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Department of Water Resources
Southern Region

January 07, 2000

STATE OF IDAHO
IDAHO DEPARTMENT OF WATER RESOURCES
1341 FILLMORE STREET, SUITE 200
TWIN FALLS, IDAHO 83301
ATTN: ALLEN MERRITT

SUBJECT: SECOND REQUEST, CEASE AND DESIST ORDER
RE: U.S. FOREST SERVICE- ILLEGAL HOWELL CREEK DIVERSION

ALLEN,

This is a follow up to my documentation dated and submitted to your office November 17,1999 and our telephone conversation as of November 22,1999 along with data Faxed from IDAHO DEPARTMENT OF WATER RESOURCES (your office). After reviewing the documentation that was sent to Water District #45-F I am very confused by your reply for the following reasons.

1. Your statement that nothing can be done until after the Adjudication Hearing (SRBA) dealing with the protest of Water Decree 45-04114 and Application For Transfer 5194 dated February 10,1998, the purpose of which is to change Place Of Use and Purpose Of Use.
2. The only Decreed Water Rights that I have been able to find pertaining to The U.S. Forest Service in the Water District #45F Drainage is 45-04111 and 45-04114, the latter water right is a domestic right located above the Pomerelle Ski Lodge in T- 13S-R 24E-S02 which is being claimed in the current Application for the Expansion Water Right T 45-07745, which is currently under Protest by Water District #45-F.
3. My records still show No Valid Water Right dealing with the diversion of water off of Howell Creek (Bennett Springs).

The confusing and interesting part of this whole "Illegal Diversion" of water from Howell Creek is that it is the "Primary Source" of water for the prior and current project of Pomerelle Ski Resort. This "Illegal Diversion" of water with no Decreed Water Right goes all the way back to November of 1976 when Pomerelle Ski Area was proposing an expansion and went into effect sometime during 1977.

This Watermaster of Water District #45-F cannot convince THE DEPARTMENT OF WATER RESOURCES to issue "A Cease and Desist Order" due to the lack of a Valid Water Right.

The IDAHO DEPARTMENT OF WATER RESOURCES (your office) has been supplied with pictures of the Area, which I supplied. Nothing has been stated or documented by The U.S. Forest Service pertaining to the Diversion off the Bennett Springs Area of Howell Creek.

In my investigation and presentation of the area to Jim Stanton IDAHO DEPARTMENT OF WATER RESOURCES we toured the Howell Creek Springs site which is 2/10 tenths of a mile above the so called Bennett Springs diversion and is part of the enclosed system that has been developed. In addition there is a "Global Positioning Tag" that has been placed on the "Pumping Station" by THE IDAHO DEPARTMENT OF WATER RESOURCES at the diversion in Howell Creek. I know through sources and pictures taken at the Pumping Station in prior years that this tag has been there a while.

My biggest concern is the lack of communication between The IDAHO DEPARTMENT OF WATER RESOURCES, MARSH CREEK WATER DISTRICT #45-F, and the Watermaster of the District. When I come across information with in an Application for expansion of a Protested Water Right Adjudication and find that the Watermaster is not applicable in the Department process it is a disservice to both the Watermaster and the Water District.

The "Cease and Desist Order" that I requested on November 17, 1999 pertaining to the Illegal Diversion of Water is being ignored. When I go back and check the Geographical Maps of what constitutes the Marsh Creek Water District #45-F drainage system and observe what The U.S. Forest Service with non written approval of THE IDAHO DEPARTMENT OF

WATER RESOURCES are doing it causes me great concern because it affects the allocation of already "Decreed Water Rights" to my Down Stream Users. This year I had to cut those Rights off earlier than normal because I could not supply the first Water Right which dates back to 1874 and no way of shutting this "Illegal Diversion" of Howell Creek off.

The Pomerelle Ski Resort is not operating on a 120 day season as they originally started out years ago and have expanded their operations to the point that they have events through out the year and the "Pump Station" is always running with no way of controlling the diversion of water as it stands today, be it a legal or illegal Water Right and the prior Water Rights take priority.

I guess when you compare Original Decreed Water Rights with Adjudicated Water Rights it creates confusion. But the point is The IDAHO DEPARTMENT OF WATER RESOURCES (your office) has indicated many times that the Decreed Water Right takes precedence over an Adjudicated Water Right because:

1. The Snake River Basin Adjudication (SRBA) was adopted in 1987 and has not been through the courts and has not even been reviewed in Marsh Creek Water District #45-F.
2. The Decreed Water Rights of Woods Versus Stokes has been recognized through the courts and are the present "Legal Water Rights" with dates going all the way back to 1873.
3. The U.S. Forest Service has two Water rights on record that has a date of May 1, 1965, which at the present time fall behind Water District #45-F Irrigation Water Rights. The only Water Right that exists is 45-04114 and only in the Adjudicated Transfer and Expansion does the U.S. Forest Service show a diversion at Howell Creek (Bennett Springs), when in reality, the water to Howell Creek is the overflow or returned water which is being illegally pumped from Howell Creek.

I therefore am submitting this Second Request for a Cease And Desist Order on the "Illegal Diversion" of water off of Howell Creek. No data

has been submitted that calibrates a Decreed Right to commingle with Decreed Water Right 45-04114 other than the Adjudicated Request of Application For Transfer #5194 and the recent submittal of 45-07745, which are both under protest.

I am asking The IDAHO DEPARTMENT OF WATER RESOURCES to finally take charge I have been working trying to get this 4-month problem resolved and with the data that has been supplied it should be sufficient. I am not trying to shut the U.S. Forest Service or Pomerelle Ski Area down only insisting that they be treated no different than any other Decreed Water User would be treated. Water District #45-F in filing a "Protest" against 45-07745 then having to file a "Petition Of Intervention" after the fact on 45-04114 and Transfer #5194 dating back to February 1998 is due to "No Communications" on the part of THE IDAHO DEPARTMENT OF WATER RESOURCES.

My consensus was, and is, as of this submission for a Second Cease and Desist Order" of an "Illegal Diversion" of water from Howell Creek (known as Bennett Springs). There is No legal diversion at this point or a valid Water Right. You cannot develop a legal water right when the water is illegally obtained. There is a proper procedure that has to be followed. This is not the case with 45-04114. Information I have obtained indicates that my original "Cease and Desist Order" is being ignored on the basis that The U.S. Forest Service and Pomerelle Ski area are trying for a Accomplished Transfer Stature. My interpretation and Webster's Dictionary indicates that they are merely taking by the removal or acquisition of the water by mere delivery with the "Intent To Transfer Title". If this does not verify what I have been trying to get across with all of this repetition to show cause, its redundant. PLEASE GET SOMETHING DONE. I will expect your prompt reply.

Cordially,

A handwritten signature in black ink, appearing to read "Donald G. Gunderson", written over a horizontal line.

Donald G. Gunderson
Water Master
Marsh Creek Water District #45-F