watermaster, he closed and locked the Dovel headgate despite the fact that there was a substantial flow in Porter Creek past all three of the downstream diversions, and despite the fact that a large quantity of water was being wasted through the Double Diamond overflow pipe at Jackass Creek. This around-the-clock waste was documented by videotape which later became a part of the 1992 District 65-B file.

At the same time all of the water being diverted through the #2 priority headgate was being dumped down a washout and an erosion gully down a steep hillside yet Mr. Lester told Mr. Berntsen that this deliberate waste of water was legitimate since it allegedly comprised "flood irrigation".

Even when the waste of water was corrected, Mr. Berntsen continued to divert 18 inches of Porter Creek water through the #2 priority headgate for the remainder of the 1991 irrigation season despite the fact that no irrigation of #2 priority lands occurred with Porter Creek water. His justification for this diversion was that it was "courtesy stockwater" despite the fact that it never reached any livestock and no such water right exists.

What the unlawful diversion did do was: 1) attempt to provide an excuse for the 20 to 50 inches of water that was both flowing over and leaking through the Double Diamond dam instead of being returned to me and 2) kill hundreds of juvenile trout and several dozen mature trout which, instead of passing downstream over a properly sealed dam or overflow, were transported down the unscreened #2 irrigation ditch during the high water period each day and then killed when the ditch dried up each evening.

Although both this 18 inch illegal diversion and an 11 inch diversion to the Ross Woods half acre were recorded in the watermaster field notes both early and late in the irrigation season, the 18 inch diversion was not shown in the watermaster records and the 11 inch Woods diversion was entered as only 2 inches.

It is worth noting that these two diversions equal 29 inches which is only part of the excessive leakage through the #1 priority diversion dam that year. Despite your frequent directives to seal that dam, it has never been repaired and sealed properly to prevent excessive waste of water during the six seasons Mr. Lester has been advisor to the water district. The water that is wasted through leakage in that dam during times of scarcity is sufficient to irrigate my two largest fields. Obviously the leakage is even much greater when the dam pool is full with a high head of water than when it is nearly empty.

During the years before Mr. Lester began claiming that Double Diamond's dam was sealed when it was not, I always insisted that their dam be sealed properly, and I continued to use the quantity of water that leaked through their dam until they sealed it. Each year when Double Diamond sealed their dam before it was damaged with the backhoe, not one drop of surface water leaked through it. Permitting that water to leak through the dam assures that it is wasted since it can never reach the Payette River due to evapotranspiration losses.

When Double Diamond shut down most of the irrigation of their #1 priority fields in order to harvest their crops during 1991, they failed to notify the watermaster so that the unused water could be released to junior appropriators as had occurred historically. This resulted in the around the clock daily waste of nearly a million gallons of water out the Jackass Creek overflow pipe, yet even when Mr. Berntsen viewed this massive waste he claimed not to have the authority to reduce the #1 priority diversion and declined to shut it down.

For the third season in a row we were denied wasted irrigation water that we were lawfully entitled to while the two senior users were not irrigating and were harvesting their crops. Overwhelming proof of this waste, including a three and one-half hour videotape and Ms. Shirley's daily records, were provided to the Department by Mr. Eismann on April 22, 1992.

## 1992

During the critical 1992 drought season, once Porter Creek water became scarce, all of the water in the creek was diverted solely to three courtesy water users, again under the guise that it was being used to irrigate lands under the #1 priority right. Roger Miller complained to me that he was being denied the use of courtesy water while a substantial quantity of Porter Creek water was flowing down the Little Jackass Creek ravine and being wasted.

Acting both as a member of the Water District Advisory Committee and as a concerned irrigator who was being denied water that was being misused or wasted, I investigated the diversions and reported the nonuse and waste to Mr. Berntsen. I also requested that he divert all but the previously agreed upon quantity of courtesy water for the Drake, Pomerleau and Woods households to the next-in-priority irrigation user who could utilize the water.

Although Mr. Berntsen promised to do this on several occasions he took no such action and no legal irrigation occurred with Porter Creek water during July and August of 1992. Despite the fact that I was the only one of the four courtesy users to file my #1 priority domestic and stockwater affidavit timely in the SRBA, I was also the only one of the four whose water was shut off by the watermaster. Again the watermaster records do not reflect what actually occurred.

I did not report this unlawful excessive diversion and use of Porter Creek water to the Department until after I had spent several weeks attempting to solve the problem with the watermaster because I was following specific instructions given to me and my attorney by Mr. Lester at the September 23, 1991 Porter Creek Water District meeting.

Please note in the transcript of that meeting that, contrary to your advice to me and the Director's advice to Mr. Eismann, Mr. Lester was highly critical of my having written letters to the Department instead of working with the watermaster to solve the problems in the district.

**1993**

When Mr. Berntsen first arrived on Porter Creek in 1993, Mr. Broom was changing irrigation pipes and had only one long line running at that moment. Without any justification for doing so, Mr. Berntsen promptly closed and locked the Dovel headgate so that only one of the seven irrigation lines could be operated. Then, without making a total measurement or an accurate estimate of available water in Porter Creek, he notified Mr. Broom that the remaining water would be shut off in two days.

Mr. Berntsen had no legal authority or apparent reason to reduce the Dovel diversion and remove water from Mr. Broom's crops on July 28, 1963 when there was a large surplus of water in Porter Creek which exceeded the total of all decreed water rights senior to ours. This unlawful removal of water by the watermaster cost Mr. Broom many dollars yet Mr. Eismann has never received the requested written explanation of why it was done.

On the basis of the watermaster shutting down all but one line and declaring that it too would be shut off in two more days Mr. Broom was forced to reschedule the Meridian, Idaho custom operator to cut his alfalfa prematurely. Several days later while this swathing was taking place, Mr. Berntsen returned to the district and I pointed out to him that several hundred inches of surplus water was flowing down Porter Creek past all of the diversions.

I requested that Mr. Berntsen open my headgate sufficiently to provide both my domestic and stockwater right and to permit me to irrigate my pasture with one line, whereupon he agreed to do so and said there was plenty of extra water available. Because of the previous unsatisfactory experiences with Mr. Berntsen, and because of his flagrant failure to deliver water to Mr. Broom a few days earlier, I videotaped the entire conversation.

Instead of leaving the irrigation and domestic and stock water flowing through my headgate as he had promised, Mr. Berntsen returned without my knowledge and closed and locked the Dovel headgate. During the night my pipeline emptied and I still had no domestic or irrigation water despite the fact that an estimated 150-200 inches of unused water was permitted to flow past my house and on down Porter Creek to the Payette River.

Meanwhile, Mr. Berntsen continued to permit Double Diamond to irrigate their #15 priority fields, a situation that was obvious even from the road which remained wet from sprinkling. Mr. Berntsen also locked the #4/#15 diversion open without a functioning measuring device to regulate it, with the claim to me that he could "estimate" the quantity of water being diverted and/or wasted despite his written instructions to the contrary. I also videotaped both of these occurrences.

Mr. Berntsen failed to return Mr. Broom's irrigation water on Tuesday, August 3, 1994 as he had agreed to do and on August 7, 1993 he again refused to deliver irrigation water to Mr. Broom when he requested it. The claim in Mr. Higginson's letter that this was the result of a misunderstanding concerning the delivery of two inches of so-called "courtesy water" in 1992 is lacking in logic.

I did not request any courtesy water. I requested: 1) my domestic water right and 2) sufficient irrigation water from my #6-7 priority right to operate one hand line on Field #5 which is in pasture. Regardless of what Mr. Berntsen or Mr. Lester claims, I documented these requests on videotape.

After refusing Mr. Broom's request for water on August 7, 1993, Mr. Berntsen opened the Double Diamond #1 priority headgate wide open despite the fact that water was already being wasted around the clock through the Jackass Creek overflow pipe. I videotaped his action, including his measurement of the excessive flow with his staff gauge and our subsequent conversation while his nephew looked on.

I asked Mr. Berntsen why he was deliberately turning in such a large additional quantity of water to be wasted in violation of the Idaho Code instead of giving it to Mr. Broom. As Mr. Eismann explained in his August 9, 1994 letter to Director Higginson, Mr. Berntsen replied that he was doing it to protect his --- (job). The inference being that he had been instructed or ordered to do it by Mr. Lester or some other IDWR authority.

When Mr. Lester and Tim Luke from the IDWR State Office visited the district on August 10, 1993, Mr. Lester made no effort to contact either me or Mr. Broom to deliver the water we had been requesting. Mr. Broom and I confronted him at the Double Diamond Jackass Creek site in late afternoon and Mr. Lester claimed that we had not requested any water.

Considering the fact that he and Mr. Luke were both there in response to Mr. Eismann's faxed request to Director Higginson for 55 inches of water, dated August 6, 1993, Mr. Lester's claim was and is ridiculous.

Mr. Lester then claimed that the IDWR had no way to determine whether Mr. Berntsen's version or Mr. Broom's and my version of the requests for water was accurate so I offered him the videotape of the three conversations with Mr. Berntsen which was in my camcorder in my pickup truck at Jackass Creek that day.

My offer of the videotape was articulate and was witnessed by both Mr. Broom and Mr. Luke yet Mr. Higginson's September 2, 1993 letter to Mr. Eismann repeated the erroneous claim that the staff had "no method to determine which, if either, version is more accurate."

When Mr. Lester finally agreed to deliver the 55 inches of water we had been requesting to Mr. Broom, he said that even if Double Diamond wanted more water they couldn't get it because of excessive leakage through their dam. In my opinion, that comment was made by Mr. Lester solely for Mr. Luke's benefit since Mr. Lester has always denied the existence of any excessive leakage through the Double Diamond #1 priority diversion dam.

It is worth noting that instead of requiring the senior diversions to repair the leaky diversion dam and inoperative measuring device or else be shut off, Mr. Lester subsequently removed all watermaster locks and declared in his report that there was plenty of water to supply all calls.

For the first two seasons of Mr. Lester's tenure as advisor to our water district, I excused his erroneous written reports as having resulted either from ignorance or from bias resulting from deliberate misinformation supplied to him by other waterusers in the district. However his ongoing failure to provide only factual, verifiable written information has destroyed his credibility with me.

When Mr. Eismann petitioned you on my behalf to replace Mr. Lester as advisor to the Porter Creek Water District on April 22, 1992, Mr. Lester's response illustrates why I question his credibility. In his April 24, 1992 memorandum to you he claimed that Mr. Eismann asked if anyone objected to his (Eismann's) taping the 9/23/91 meeting despite the fact that no such conversation took place and Mr. Eismann did not tape the meeting.

The written transcript was prepared by a transcription specialist employed by Mr. Eismann, from the official original recording of the meeting taped by Don Rumsey's secretary in Mr. Rumsey's capacity as Secretary to the water district. Mr. Lester's claim and the Department's subsequent claim that the written transcript was not valid because it was not an official transcript would, therefore, seem to lack merit.

By repeatedly telling both the watermaster and the offending waterusers that the watermaster is not permitted to halt the waste of irrigation water unless he happens to see it as an incidental part of one of his infrequent "scheduled" visits to the district, Mr. Lester is giving tacit approval to the ongoing waste.

Mr. Berntsen's refusal, in your presence, on May 25, 1994, to adjust the #1 priority Double Diamond headgate to reduce that waste because he claims it takes three and one-half hours to show up at the Jackass Creek overflow or because it may cost the water users an extra watermaster visit, was a deliberate refusal to perform his duties.

I'm sure you are aware that Sec. 18-4302 of the Idaho Code imposes criminal penalties for permitting irrigation water to be wasted instead of returning it to the stream for use by other junior appropriators. Yet that is exactly what Mr. Berntsen did when he increased the Double Diamond diversion from the 3 inch weir crest (1.25 cfs) they had requested to the 6 inch weir crest which assured the waste of most of the water.

Because he admitted on videotape that he knew water was already being wasted out the Jackass Creek overflow pipe with the 1.25 cfs diversion, and because he knew that Double Diamond had not requested, did not want and could not use the extra water, it was Mr. Berntsen, not Double Diamond's farmer, who was guilty of the criminal offense.

Mr. Lester's claim that senior appropriators are entitled to receive their maximum decreed diversion day after day and month after month ignores the historical duty of water as well



as reasonable consumptive use requirements and the fact that it is a misdemeanor to waste irrigation water which could be utilized by a junior appropriator.

Mr. Lester's repeated claim, both verbally and in writing, that the waste of water is a civil matter which should not involve the Department ignores the legislative mandates which require the Director and the Department to administer Idaho citizens' water in accordance with all of the water laws. Neither Mr. Lester nor Mr. Berntsen are exempt from arrest and criminal prosecution for their failure to obey the law.

The Department does not have the option of choosing which law it wants to enforce and ignoring the others. And neither Mr. Lester nor Mr. Berntsen may ignore portions of the Idaho Code or the Idaho Constitution which the watermaster has sworn to uphold. So long as there is any water in Porter Creek, it must be distributed to the owners of valid water rights who request it in the amounts they request in order of priority, providing it is not being misused or wasted.

If there is even one inch of unused water flowing down Porter Creek and I request it, either for domestic use or for irrigation use under any of my decreed Porter Creek water rights, the watermaster is required by law to deliver it to me to be applied beneficially. The fact that some other water user with a right senior to me has not maintained either his conveyance system or his diversion dam sufficiently to utilize that water does not permit the watermaster to waste it instead of delivering it to me.

There are only two locations in the entire length of Porter Creek where the stream is more than twelve feet wide, including the county road bridges. Both of those locations were created by Double Diamond when they damaged the stream banks with their heavy equipment at their two diversion dams. Both of those dams must either be relocated or rebuilt further into the damaged stream banks before they can be sealed properly.

The claim that a wateruser cannot quickly and easily seal a properly constructed diversion dam on Porter Creek with a single large roll of plastic so as to prevent all of the surface water from leaking through the dam is not valid. Yet it has been used in every recent year as the excuse for deliberately wasting water which had historically been utilized by me or my predecessors.

There are only two adjudicated domestic water rights on Porter Creek and mine is the only one that has been both scrutinized intensely and which has also been shut off every year since Mr. Lester became the district's advisor. The other domestic right holder, whose priority is junior to both of my irrigation rights, is permitted to divert and use as much water as he pleases without any controls or measuring device.

Mine is the only system that has been painstakingly measured to ascertain exactly when either one inch or two inches of water is being removed and even then the setting has not been adhered to both by Mr. Lester and by Mr. Berntsen. Because Double Diamond's flow meter at their #4/#15 diversion rarely works and is not accurate when it does work, we requested that Mr. Lester also measure it for accuracy.

He advised Mrs. Pattee, Paul Dovel and me that he had already measured it and found it to be accurate yet, unlike mine, there is no evidence of any such measurement in the Porter Creek Water District files. Was Mr. Lester telling the truth?

For approximately the past week Double Diamond has been diverting the full 60-65 inches of water through their fully open #4/#15 headgate, and applying that water only to #15 priority lands with a 20 inch junior right, in order to saturate those acres. As usual their pipeline flowmeter is not functioning.

Every year they do this while permitting their #4 priority acres to become unreasonably dry despite the fact that there is insufficient water in the creek to fill senior rights. Then the watermaster is called to duty and Double Diamond uses twice the normal quantity of water that would have been required to irrigate their #4 priority lands had they been irrigated properly (notwithstanding IDWR Attorney Collair's arguments to the contrary).

The controls, such as flagging junior fields, that the Department has put in place to prevent out of priority diversions are meaningless because the watermaster refuses to utilize them on an ongoing basis throughout the season. Mr. Berntsen's alleged claim that there was "no significant use of Porter Creek water on Double Diamond's junior fields" in 1993 while Mr. Broom and I were deprived of water is not true. The truth is that every year since Mr. Berntsen became the Porter Creek watermaster, Double Diamond has used Porter Creek water to irrigate their #12 or #15 priority fields while our entire system, including domestic water, has been shut off.

Mr. Lester's comments to the assembled water users during our May 25, 1994 water district orientation meeting blaming one individual (me) for their loss of historical domestic water filed as expansion claims were both inflammatory and untrue.

The truth is that neither I nor my attorney, Mr. Eismann, asked the Department to halt the use of courtesy water after Mrs. Drake, the Pomerleaus and Mr. Woods filed for domestic use in the SRBA as Mr. Lester claimed. In fact I voted in our annual water district meeting that year to allow two inches of courtesy water to be delivered continuously from the Double Diamond ditch to each of the historical users.

When Mr. Eismann did object to the delivery of courtesy water in his earlier letter, dated April 22, 1992, it was because Mr. Lester and Mr. Berntsen had illegally removed all of my decreed irrigation and domestic water from me in order to supply from 13 to 100 inches of courtesy water to people with no water rights or with rights junior in priority to mine. It was also because new property owners in the area were already claiming additional courtesy water over and above the four historical users.

Although the Department claimed the water was being provided courtesy of Double Diamond, the truth is that it was water taken from my crops which cost me several thousand dollars. Double Diamond has never reduced their total irrigation water use by even one inch to supply the courtesy water which was always delivered in addition to whatever quantity of water Double Diamond could use plus their ditch losses.

During the 1986 Double Diamond hydro hearings, co-owner Don Rumsey agreed to provide 2 inches of courtesy water to each of the historical users from his #1 priority right. However he has never done this. In order to provide the courtesy water transfers he must in fact give up the right to irrigate a comparable number of Porter Creek acres that he has been legitimately irrigating with Porter Creek water. I have suggested that he make good on that promise and have said that I will not oppose the transfer of the four domestic and/or stockwater rights, including ours, which have historically been taken from the Double Diamond ditch.

The truth that Mr. Lester did not tell the other courtesy users on May 25, 1994 is that the IDWR had convinced the Legislature to change the water law to permit expanded uses and/or new uses which have occurred or will occur prior to the final SRBA decree. However some Snake River water users challenged the new law in court and it was declared unconstitutional on all three of the issues brought forth by the challengers.

The Director and the court - not George Dovel - was responsible for the removal of the minor water usage by the four of us and I protest Mr. Lester not telling the truth to my neighbors.

Immediately following that May meeting with you, Mr. Lester and Mr. Berntsen, I met with Margaret Drake and told her the true story. Mrs. Drake is my friend and she advised me that she did not intend to deprive me of my irrigation water. Again I encourage Mr. Rumsey to follow through on his promise unless he's only willing to give away water that belongs to my crops rather than to his.

Notwithstanding the Payette River Basin Adjudication and other grandfather right claims, I have hard evidence that Porter Creek water has been applied beneficially on the Dovel Ranch continuously since approximately 1860.

The first person to file a water right on Porter Creek was John Applegate who filed a location notice for water appropriation on the ranch I presently own. In 1877 he sold the land, buildings, other improvements, cattle and water right to James DeGrouchy, an Englishman who made the second application for a homestead patent in this area. However because Mr. DeGrouchy did not obtain his U.S. citizenship until 1884, his patent was not granted until then (one year after the Faul patent for the homestead which is presently partly owned by Steve Dobson and Tom Oliver).

In 1902 Mr. DeGrouchy sold this ranch to Frank and Ida Prout along with "The oldest water right on Porter Creek" in a continuing chain of title that is also recorded in Idaho City. However in 1917 a lawsuit brought by a former owner of what is now the Double Diamond Ranch sued for the first water right on Porter Creek. The court awarded the water rights, not on the basis of when they were first located and used, but on when the homesteads were patented. That is how this ranch evolved as the #3 priority water right on Porter Creek.

The title to the property and water right transferred to the Federal Land Bank with a loan to

Mr. Prout and his sister, and then to Angel Madarieta's father and mother. Angel Madarieta later acquired the ranch, along with 13,000 acres elsewhere, and ultimately sold this ranch to my sister and me along with "the third water right on Porter Creek" for a price which was calculated to be \$1,500.00 per acre for the irrigated land. However, before the sale closed I learned that Mr. Madarieta had filed priority dates of 1908 and 1912 for the two irrigation rights based on misinformation provided by a neighbor. This changed our recommended Porter Creek irrigation priorities from #3 to #'s 6 and 7 because of other questionable filings which claimed earlier dates.

In March of 1982 my attorney, a former IDWR lawyer, and I contacted the Department and we were assured verbally that we would be given the opportunity to file corrected priority dates, as well as several minor rights which had been inadvertently omitted, in June of 1983. So we bought the ranch on that assurance. However when June of 1993 arrived the Department had decided not to allow another series of corrections to their recommendations so we were forced to petition the court for a redetermination of our water rights.

Typically slow, our petition was not heard until July of 1985 and both the Department and several local residents appeared in opposition to our petition for redetermination. One resident who had filed a Porter Creek water right despite having no ditch or diversion, warned me that I would be "opening a big can of worms" if I told the truth. And because Water Resource employees told Judge Doolittle that allowing more challenges would needlessly prolong the conclusion of the adjudication, he refused to hear our petition.

The following winter my sister and I testified at the final adjudication hearing and told Judge Doolittle that dropping the seasonal consumptive use limitation would permit radical expansions in historical water right usage. However the Deputy Attorney General representing the Department testified incorrectly that these acre-feet-per-acre annual limitations were still a part of the adjudication.

The adjudication decree ignored the painstaking field examination conducted by Senior Water Resource Agent Forrest Luthy and, instead, included false claims of current irrigation with Porter Creek water that had actually not occurred for as long as 31 years. It also included last minute changes to the Porter Creek adjudication work sheets based on exaggerated claims by new owners, reflecting more acres in the fields than actually exist. This, of course translated into illegal expansions as new lands were suddenly irrigated with the "extra" Porter Creek water that had been claimed but never used for nonexistent acres.

Instead of using their maximum permitted diversion of between 63 and 87 days out of each 271 day irrigation season as was permitted with the annual consumptive use limit, senior users began diverting the maximum daily amount every day of the season. With Mr. Lester's cooperation, they used the additional senior water to irrigate junior lands. Although the Department placed an annual consumptive use limitation equaling 63 days of maximum diversion on the expanded #2 priority water right, the seasonal limitation is meaningless because Mr. Lester refuses to allow the watermaster to measure it early in the season.

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About two years ago Mr. Lester prepared an expansion transfer for Double Diamond which would have permitted them to use #1 priority water on their #4 priority ground near the Brown's house on Porter Creek road as well as at their main ranch. It would also have permitted them to change their #15 priority to #4 so as to be senior to my water rights.

Without my protest, which has already cost me nearly \$15,000.00 in attorney fees, this expansion would have essentially eliminated the use of Porter Creek water by the other water users.

In my opinion, the IDWR, with the help of Mr. Lester, has gone to extremes to treat me unfairly in the administration of Porter Creek water. Regardless of how much it is denied, the truth is that ever since Mr. Lester took over the district neither he nor the watermaster have ever complied with a call from me for water unless it has been accompanied by a written request to either you or to the Director.

In fact Mr. Berntsen has ignored my historical use of water when the senior diversions are shut down to harvest crops or when they are pumping out of the river, and has advised me during two of the last three irrigation seasons that we will get no more water once we are shut off initially.

Mr. Lester has conducted several inspections on my property while accompanied by one or two other water users but has never contacted me personally except to leave two notes after the fact. Although he did contact you promptly concerning permission for me to plug the #1 headgate temporarily when their ditch washed out and damaged our alfalfa field, it required considerable persuasion on my part, which including listening to him impugn my integrity or my intelligence for explaining siltation in a ditch to him.

In my opinion any ten year old youngster who watches TV could have identified the beaver dam in the Double Diamond ditch by the tooth marks on the limbs or by the several small cottonwood trees along the ditch that had been freshly cut down by the animals. Yet despite the fact that Mr. Broom showed Mr. Lester the evidence, beavers are not specifically mentioned in his reports of the incident. Instead he chose to quote a Double Diamond employee's false claim that the ditch was dammed and destroyed by a local resident.

That is similar to his 1989 field inspection report wherein he claimed that there was no evidence of leakage through ground squirrel holes from the #2 priority ditch on the same day that I photographed several hundred gallons of water flowing out a dozen or more such holes in that ditch bank exactly where he inspected it.

Although Dobson /Oliver prevailed in that court action, Mr. Dobson has since admitted the damage caused by his ditch leakage to Mr. Broom's buildings and crops. He has also made a sincere effort to remedy the situation both by reimbursing Mr. Broom for lining the ditch in 1993 and by lining it himself in 1994. This has improved our relationship. However the Department still appears to be bending over backwards to keep from fulfilling

their legal obligation to declare a forfeiture of both the fictitious acres claimed by Double Diamond for their #1 priority water right, and for the 50 percent of that right which has not been used during the past ten years.

Following the initial hearing, overwhelming evidence of both the forfeiture of acres and the forfeiture of unused water was ignored in the proposed decision. Following appeal and a reopened hearing for Double Diamond's benefit, it was suggested by Mr. Eismann and agreed by all parties that the existing capacity of the Double Diamond pipeline distribution system would be measured by April 15, 1994 to satisfy the Department as to what that capacity has been in recent years.

Despite substantial repairs to the system by April 15th to improve its efficiency and capacity, it still would not distribute anywhere near the quantity of water claimed by Mr. Rumsey. But instead of requiring the measurements to be conducted as agreed upon, the Department permitted Double Diamond to spend an additional three weeks altering the pipeline to further increase its capacity by an additional 60 percent.

The measurements that were ultimately taken revealed only what the potential was for an improved system rather than the system capacity that has actually existed during the period of forfeiture.

Similarly, Mr. Lester's repeated recommendations to only measure the system waste from the Double Diamond overflow pipe at Jackass Creek in mid August when it is historically at its lowest for the season, rather than all season long, assures that the massive waste in June-July will not be "officially" measured by the Department.

I have spent considerable time and money accurately measuring and recording the losses in the two major Porter Creek irrigation systems since the 1989 irrigation season. I now have ample proof that approximately two-thirds of the Porter Creek water diverted during times of scarcity has not been applied beneficially. Less than that quantity of waste has been declared excessive in every one of the pertinent Idaho and western states court cases that we have researched.

The waste deprives not only me and other Porter Creek irrigators of water that has been available to us when these users historically switched to their efficient Payette River sources which do not waste water, but it also deprives all other junior downstream users on the Payette River of water that has been lawfully available for their use for many decades.

If using Porter Creek water when it becomes scarce saved the irrigators time and money there might be a valid argument for its continued use. However, in the case of Double Diamond's system, it has historically cost them more money to attempt to commingle Porter Creek and Payette River water without wasting several hundred additional gallons per minute, than it has to run the river pump efficiently from the sump containing only Payette River water.

It appears that your May 25, 1994 inspection and orientation was a waste of your time and mine. The #1 dam leakage has not been halted and the #2 leakage and overflow has not

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been repaired properly as you directed. Yesterday the watermaster once again locked the #2 headgate wide, open rather than adjust it properly which increases the dam leakage.

And despite the fact that Double Diamond's flowmeter at their #4/#15 diversion has never worked for an entire 24-hour period at any time since it was installed, and also in spite of the fact that the watermaster has received repeated instruction not to divert water there unless a proper working measuring device is installed, Mr. Berntsen also locked their headgate in the fully open position permitting more than 60 inches to flow through a separated pipeline for the past 24 hours without measurement.

Porter Creek and Shafer Creek water are apparently being commingled as occurred last season but this is of no consequence due to the relatively small quantity being diverted. This morning the diversions were #4/#15 - gauge inoperative, estimate 1.2 cfs; #1 - .898 cfs; #2 - 1.04 cfs; #5 - .05 cfs; flow downstream past #5 - .15 cfs.

With only 3.34 cfs of water available in Porter Creek this morning it is appropriate that our irrigation be shut down providing the water will be applied beneficially to senior right lands with only reasonable waste. However because of the quantity that is presently being wasted, including the flow past my house, I herewith repeat my request for .04 cfs to be delivered to me, and for the rest of the water to be distributed in accordance with the guidelines that have already been established by the Department.

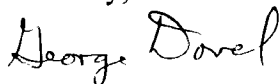
This includes releasing available Porter Creek water to us later in the season as has occurred historically when it is not being utilized by the holders of senior water rights .

The Idaho Constitution and the Idaho Code require that Idaho's water policy of obtaining the maximum benefit from the resource, which belongs to all of us, be adhered to by the Department. In the Porter Creek area that translates into irrigation of the maximum number of acres commensurate with the available water supply from all sources and using the Idaho Code and case law as guidelines.

Unless I see a sincere effort on the Department's part to do so, rather than paying lip service to the concept while permitting most of the water to be wasted, I plan to redirect my efforts so as to inform Snake River Basin irrigators, Idaho legislators and the future Governor and Attorney General about how poorly our water resource is being managed in this area.

I herewith submit this letter for inclusion in the record as part of the Water District 65-B file, without the requirement for additional creative excuses in response. Again please accept my sincere thanks for your personal efforts on behalf of good resource management.

Sincerely,



George Dovel

CLT: IDWR Director Higginson

Atty. Richard Eismann