

COPY

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August 10, 1994

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

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AUG 12 1994
Department of Water Resources

Re: Request for lawful delivery of Porter Creek water

DELIVERED BY FACSIMILE

Dear Mr. Tuthill:

I am in receipt of the August 5, 1994 letter, written by Water Rights Supervisor Steve Lester at your request, in response to my July 29, 1994 written and oral requests (A) for permission to deliver up to .02 cfs of stockwater for Arlie Woods' right no. 65-10771 through the valve at the end of said pipeline in accordance with the Dovel/Wallace/Woods agreement executed March 31, 1983, and (B) for the continued delivery of a maximum of .04 cfs of water to the #6/7 priority pipeline for irrigation, stockwater and fire protection.

A. Delivery of Woods stockwater from the Dovel pipeline.

The claim in Mr. Lester's letter that the Department cannot authorize the Woods 65-10771 stockwater to be delivered from the Dovel 65-10950 pipeline unless Mr. Woods first files a formal application (accompanied by a \$100 fee) to add a point of diversion to his water right ignores the following facts:

1. The Dovel 65-10950 water right is permitted by the Payette River Basin Decree to divert water from either the NWSE of Sec. 12 or the SWNW of Sec. 7. Permitting the Woods stockwater to be delivered only from the lower Sec. 12 Dovel/Woods diversion assures that several inches of water will be wasted from transpiration losses flowing down Porter Creek in order to reach the lower diversion, and several more inches of water will be unlawfully wasted in the leaky Woods ditch in order for even one inch of stockwater to reach the legal place of beneficial use.
2. Mr. Woods historically received his one inch of stockwater at the Ross and Fern Woods residence only when I or my predecessor permitted a small quantity of overflow to flow into the roadside ditch a short distance above the house. The delivery of more than .02 cfs (one inch) of Porter Creek water for stockwater purposes to be used under decreed right no. 65-10771 in the SESE of Sec. 12 is a violation of the Idaho Code since it exceeds the maximum decreed stockwater diversion.
3. While the Director (Department) does not have legal authority to change the quantity of water specified for diversion under any decreed water right, he was recently given

the authority under I.C. Sec. 42-222A to designate a drought emergency area for approval by the governor. The Director then has full authority to temporarily change the point of diversion, place of use and even the purpose of the diversion following an application accompanied by only a fifty dollar (\$50.00) fee.

The claim that Mr. Woods must file an application for a permanent additional point of diversion in order to receive the stockwater is, therefore, not accurate. Such an application would also violate the terms of the aforementioned March, 1983 agreement and would work an unnecessary hardship and expense on both of the parties involved.

B. Out-of-priority shutdown of the Dovel #6/7 priority pipeline headgate.

1. On July 30, 1994, District 65-B watermaster Hank Berntsen advised me that both Mr. Lester and you had instructed him to close and lock our #6/7 headgate and deliver all of the available water in Porter Creek to the #4 and #5 priority diversions.

According to Mr. Berntsen, this instruction was apparently based on the following premises: (a) that all other senior priority Porter Creek water users did not want any of the water; (b) that Double Diamond could use all of the available water in Porter Creek through their #4/15 pipeline for their #4 priority lands; (c) that Double Diamond had requested the watermaster to open their #4/15 headgate wide open, yet had agreed to divert only that quantity which would also permit five inches (.10 cfs) of water to flow out the overflow pipe and flow on down Porter Creek to be utilized by Arlie Woods as his one-inch maximum #5 priority stockwater right; and (4) that the watermaster could somehow regulate the flow in the creek so that Mr. Woods' #5 priority would receive water but that my #6 priority would not.

When my pipeline headgate was closed and locked on the evening of July 30, 1994, water was still leaking down Porter Creek past the Double Diamond #1 and Arlie Woods #5 priority diversion dams, and the dam at my #11 priority diversion was full and overflowing. The watermaster advised me then that I was welcome to use the water from that diversion but said he could not divert any water into the pipeline.

This instruction to the watermaster to lock our headgate in the closed position so that we could not receive any of our decreed domestic, irrigation or stockwater through our efficient pipeline system but must, instead, dip it with a bucket or reinstall a pump in the creek, was a direct reversal of your recent ruling (i.e. that so long as unused water was flowing down Porter Creek, I, as holder of the next senior water right, was entitled to receive that quantity of water through my #6 pipeline rather than from my #11 diversion near my house).

When the watermaster also closed the #1 priority headgate and locked the #4/15 headgate in the fully open position, this caused much of the water to flow down Porter Creek and be wasted since Double Diamond either could not use or did not choose to use all of the available water on their #4 priority lands.

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When this water continued to flow into the Payette River around the clock for two days, Mr. Woods complained to the watermaster that he was not receiving irrigation water at his house. An agreement was reached whereby Double Diamond would request all of the excess water flowing past the #4/15 and #6/7 diversion to be diverted through their #1 priority headgate for use by Mr. Woods and other former courtesy water users, and these users were promptly notified of the turn-in by a Double Diamond representative.

As soon as the #1/#9 headgate was locked in the full open position, Mr. Woods resumed flood irrigation of his yard, his orchard and his pasture which has no domestic right and has only the #9 priority irrigation rate for a maximum diversion at the headgate of .07 cfs (3-1/2 inches). A running current of "return" water has been visible flowing down one side of the Woods' alfalfa field into the roadside ditch for the past eight days and I consider this an excessive waste of water, especially when my senior #6 priority diversion has been shut down.

I have not objected to this unlawful out-of-priority diversion except to point out to the watermaster that water must reach the Double Diamond pipeline at Jackass Creek and be used beneficially in order for the diversion to be lawful. I am very concerned that Margaret Drake would be deprived of any source of domestic water at her house if the water in the Double Diamond ditch were shut off completely since her spring is obviously supplied by seepage from the Double Diamond ditch at Little Jackass Creek.

Mrs. Drake was forced to haul several water truck loads to supply her domestic needs when the #1 ditch was dried up earlier and she is presently able to run only two tiny lawn sprinklers early in the morning, then only one, and then none by afternoon as the seepage disappears. She has graciously offered me the use of her tanker to irrigate my garden once the vehicle returns from the forest fires but I have been forced to equip my pickup truck with a 500 gallon tank and haul water to reduce the damage to my garden and fruit trees.

Mr. Lester's claim that so-called "shots" of water diverted through the #1 priority headgate may be legal reason for the shut-down of the tiny quantity of water I was using legally from the #6 pipeline is typical of the far fetched excuses offered by the Department to attempt to justify their failure to deliver water to me in order of priority as required by the Idaho Code.

During the past eight days I have observed Porter Creek water reaching the Double Diamond pipeline at Jackass Creek only one time and most or all of it was wasting out the overflow then. The remainder of my inspections have revealed a ditch that is either slightly damp or completely dry, indicating that no water has reached that spot within the preceding 24 hours.

I am not formally objecting to this delivery of courtesy water by the watermaster but I insist that my request for delivery of a maximum of .04 cfs (2 inches) of irrigation and stockwater into my #6 priority pipeline also be honored. With the worst fire conditions in a decade Porter Creek residents are sitting on a tinder box that is ready to explode. A bona fide drought emergency obviously exists and, with no water, a quick response to fire is impossible.

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I also suggest that the headgate permitting water to flow down Little Jackass Creek be unlocked so that Mrs. Drake can utilize the water beneficially rather than see it wasted in the remaining 3,000 feet of porous Double Diamond ditch between the headgate and Jackass Creek. If it becomes necessary for either Mrs. Drake or me to file an application for temporary change in point of diversion and place of use as provided in I.C. Sec. 42-222A, I hereby agree to pay the appropriate filing fees.

The claim by Mr. Lester that, "Watering of natural vegetation (by Marty Broom) near the hay barn (with a single lawn sprinkler) is not a valid use of the right," is one more example of the extreme double standard used by Mr. Lester and the Department in administering the Dovel water rights versus the other Porter Creek waterusers' rights.

In times of water scarcity Double Diamond is permitted to water "natural vegetation" with their #1 Porter Creek priority in a horse pasture and lawns adjacent to a house, and they are even permitted to water crops with a wheel line in the SESE of Sec. 23 with Porter Creek water despite the fact that this land has no Porter Creek water right.

Mr. Woods is permitted to divert up to twelve times the maximum allowable stockwater diversion under his #5 priority and to use all of the water for domestic irrigation at residences down Porter Creek despite the fact that there is no domestic right to justify such use. Until July 30, 1994, there were no cattle at that location yet water was diverted and used for domestic irrigation there. At the same time four times the quantity of his #9 right was also diverted to irrigate his yards, pasture and orchards on the "Cemetery Road" in the guise that it was a "transfer of the stockwater right from the #5 location."

Similarly, the ongoing diversion of uncontrolled quantities of water to the #9 irrigation priority and to other non decreed domestic uses, while my lawful request for 2 inches of water to provide critical stockwater under my #6 priority is ignored, is a violation of the Idaho Code.

In the absence of my attorney, Richard Eismann, who is on vacation, please consider this to be a formal request for the delivery of .04 cfs of water through my #6/7 priority headgate. As you are aware, I have a legal responsibility to mitigate the potential damage from fire under unusual conditions, just as the other Porter Creek waterusers are doing.

If my request for the two inches of water in my pipeline is denied, please also consider this a formal request for a prompt written response giving valid and lawful reasons why the request was denied, and including the names and titles of every individual who was responsible for said refusal to deliver that quantity of water in accordance with the priority established in the Payette River Basin Adjudication.

Thank you for your prompt attention.

Sincerely,

George Dovel
CLT - IDWR State Office, R.B. Eismann, concerned waterusers