

ROSHOLT, ROBERTSON & TUCKER
Chartered

ATTORNEYS AT LAW

JOHN A. ROSHOLT
J. EVAN ROBERTSON
JAMES C. TUCKER
GARY D. SLETTE
JOHN K. SIMPSON
NORMAN M. SEMANKO
JERRY V. JENSEN
TIMOTHY J. STOVER
AMY D. CHESTNUT

Twin Falls Office
142 3rd Ave. North
P.O. BOX 1906
TWIN FALLS, IDAHO 83303-1906
TELEPHONE (208) 734-0700
FAX (208) 736-0041

Boise Office
1221 WEST IDAHO, SUITE 600
P.O. BOX 2139
BOISE, IDAHO 83701-2139
TELEPHONE (208) 336-0700
FAX (208) 344-6034

May 3, 2000

Donald G. Gunderson, Watermaster
Marsh Creek Water District 45F
P.O. Box 125
Albion, ID 83311

RECEIVED
MAY 04 2000
Department of Water Resources
Southern Region

Re: Delivery on Howell Creek

Dear Don:

This morning, Earl Warthen informed me that his irrigation water right from Howell Creek was shut off yesterday, presumably due to scarcity of water. He also understands that other water rights on the stream have been shut-off or cut back.

The purpose of this letter is to inquire whether all junior water rights and beneficial use claims on Howell Creek and its tributaries have been shut-off, and if not, to request that such rights be shut-off to provide for the delivery of downstream water rights, including Earl Warthen's, pursuant to Idaho Code Section 42-607. In particular, we understand that the Forest Service's beneficial use claim A45-04114 for commercial purposes at Pomerelle Ski Area is still being diverted from Bennett Spring and/or Pomerelle (or Ski Run) Spring.

As you know, the validity of the Forest Service's claim has yet to be determined in the Snake River Basin Adjudication. Regardless of its ultimate legal status, however, the claim is subject to the provisions of Idaho Code Section 42-607 during times of scarcity. This point was recently communicated to you in Allen Merritt's letter of January 21, 2000, in which he states:

As watermaster you are responsible to deliver the rights in the Marsh Creek Drainage to the water users based on the priority of their respective water rights. Section 42-607 of the IDAHO CODE indicates in times of scarcity of water the claimed or BENEFICIAL USE CLAIMS shall be held to be subsequent or junior to all DECREED, LICENSED or PERMITTED rights. That means if a call for delivery of any right recorded as a decree, license or permit is made, you may shut off any water right recorded as a beneficial use claim. This curtailment can be made regardless of the priority claimed under the beneficial use right as long as the curtailment of the beneficial use right actually supplies additional water to the system that is necessary for delivery of the right that is being called for.

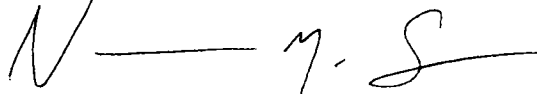
Don Gunderson
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We believe this provision requires you to shut-off the Forest Service's claimed water right from the Bennett and Ski Run Springs, in order to provide water to downstream water rights that have been shut-off or reduced. As indicated below, we are unsure just how much water the Forest Service is diverting, although we understand the current claim to be for .06 cfs (3 inches). Therefore, we do not know how much water might be supplied to downstream users by shutting the Forest Service off. It will presumably provide water for one or more senior rights which are not currently being fully delivered downstream. Unless you determine that curtailment of the Forest Service's diversion would not result in water being made available to a downstream user, the diversion must be curtailed.

In addition to shutting-off any junior rights and beneficial use claims to provide water to the downstream users, including Earl Warthen, we would like verification of the amount of water that the Forest Service has been diverting this year under claim no. A45-04114. It is our understanding that the Forest Service agreed to install a measuring device at a meeting that was held in mid-March of this year. Unfortunately, Earl Warthen was not invited to that meeting, despite the fact that he is a protestant both to the Forest Service's pending transfer and permit applications. If the measuring device has not been installed yet, we request that it be done immediately. If a measuring device has already been installed, we would like to know what quantity of water has and is being diverted.

Thank you for your prompt attention to this matter. I can be reached at 734-0700 if you have any questions about this request.

Sincerely,



NORMAN M. SEMANKO

05030001.NMS

cc: Allen Merritt
Steve Spencer, USFS
Andrwood, Inc.
Roger Ling
James Annest
Tom Geary
Earl Warthen