



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

June 8, 2009

Allen and Max Kay
PO Box 44
Swanlake, ID 83281

Registered and Regular Mail

Re: Diversion of Water from Marsh Creek, Water Rights 29-350 and 29-352

Dear Gentlemen,

Our office recently received several inquiries regarding your diversion and use of water from Marsh Creek near Red Rock Pass. Specifically, concern has been expressed about potential diversion of water from the creek in excess of the amount authorized under your water rights. The matter was raised by several downstream users in part because a significant amount of water was being diverted out of the Marsh Creek drainage, and into the Swan Lake and Bear River drainages. Records on file at the Idaho Department of Water Resources (Department or IDWR) show that you own two water rights from Marsh Creek, 29-350 and 29-352, both bear a priority date of August 1, 1865. The two rights combined allow for a total rate of diversion under your authorized points of diversion for two cubic feet per second (2 cfs). The authorized place of use under the rights includes some lands located within the Swan Lake drainage.

On June 2, 2009, Department staff inspected the point of diversion from Marsh Creek that conveys water to the lands in the Swan Lake drainage. Staff attempted to contact you both the day before, and the day of the site visit, but was not successful in reaching you. Staff found culverts on the creek and your ditch diversion with accommodations for a sliding head gate on each but no gates were in place on the culverts. Both culverts were washed out. Staff estimated that significantly more than 2 cfs was being diverted to the ditch. Additionally, the place of use in which the water was conveyed had several inches of standing water through much of the field.

The purpose of this letter is to advise you of the Department's recent site visit to your Marsh Creek diversion that delivers water to your lands in the Swan Lake drainage. The Department also wishes to advise you of our finding regarding your diversion of water from the creek in excess of that amount authorized by your water rights. The Department hereby requests that you immediately limit your diversion to the 2.0 cfs authorized by your rights, and that you immediately fix your diversion and head gate structure to prevent further excess water use. We trust that you will endeavor to be cooperative in making the necessary repairs to your diversion.

The Department understands and respects the fact that your Marsh Creek water rights share the most senior priority date on the creek. However, it is important that all rights are used within their legal limits so that the resource can be allocated for the greatest good of all water appropriators. Normally, public or water user inquiries such as the ones we received would be

referred to a local water district watermaster for investigation and resolution. Although a water district exists for Marsh Creek, the district has been inactive for many years and there has been no effort among the users in the drainage to make the district operational. Given the current inactive status of the district, the fact that the rights in the Marsh Creek drainage and the Portneuf River Basin have been decreed in the SRBA, and the fact that the Department is currently in the process of creating a new water district in the lower Portneuf River drainage, IDWR believes that the time is appropriate for the district to become active and functional no later than the 2010 irrigation season.

If you have questions or concerns regarding this matter, please contact me directly at (208) 287-4959, or either Ernie Carlsen or Dennis Dunn at our Idaho Falls regional office at (208)-525-7161.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Luke".

Tim Luke
Water Distribution Section

Cc: Ernie Carlsen, IDWR Eastern Region
Dennis Dunn, IDWR Eastern Region