COPY

Route 1, Box 61
Horseshoe Bend, ID 83629
Phone or fax (208)793-2768

RFA WCY Norm PJZ Phil

RECEIVED
AUG 30 1994
Department of Water Resources

Scott SK

August 29, 1994

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

Re: Third written request for lawful delivery of Porter Creek water

Dear Mr. Tuthill:

I have received and read your August 24, 1994 letter responding to my request for lawful delivery of Porter Creek water by the District 65-B watermaster. I appreciate your honesty in accepting responsibility for the ongoing unlawful removal of water from my #6/7/11 priority Porter Creek water rights in order to supply excessive quantities of water to the Woods #9 priority right (and to other users with no Porter Creek water rights).

However some of the explanations which appear to attempt to justify this unlawful removal of water from me are either incomplete or inaccurate and I shall attempt to correct them herein. Also, written directives from you in this letter are confusing since they conflict with previous written and oral instructions from your office, and constitute a double standard in the delivery of water to different Porter Creek waterusers.

This letter will also contain examples of this double standard which, in my opinion, constitute a violation of pertinent sections of the Idaho Code and of my guarantee in the Idaho Constitution of equal treatment.

**1. Double Diamond's demand for "all water in the creek"** (for the #4 right), **except enough flow to satisfy the downstream no. 5 priority water right held by Mr. Woods, was improper.**

While watermaster compliance with such a request may seem theoretically possible to an attorney or other inexperienced person who is ignorant of both stream flows and sprinkler irrigation, it presupposes that Double Diamond can and will legally divert and apply, with reasonable losses, exactly all of the minimum available water in the creek on a daily basis to its #4 priority lands, except for a specific number of inches permitted to flow on downstream to be utilized by the Woods #5 priority lands.

However, even a novice pipe changer knows that it is not feasible to attempt to utilize more water by running part of a line since the field cannot receive proper coverage that way, even if the extra pipes were available and could somehow be added to extra risers and valves, or elbows. The quantity of water utilized by Double Diamond in the two irrigation lines to irrigate their #4 lands varied with each pipe change and was never equal to the lowest available water supply in the creek.

As I reported in my August 10, 1994 letter to you, the surplus water not used at the #4 and #5 diversions, during even the lowest daily flow period, was simply wasted into the Payette River instead of being diverted to my #6 priority as I requested on July 28, 29, and 30, 1994.

Permitting Double Diamond to dictate that my next-in-line #6 priority lands may not receive any surplus Porter Creek water violates the intent of watermaster delivery. Permitting even diurnal surplus water to be used only on the #5 and #9 priority, with the rest of it deliberately wasted, ignores the Department's and the watermaster's responsibility to deliver the water in order of priority until all of it is used to fill existing lawful requests.

**2. My two day old request for water was ignored and, instead, water was delivered out of priority.**

Two days after my shutdown, the watermaster corrected the excessive waste of Porter Creek water into the river. But instead of honoring my two day old request for 2 inches of water at my #6 headgate, he chose to deliver all of the surplus water to Mr. Woods' #9 priority lands and to the other so-called "courtesy" users.

The flimsy claim that, because a tiny quantity of water may have actually reached the Double Diamond #1 distribution box for a few minutes once every few days, it somehow constituted lawful beneficial use on the #1 priority lands, has no legal precedent and is not valid. Yet it has been used for nearly a month as an excuse to justify the ongoing unlawful diversion of "courtesy" water and excessive water diversion to the #9 priority while my #6 priority has been shut down.

Mr. Lester's claim, in his August 5, 1994 letter, that so-called "shots" of water are acceptable has no basis in law or precedent, especially since the water was used out-of-priority.

**3. The claim that I did not honor water district protocol is not true.**

It is true that the watermaster has not heard from me in two weeks, except for a memo I mailed to him on August 18, 1994 (see copy enclosed) along with a copy of my August 18, 1994 letter to Director Higginson repeating my request for delivery of 2 inches of water. However, as hereinabove stated, I made exactly that same request for delivery of 2 inches in my #6 priority pipeline directly to the watermaster on July 28, and 30, 1994.

On July 30, 1994, I (a) asked Mr. Berntsen for two inches of water whenever it was not being used by the #5 priority; (b) thanked him for notifying me of the shutdown before my pipeline emptied and expressed my concern to him that my pipeline be kept full whenever any surplus water was available; (c) reminded him that I was entitled to receive the two inches of water I had requested whenever water was in the #1 priority ditch yet not reaching the place of beneficial use; and (d) advised him that I would continue to process my request for the two inches of water directly to the Western Region office.

I am not aware of any policy or directions from you or Mr. Lester requiring me to repeat a request for water to the watermaster on a daily basis. Under the foregoing circumstances repetition of my request would be redundant, would not seem logical, and would simply constitute undue harassment of the watermaster. However, as mentioned above, I did send Mr. Berntsen both a memo and a copy of the 8/18/94 letter as a courtesy to keep him informed of my ongoing efforts.

**4. Water delivery is not restricted through the #4/15 headgate, the #5 headgate, the #9 headgate, or the uncontrolled upstream diversions. Yet my water delivery is restricted in favor of every other Porter Creek diversion, whether senior to or junior to mine in order of priority.**

The "second class" nature of water deliveries only to my specific headgate has continued throughout this entire irrigation season despite your on site instructions to the watermaster that my water rights are just as valid as any other Porter Creek right, and that I am entitled to delivery of the quantity of water I request whenever it is available and not being used by a senior right holder.

When the #4/15 and #6/7 diversion dam was improperly sealed earlier this season and Double Diamond was irrigating both #4 lands and #15 lands, Mr. Berntsen opened the #4/15 headgate wide open yet refused to open my #6 headgate more than four turns until we sealed the dam "because it might limit the quantity being diverted by Double Diamond." This was in spite of the fact that 40 percent of the water diverted by Double Diamond was being applied to lands with a priority junior to mine.

For the past four weeks, Double Diamond's #4/15 headgate has still been locked wide open permitting them to divert in excess of their #4 water right if it is available and if they choose to do so. In addition, up to thirty inches of water has been permitted to flow downstream and thence through another headgate locked wide open to supply Mr. Woods' 3-1/2 inch #9 priority right (less the five inches or so that leaks through the #1/#9 diversion dam even when no water is backed up behind said dam, and which is permitted to flow through the #5 headgate).

Your ruling that surplus water will be permitted to flow down Porter Creek in sufficient quantity to satisfy Mr. Woods #5 right and your failure to instruct the watermaster to let surplus water in the #1/#9 ditch flow on down the creek to reach my #7 or #11 priority diversions is another example of the inconsistency in administering the two rights.

If the headgates were adjusted properly Mr. Woods' #9 priority diversion would receive the maximum of 3-1/2 inches to which he is lawfully entitled instead of the 10-20 inches he has been receiving for most of every day. Much of this excess water would then flow on downstream and could at least be utilized legally at my diversion near my house.

Mr. Woods is not entitled to the extra 15 or so inches of water he is receiving that I am entitled to receive. We both know that his headgate is left wide open because a 3-1/2 inch diversion will not reach his property, and because his request for nonexistent domestic water right use is honored while my request for a decreed domestic water right use is denied.

I'm sure you also realize that if the #1/#9 headgate were adjusted properly or closed entirely, the resulting head would again increase the leakage through the #1 diversion dam.

**5. The claim that a two inch diversion into my pipeline would require constant monitoring is both illogical and inaccurate.**

I fail to understand why, with diurnal creek flow fluctuations, the diversion of a maximum of two inches into my pipeline would require "constant monitoring" yet the delivery of five or more inches at the same location to Mr. Woods' downstream headgate does not. Until I receive a valid answer to that question I shall continue to consider this as simply one more example of the double standard being applied to my water rights.

It has been painstaking established, and Mr. Berntsen is aware, that when my headgate is opened only exactly 2-3/4 turns (which is only a tiny 1/16" slit) and Double Diamond's headgate is wide open, a reduced head in the joint diversion box does not deprive Double Diamond of any water.

However it does deprive me of the 2 inches because there is insufficient head then to force water through the tiny opening in my headgate. This is the same circumstance that would exist if my diversion were a few feet downstream from the Double Diamond #4/15 diversion.

**6. The watermaster has failed to re-fill my pipeline when surplus water is available during his regularly scheduled visits.**

Even if the claim that my pipeline must be monitored were valid, I do not understand why the watermaster has not taken the time to refill my pipeline, as per my request, during his regularly scheduled visits to the district when surplus water has been available. During each day I see at least 20 inches of water flowing out the overflow pipe at my diversion until afternoon, and I am entitled to receive all but the #5 diversion into my pipeline at that time.

Earlier, when water was also scarce, Mr. Berntsen was delivering five inches of #9 water to Mr. Woods through the #1 headgate as "a temporary transfer of the #5 stock water right." He knew that the five inches would not reach Mr. Woods' property so he took the time to open the #1 headgate wide each day for a few minutes to send a surge of water down the ditch. If a double standard does not exist why does he not spend a few minutes doing exactly that same thing to my pipeline?

**7. In your letter you have ignored the stated purpose of my call for .04 cfs of irrigation and stockwater and have also applied a double standard concerning my use of domestic water which has a decreed water right, versus Mr. Woods' use of domestic water at two different locations, neither of which have a valid domestic water right.**

In the paragraph on page 3 of your August 24, 1994 letter entitled "Priorities Within the Dovel Pipeline", you write, "It has been our understanding that the primary use of the 0.04 cfs which you are requesting is the watering of your garden," and you go on to claim that such water use is junior to Mr. Woods' #9 priority use.

You fail to state how you arrived at this understanding which is absolutely false and which constitutes an implied charge that I have not told the truth in my letters.

My call for .04 cfs of water through my #6 priority pipeline was clearly identified verbally to Mr. Lester on July 29, 1994, verbally to Mr. Berntsen on July 30, 1994, in my letter to you dated August 10, 1994 and in my letter to Mr. Higginson dated August 18, 1994 as, "water to the #6/7 priority pipeline for irrigation, stockwater and fire protection."

I also explained in detail in my letter to you that I was using a 500 gallon tank to haul water for my garden and fruit trees (domestic use) but that I was requesting the .04 cfs for irrigation (of my pasture and separate orchard which is not part of my domestic area) and for stockwater and fire protection (see para 4 page 3 and para 1 page 1).

On August 18, 1994, Mr. Broom asked me to repeat my written request to the department for stockwater since my 500 gallon tank is contaminated with lead and cannot be used for stockwater, and because he is forced to spend many unnecessary hours hauling stockwater nearly a half mile in cans from the well at his home. At the same time, 15 or more inches of Porter Creek water is being diverted solely for domestic use by Mr. Woods at his house.

None of that water has been used to irrigate the 3-1/2 acre alfalfa field which is the only ground covered by his #9 priority irrigation right, a fact that is instantly verified by comparing the dried up 3-1/2 acre field with the lush green of his yards and fruit trees by his house. Yet the watermaster, and you as his supervisor, permit this unlawful domestic diversion to continue in the guise that it is a legitimate delivery of his #9 irrigation right while my lawful irrigation of two acres of field no. 5 with a valid #6 priority irrigation right and the coincidental use of stockwater is denied.

Whoever gave you the false impression that I planned to use the .04 cfs primarily to water my garden apparently neglected to consider that the maximum daily consumption of water in my garden is about 250 gallons, or slightly less than two percent of .04 cfs. The double standard you have applied to Mr. Woods' *known* use of two irrigation rights for domestic irrigation versus my *alleged* intended use of an irrigation right for domestic irrigation cannot be denied.

**8. Both you and the Department have also used a double standard to interpret the quantity of water Mr. Woods is entitled to divert per acre versus the quantity of water that I and other waterusers are entitled to divert per acre.**

On page 1 of the very same letter in which you deny me the right to use my #6 irrigation right for domestic irrigation of lawn or garden, you state that Mr. Woods uses #5 irrigation water to irrigate his lawn around his (other) home. Then you conclude that since he is using this #5 irrigation right to irrigate his lawn, he is entitled to divert the entire .32 cfs #5 priority irrigation right during irrigation season solely for lawn watering and stockwater.

Following that line of reasoning I should be entitled to divert my entire #6/7 irrigation right of 2.45 cfs solely to irrigate my lawn and water livestock, before any water is allowed to Mr. Woods' #9 diversion for any purpose.

You are aware, from unrefuted sworn testimony presented in your presence during a January 10, 1989 hearing, that no water has been conveyed to the eight acres decreed as #5 priority right no. 65-10771 to Arlie Woods at least since the conveyance ditch was obliterated in 1954. And you have admitted in your letter that Mr. Woods uses this right for domestic irrigation purposes to irrigate the lawns adjacent to the house which, unlike my house, is not even in the same section as his decreed irrigation and stockwater rights.

You should also be aware that the #5 irrigation right was decreed for a maximum diversion of .32 cfs to irrigate eight (8) acres which established a duty of water of .04 cfs maximum per acre irrigated for that diversion. Yet, without due process to legally change the decree, you claim that Mr. Woods can legally divert .32 cfs to irrigate only less than one acre, thereby increasing the duty of water adjudicated in the decree by eight hundred percent.

During this same period the Department and your office have insisted in writing that both I and Double Diamond are only entitled to divert .02 cfs per acre, or portion thereof, <u>that is actually irrigated</u>. In fact you have reduced Double Diamond's maximum allowable diversion for three successive years to correspond to the actual number of acres being irrigated times .02 cfs per acre.

I suspect that the DAG's response to this would be to claim that Mr. Woods has more acres "available" to irrigate in the same quarter quarter. But so do I. The difference is that Mr. Woods has had no conveyance system to transport the water to those eight acres for the past forty years, thereby providing no merit for such a claim.

It is my contention that the .02-.04 cfs permitted for domestic irrigation was never intended to be a separate right from other irrigation except (a) to identify a secondary source and use of water such as the Madarietas' relatively recent pumping of water out of the creek near their house; (b) to establish a standard maximum quantity of water which may be diverted by water users solely to irrigate their yard and garden; and (c) to identify domestic irrigation, including fire protection, as having a year round priority which was considered to be superior in priority to all other water uses.

For these reasons most irrigators who asked, including me, were told that it was not necessary to file a separate right in the Payette River Basin Adjudication for domestic irrigation or stock water use so long as we always used water from the same source and same points of diversion as was used to irrigate our other lands. I am not familiar with any statute or case law in the western states which prohibits the diversion of either irrigation or domestic water via any single one of several established easements to a place of beneficial use having the same legal description.

But even if the Department changes its perpective once again to interpret an irrigation water right to include domestic irrigation, both that use and stockwater use are specifically limited by both the maximum decreed diversion rate of .02 cfs at any given time, and by the maximum decreed annual consumptive use of 1.20 AFA for irrigation and .70 AFA for stockwater. This consumptive use limit in the decree allows that <u>maximum</u> of one inch to be diverted only for very brief periods.

I know of no section in the Idaho Code, including the recently enacted Sec. 42-222A, which permits the Director, or you or the DAG as his representatives, to arbitrarily increase either the maximum decreed diversion volume or the maximum decreed annual consumptive use of any water right.

While I appreciate your sending me the Temporary Change Application and the Application For Transfer of a Water Right, I am not inclined to execute these forms for myself at this time until you correct the unlawful removal of .04 cfs of water from my #6 priority to be wasted and/or misused by junior or nonexistent priorities. I doubt that Mr. Woods is interested in filing a transfer so long as you continue to provide him with as much water as he wants in two separate locations, for whatever purpose he chooses to use it, regardless of decreed priority or volume.

Finally, I take this opportunity to again emphasize the hardship that exists to Mr. Broom and his livestock as well as the extreme fire danger that still exists and which creates the necessity for having my pipeline full to be able to fight fire instantly. Please also consider this a formal request to the Department and to the watermaster to promptly fill my #6 irrigation pipeline from the daily surplus of Porter Creek water that is not being diverted to the #4 and #5 priority headgates, regardless of your ruling on other issues I have discussed.

I respectfully request that you consider my suggestions herein which will not deprive the #4 priority diversion of any water they might otherwise put to lawful beneficial use. If you feel that these issues can be better addressed with a personal conference at your office, I shall be happy to attend on short notice by telephone. Thank you for your prompt consideration of my requests.

Sincerely,

George Dovel
CLT - Watermaster Hank Berntsen, IDWR State Office, Richard Eismann

COPY

# Memorandum

**To:** Hank Berntsen
**From:** George Dovel
**Date:** August 18, 1994
**Subject:** Request for water delivery

Since #4, #5, and Arlie's #9 water rights plus the other courtesy users are all receiving Porter Creek water, I have requested 2 inches for my pipeline which is almost empty. This will let Marty continue to water his cattle and pigs, and provide me some emergency fire protection.

COPY

# Memorandum

**To**: Hank Berntsen
**From**: George Dovel
**Date**: August 29, 1994
**Subject**: Request for water delivery

Please fill my pipeline with some of the surplus water that is available around mid day each day as soon as possible.

In order to prevent misunderstanding, I am also repeating my request for up to 2 inches (.04 cfs) of irrigation/stockwater and water for fire protection to be delivered into my pipeline at my #6 priority headgate. The enclosed copy of my 8/29/94 to Mr. Tuthill will explain my reasons for repeating this request to you.

Thank you.