



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

March 31, 2008

Erma Banks
3229 Banks Rd
Bancroft, ID 83217

Re: Order Denying Petition for Reconsideration Regarding Idaho Department of Water Resources' Order Requiring Measuring Devices and Controlling Works on Diversions from Toponce Creek dated February 27, 2008

Dear Ms. Banks,

The Idaho Department of Water Resources (Department) received your correspondence dated March 7, 2008 asking for reconsideration of the February 27, 2008 Department order requiring measuring devices and controlling works on diversions from Toponce Creek. The Department received your correspondence on March 12, 2008. The Department has issued the enclosed **Order Denying Petition for Reconsideration** pursuant to section 67-5243, Idaho Code. **This preliminary order can and will become a final order without further action of the Department unless a party petitions for reconsideration or files an exception and/or brief as described in the enclosed information sheet.**

Regards,

Tim Luke
Manager, Water Distribution

Cc: Steve Hebdon, Water District 29 Watermaster
Portneuf-Marsh Valley Canal Co.
Ernie Carlsen, IDWR Eastern Region
Cindy Bird, IDWR Soda Springs Field Office

BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE

STATE OF IDAHO

IN THE MATTER OF REQUIRING)
MEASURING DEVICES AND)
CONTROLLING WORKS ON TOPONCE)
CREEK, TRIBUTARY TO PORTNEUF)
RIVER, WATER DISTRICT 29)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

This matter having come before the Department of Water Resources (Department) as a petition to reconsider the Department's Preliminary Order Requiring Measuring Devices and Controlling Works on Toponce Creek, Tributary to Portneuf River, Water District 29 (hereinafter referred to as the "Order"), dated February 27, 2008, the Department finds, concludes, and orders:

FINDINGS OF FACT

1. The Department issued the Order as a preliminary order pursuant to Idaho Code § 67-5243 and Rule 730 of the Department's Rules of Procedure (IDAPA 37.01.01.730).

2. Idaho Code § Section 67-5243(3) provides in pertinent part as follows:

Unless otherwise provided by statute or rule, any party may file a motion for reconsideration of a recommended order or a preliminary order within fourteen (14) days of the issuance of that order. The presiding officer shall render a written order disposing of the petition.

3. Idaho Code § 42-1701A(3) provides as follows:

Unless the right to a hearing before the director or the water resource board is otherwise provided by statute, any person aggrieved by any action of the director, including any decision, determination, order or other action, including action upon any application for a permit, license, certificate, approval, registration, or similar form of permission required by law to be issued by the director, who is aggrieved by the action of the director, and who has not previously been afforded an opportunity for a hearing on the matter shall be entitled to a hearing before the director to contest the action. The person shall file with the director, within fifteen (15) days after receipt of written notice of the action issued by the director, or receipt of actual notice, a written petition stating the grounds for contesting the action by the director and requesting a hearing. The director shall give such

notice of the petition as is necessary to provide other affected persons an opportunity to participate in the proceeding. The hearing shall be held and conducted in accordance with the provisions of subsections (1) and (2) of this section. Judicial review of any final order of the director issued following the hearing shall be had pursuant to subsection (4) of this section.

4. On March 12, 2008, the Department received correspondence from Erma Banks dated March 7, 2008, asking for reconsideration of the Order. The petition did not specifically request what action the Department should take but did ask the Department to understand that Mrs. Banks' water right from Toponce Creek is stored in Chesterfield Reservoir and then re-diverted via a siphon pipe from the reservoir.

5. Erma Banks is the holder of water right no. 29-94B, which authorizes the diversion of water from Toponce Creek with points of injection to and re-diversion from the Portneuf River. The Department understands that the point of diversion for right 29-94B is the Feeder Canal off of Toponce Creek that diverts water from the Creek to the Chesterfield Reservoir, which is owned and operated by the Portneuf-Marsh Valley Canal Company. The Department further understands that the location of the point of injection under right 29-94-B is at the Portneuf River within the Chesterfield Reservoir, and that the location of the point of re-diversion is the siphon pipe referenced in Mrs. Banks' correspondence dated March 7, 2008. The Department understands therefore that Mrs. Banks is the recipient of water from Chesterfield Reservoir via the siphon pipe.

6. Although other water rights from Toponce Creek are diverted through the Feeder Canal, including the storage water rights owned by the Portneuf-Marsh Valley Canal Company, and while the Feeder Canal may primarily be operated and maintained by the Portneuf-Marsh Valley Canal Company, other Toponce Creek right holders who divert their water and/or benefit from water delivered through the Feeder Canal bear at least some proportional responsibility for the installation of controlling works and measuring devices on the Feeder Canal.

CONCLUSIONS OF LAW

1. The petitioner has not provided adequate information to show that the Order is in error.


2. The Department should deny the petition for reconsideration of the Order pursuant to Idaho Code § 67-5243(3).

3. Idaho Code § 42-1701A(3) entitles the right holder to a hearing before the Department.

ORDER

IT IS HEREBY ORDERED that the petition for reconsideration of the Preliminary Order Requiring Measuring Devices and Controlling Works on Toponce Creek, Tributary to Portneuf River, Water District 29, is **DENIED** pursuant to Idaho Code § 67-5243(3).

Dated this 31st day of March, 2008.


GARY SPACKMAN
Administrator, Water Management Division