

June 2, 1997

RECEIVED

JUN 05 1997

Norman Young
Administrator
Idaho Department Of
Water Resources
1301 N. Orchard St.
Boise, Idaho 83706-2237

Department of Water Resources
Southern Region

Dear Mr. Young;

As watermaster of district 45-F, Marsh Creek drainage and being involved with Mr. Bennie Smyer and his reservoir storage problem, I feel I need to put the following down in writing, even though it has been brought out in the differant meetings and correspondence.

Three years ago when I was called in on a complaint from Mr. Jim Chatburn and Mr. Leo Bell, it was dealing with the Summit Creek rights down stream and water not getting to the requestor due to Mr. Smyer's dam. The out come of the complaint got the Department of Water Resource people from Twin Falls and myself involved in a meeting with Mr. Smyers. He was given two ways to correct the problem and enough time to get it resolved.

Approximately one month went by and nothing was done by Mr. Smyer's. Therefore, Mr. Jim Chatburn and his ^{son} Jeff decided to follow up with the second alternative given Bennie. The Chatburns and myself as a witness, proceeded to divert the Summit Creek to the upper stand pipe bypassing his reservoir. I videoed the whole process that took place. Our small amount of water created its path to approximately 300 yards below the dam in 18 hours and another 12 days to reach its beneficial user of complaint. It will be noted Bennie has never completed nor complied to any request on his own. See attached letters.

Mr. Young, I have two complete video tapes documenting TWO months of what was going on at Bennies reservoir and Summit Creek. These tapes are at the Twin Falls office for reviewing.

The Department Of Water Resources personnel involved with my transactions the last three seasons, have been Allen Merritt, Jim Stanton, Corey Skinner, and the legal side John Holman and yourself. I have attached the correspondence that has related to the original complaint and the follow-up on the violations that have been in an on-going state for the last three years.

Norm, I stated that I was having problems within my water district at the meeting held in Burley on April 1, 1997. The problem is enforcing our Legislative Laws governing water in Idaho on all USERS of water. Since Mr. Smyer has been able to get away with what he is doing, when He has NO WATER RIGHT, NO STORAGE RIGHT and being in VIOLATION with his DAM on Summit Creek, I am having problems of enforcing your LAWS...

There cannot be a double standard to operate by and I cannot believe the State of Idaho has intended a double standard but as I sit here and write you. WE are operating under a double standard and it is not working, the people are saying, "IF Bennie can get away with it, why can't I."

As a whole, in closing, I have tried to keep this on a professional level and not personal. I am getting tired of the defamation of my character in trying to adhere the laws that are in question by Mr. Smyer. Where does it stop!!!

If you have any questions, or if I can be of any assistance, please feel free to contact me at your convenience.

Sincerely,



Don G. Gunderson,
Watermaster 45-F

Enclosures

cc: Allen Merritt, IDWR ✓
Jim Chatburn
Leo Bell
Corey Skinner, EIT



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301 (208) 736-3033

~~CECILIA ANDRUS~~
Governor PHIL BATT

R. KEITH HIGGINSON
Director

April 8, 1995

Bennie Smyer
PO Box 573
Albion, ID 83311

RE: Summit Creek Dam
Water loss in reservoir pool

Dear Mr. Smyer:

Thank you for meeting with Don Gunderson and me last Friday, April 7th, to discuss the matter of potential injury to downstream waterusers. As we observed water from Summit Creek flows into your reservoir forming a dead storage pool before passing through the dam and continuing down the creek. We observed that there is a significant loss of flow in the reservoir and in the creek channel below. (Actually all flow in the creek sinks below the dam within 150 yards and a large portion of the flow sinks in the dead pool.)

To alleviate allegations that the water lost in the dead pool injures downstream waterusers, as you know, I directed that water be channeled around the dead pool. To facilitate this action you agreed to either:

i) Allow waterusers access to your property so they could complete channelization of the stream directing flow away from the dead pool and directly into the lower pipe where it currently flows. This effort would require a backhoe which you understand the waterusers have in possession.

or

ii) You will dam the creek at the upper end of the reservoir and complete a ditch through the reservoir pool to the existing upper bypass pipe. This effort may be completed by loader equipment you possess.

Hopefully one of the above or a combination of effort from all concerned can complete redirecting the water away from the dead pool as soon as possible.

As we discussed, once the water is rechanneled through the reservoir Don Gunderson, watermaster, will observe how far the water makes it down the creek and determine the benefit, if any, the water flowing

down the creek makes. If the effort appears to him to be futile, it should not matter where the water is allowed to sink.

In summary, please be reminded that the water right you have applied for in the Summit Creek reservoir (application 45-07605) is protested and presently not authorized and the Dam Safety certificate for storage in the Summit Creek dam is not authorized. Water must be rechanneled through the reservoir to benefit downstream users or until the watermaster determines no injury to downstream rights. The rechannelization must be limited to within the highwater reservoir pool of the structure.

Thanks again for your cooperation. If you have comments please feel free to contact our office.

Sincerely,



Allen Merritt, PE
Southern Region Manager

CC: ✓ Don Gunderson, watermaster
Jim Chatburn
Leo Bell
IDWR-Dam Safety, Dave Hollingshead



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301 (208) 736-3033

CEGIL D. ANDRUS
Governor PHIL BATT

R. KEITH HIGGINSON
Director

April 19, 1995

Bennie Smyer
PO Box 573
Albion, ID 83311

RE: Summit Creek Dam
Water loss in reservoir pool

Dear Mr. Smyer:

This day Don Gunderson has informed me that his recent contacts with the waterusers downstream from your dam has resulted in them declining the offer to participate in re-channeling of Summit Creek water through your reservoir basin. As you may recall at our meeting April 7th you indicated that if the waterusers would not participate that you agreed to dam the creek at the upper end of the reservoir and complete the ditch through the reservoir pool to the existing upper bypass pipe by using your loader. Please let me know when you have completed this work. Please also notify Mr. Gunderson so he can observe how far the water makes it down the creek and determine the benefit, if any, the water flowing down the creek makes as we agreed.

Thanks again for your cooperation. If you have questions please feel free to contact our office.

Sincerely,

Allen Merritt, PE
Southern Region Manager

CC: ✓ Don Gunderson, watermaster
Jim Chatburn
Leo Bell
IDWR-Dam Safety, Dave Hollingshead



State of Idaho
DEPARTMENT OF WATER RESOURCES

Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

Rec'd
3/14/96

March 13, 1996

Bennie Smyer
PO Box 128
Albion, ID
83311

Dear Mr. Smyer;

It is come to our attention that water is again being diverted into your reservoir on Summit Creek. As you are well aware, you have no right to store any water at this site. Your application for a storage permit (45-07605) has been protested, and will not be acted upon until at least the end of the Snake River Basin moratorium on January 1, 1998.

Therefore, please take the necessary steps to insure the integrity of the diversion ditch around your dam. This ditch needs to be in proper condition to carry all the flow of Summit Creek around the dam so that no storage occurs. Illegal water diversions, and the possible penalties for such diversion, are covered under Sections 42-351 and 352 of the Idaho Code. Copies of these statutes are enclosed for your information.

Watermaster Don Gunderson needs to be satisfied with your efforts in this matter. Thank you for your cooperation.

Sincerely,

James E. Stanton
Sr. Water Resource Agent

cc: Don Gunderson -
Allen Merritt, IDWR
Norm Young, IDWR



State of Idaho
DEPARTMENT OF WATER RESOURCES

Southern Region, 222 Shoshone St. East, Twin Falls, Idaho 83301-6105 (208) 736-3033
Fax (208) 736-3037

PHILIP E. BATT
Governor

KARL J. DREHER
Director

June 4, 1996

Bennie Smyer
PO Box 128
Albion, ID 83311

RE: Compliance Conference for Notice of Violation/Order dated
May 23, 1996 issued to Bennie Smyer

Dear Mr. Smyer:

Please be advised the department has scheduled the compliance
conference for the above referenced matter for **11:00 am on June 12,
1996 to be held at the Smyer's Dam #1 site east of Albion, Idaho.**

Thank you for your cooperation in scheduling this matter.

Section 42-351, Idaho Code, provides in pertinent part as follows:

(3) The compliance conference shall provide the
opportunity for the recipient of a notice of violation to
explain the circumstances of the alleged violation and,
where appropriate, to present a proposal for remedying
the damage caused by the violation and assuring future
compliance. If the recipient and the director agree on
a plan to remedy the damage caused by the alleged
violation and to assure future compliance, they may enter
into a consent order formalizing their agreement. The
order may include a provision providing for the payment
of any agreed civil penalty.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Allen Merritt', is written over a horizontal line.

Allen Merritt, PE
Southern Region Manager

CC: Norm Young - IDWR
Don Gunderson ✓

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

Recd
5/24/96
10:30 AM
Reilly

IN THE MATTER OF THE DIVERSION OF)
WATER WITHOUT A VALID RIGHT OR NOT)
IN CONFORMANCE WITH A VALID WATER)
RIGHT ON LANDS OWNED OR CONTROLLED)
BY BENNIE SMYER)

NOTICE OF VIOLATION

The Director of the Department of Water Resources (department), being charged with the duties of protecting vested water rights, enforcing specific statutes of the state of Idaho and the rules promulgated by the department, and being authorized to order the cessation of violations or attempted violations of the provisions of the law relating to all aspects of the appropriation and distribution of water, has caused an investigation of certain diversions of water being made by or under the control of Bennie Smyer (alleged violator).

ALLEGED VIOLATION: The diversion of water from Summit Creek into Smyer's # 1 Reservoir without a valid Water Right.

Based upon the department's investigation and understanding of the law, the Director makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. On May 8th, 1996, the watermaster of water district 45-F, being a department representative, conducted a field examination and determined that Mr. Smyer has allowed, through action or neglect, all of the waters of Summit Creek to flow into Smyer's #1 reservoir (D45-7605) where a large portion of the waters sink. On May 8th, 1996, up to 2 cfs was observed flowing into the reservoir with no water being discharged through the outlet works.

2. In a letter to Bennie Smyer dated March 13th, 1996, from the department, Mr. Smyer was directed to insure the integrity of the bypass ditch around the reservoir and not to allow water to be stored behind the dam.

3. Mr. Smyer does not possess a water right to take water from Summit Creek and store behind Smyer's #1 dam. Mr. Smyer's pending water right application for permit No. 45-07605 has not been approved by the department, nor is Smyer's #1 dam authorized to store water under §42-1719 of the Idaho Code.

4. In the spring of 1995 a similar situation occurred. In a meeting with Bennie Smyer on April 7th, 1995, and in letters to

Bennie Smyer from the department dated April 8th, 1995, and April 19th, 1995, Bennie Smyer was directed to bypass the Summit Creek flows through the upper bypass outlet. Bypassing of the water was commenced on April 24th, 1995. On May 7th, 1995, water finally made its way down the Summit Creek channel below the dam to Howell Creek where it commingled and provided water to decreed right holders downstream as observed by the watermaster.

5. The diversion of water by Bennie Smyer into Smyer's #1 reservoir injures the rights of prior appropriators by making less water available to them for beneficial use.

CONCLUSIONS OF LAW

1. Section 42-351(1), Idaho Code, provides as follows:

If the director of the department of water resources finds, on the basis of available information, that a person is diverting water or has diverted water from a natural watercourse or from a ground water source without having obtained a valid right to do so or is applying water or has applied water not in conformance with a valid water right, then the director of the department of water resources shall have the discretion to take action against such person. The director may file an action seeking injunctive relief or may commence an administrative enforcement action by issuing the person a written notice of violation directing the person to cease and desist the activity or activities alleged to be in violation of applicable law or any existing water right. The notice of violation shall be served upon the alleged violator in person or by certified mail. The notice of violation shall identify the alleged violation and specify whether that person is diverting water or has diverted water not in conformance with a valid water right. The notice of violation shall state the remedy, including any restoration and mitigation measures, and the civil penalty the director seeks for redress of the violation and shall contain a statement of findings of fact and conclusions of law that provide a factual and legal basis for the initiation of the administrative enforcement action.

2. Section 42-201, Idaho Code, provides in part as follows:

All rights to divert and use the waters of this state for beneficial purposes shall hereafter be acquired and confirmed under the provisions of this chapter and not otherwise.

3. Section 42-352, Idaho Code, provides in part as follows:

Any person who wilfully violates any cease and desist

order issued under chapter 3, title 42, Idaho Code, after the same has been served on that person shall be subject to a civil penalty to be imposed by the director of the department of water resources not to exceed one hundred dollars (\$100) per diversion for each calendar day, or any part of a calendar day, ...

4. Smyer's #1 dam is presently storing water without a valid water right in violation of Idaho law.

5. The illegal diversion of the public waters of the state of Idaho must be stopped to prevent injury to other water rights, to protect the water resources of the state and to assure that the allocation and use of available water supplies takes place in an orderly manner.

6. The Director of the department should issue a Notice of Violation to Bennie Smyer directing him to immediately cease and desist all storage of water in Smyer's #1 reservoir and to immediately bypass all flows of Summit Creek around the reservoir by using the bypass ditch that was used in 1995 and to pay a civil penalty for each day water is illegally diverted into Smyer's #1 reservoir.

ORDER

IT IS HEREBY ORDERED as follows:

1. Bennie Smyer shall immediately cease and desist the diversion of all waters into Smyer's #1 reservoir.

2. Bennie Smyer shall immediately bypass all of the flow of the waters of Summit Creek through the bypass ditch utilized in 1995 so as not to cause storage behind the Smyer's #1 dam by action or inaction.

3. Bennie Smyer shall submit to the department a civil penalty in the amount of \$100 per day for each day or part thereof in which water is illegally diverted after receipt of this notice of violation; ie, for each day in which all of the waters of Summit Creek are not bypassed, to the extent of the capacity of the bypass ditch, until such time as water right 45-07605 and storage behind Smyer's #1 dam (D45-07605) is authorized.

IT IS FURTHER HEREBY ORDERED as follows:

1. Bennie Smyer is entitled to a **compliance conference** with department staff, if he files a written request to the department within fifteen (15) days of receipt of this Notice of Violation.

2. At the compliance conference, Bennie Smyer shall have the opportunity to enter into a **consent agreement** with the department to resolve and assure future compliance with the laws of the state

of Idaho.

DATED this 23rd day of May, 1996.

Norman C. Young

by [Signature]

NORMAN C. YOUNG
Administrator

Karl Dreher, Director
Idaho Department of Water Resources
1301 N. Orchard St.
Boise, ID 83706-2237

Dear Director Dreher:

We are the property owners who have homes, businesses, and other structures on the Summit Creek / Howell Creek drainage below the Smyer Dam.

It has come to our attention that the Idaho Department of Water Resources is under the impression that this dam offers flood control protection to the City of Albion. This is not the case. The Summit Creek / Howell Creek drainage runs south to north along the east side of the Albion Valley, and gets no closer than two miles to the city of Albion.

Historically the City of Albion has been flooded by water from Marsh Creek and Land Creek, which run through the town. In fact, it would take a flood of biblical proportions for water from the Summit Creek / Howell Creek drainage to flood the City of Albion.

The people, animals, and structures that would be threatened by a flood coming out of Summit Creek are the ones located downstream on the Summit / Howell Creek drainage. As the property owners who reside, and make a living off the land below the Smyer Dam, we believe this dam poses a very real and grave threat to our safety, and the safety of our livestock.

In 1987 the Smyer Dam, still under construction and containing no spillway, broke causing many thousands of dollars of damage to property and non-repairable damage to the creek channel and fields along the creek channel. The riparian areas virtually gone. In many places ten to fifteen foot deep gullies have replaced the flat flood plain like riparian areas.

The current Smyer Dam is many feet higher than it was when it broke in 1987, and there is still no adequate spillway protection should the dam overflow. With the amount of high water content snow in the Summit Creek drainage this year, we feel this dam is a serious threat to our safety and livelihoods.

The Department of Water Resources has told Mr. Smyer to prevent water from entering and being stored behind this dam on numerous occasions. Mr. Smyer has continually ignored or flouted the department's orders. He has no water right for the water he traps behind the dam.

Director Dreher, why won't the Idaho Department of Water Resources help us? How much longer must we live in the shadow of fear that this dam has cast on our peaceful rural lifestyle?

THIS DAM IS DEFINITELY NOT BENEFICIAL AS A FLOOD CONTROL DEVICE, IT IS A DANGER TO LIFE AND PROPERTY.

Sincerely yours,

The property owners of the Summit Creek Drainage

David Bell Leo Bell
Shari Bell Merla Bell

Mayor Jay Livingston
City of Declo

Gayley Norma E. Dayley
Lorraine Dayley LaTune Dayley
to whom it may concern,

The concern I have is that marsh creek runs within about 200 feet of our new high school. I've seen marsh creek at flood stage before and any additional water would certainly cause us problems.

rich l. Matthews, Principal Declo High School.

Albert Bennett

Jammy Chatham

Al Chatham

Suzie Chatham

Jim Chatham

Hennie Chatham / Property owner also City of Albion Clerk / Treasurer

CC: Norm Young
Allen Merritt

News Release

IDAHO DEPARTMENT OF WATER RESOURCES

1301 N. Orchard St., Boise ID 83706 — Phone: (208) 327-7900 FAX: (208) 327-7866

Release 97-13

ALBION MAN ORDERED BY STATE DAM SAFETY OFFICIALS TO DRAIN, FIX OR BREACH PAIR OF DAMS

For Immediate Release
Boise, Idaho - March 11, 1997

For Media Information:
Dick Larsen - 327-7933

A Cassia County man has been ordered by state safety of dams officials to immediately drain and repair two dams near Albion or to take action to breach the embankments, the Idaho Department of Water Resources said today.

Bennie Smyer of Albion has been told to completely drain the dams, open blocked spillways and make other repairs to the pair of dams, located on Summit Creek and Pine-Anton Creeks east of Albion, because they could pose flooding risk to downstream properties should the two dams fail. Neither dam has even been issued certificates of approval to store water by IDWR.

IDWR Safety of Dams inspectors visited the two dams Monday and were given assurances by Smyer that he would take action to resolve the situation.

Downstream property owners also had petitioned IDWR in late February to take immediate action to remove the threat to their safety and livelihoods they felt was posed by high spring run off and the operation of the two Smyer dams.

Problems with the two dams include outlet facilities that were not working properly or obstructed, spillway channels that were too small and blocked with fill, and a lack of freeboard space because the crests of the dams are too low.

-more

Post-it® Fax Note	7871	Date	3/12/97	# of pages	2
To	Bennie Smyer	From	Jennifer Bunch		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #	673-6242	Fax #			

Cassia County Dams Order - Page 2

Smyer has been given until March 21 to make repairs on the Pine-Anton Creeks dam and until March 28 on the Summit Creek dam. If the repairs are not completed by the deadline, the IDWR order requires Smyer to immediately breach the embankments and safely release all the remaining waters stored behind the dams.

The Summit Creek dam is approximately 20 feet high with a storage capacity of 25 acre feet (8.15 million gallons). The Pine-Anton Creeks dam is approximately 13 feet high with a storage capacity of 15 acre feet (4.88 million gallons).

IDWR officials say they are concerned that record snowpack in the area could produce runoff which would fill and overtop the dams causing them to fail. Governor Phil Batt has already declared that a state of extreme emergency exists in the area due to imminent flooding caused by the unusually heavy snowpack.

-30-30-30-