



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

November 27, 1996

George Lemmon
Watermaster, District 36A
1050 East 2727 South
Hagerman, ID 83332

Distribution of Water from Billingsley Creek and Tributaries

Dear George:

This letter provides further instructions regarding my letter dated November 21, 1996. After sending the letter, I was informed that Norm Young of this office verbally told some of the waterusers from Billingsley Creek that Aqua Life, Inc. must renew its call for delivery of its rights in writing before the watermaster would regulate diversions in response to the call. I called Norm Young at home, and he confirmed that he expected a written request from Aqua Life. IDWR informed Tom Arkoosh, attorney for Aqua Life, that a written request is necessary.

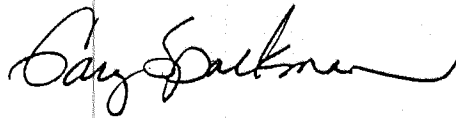
Upon receiving a written call, IDWR will act immediately to require regulation of surface water rights to satisfy the call. IDWR will notify you of the receipt of the written call and distribute copies to the parties who may be affected. As the watermaster, you should determine how much water is available from each source and determine who should be entitled to water. Water users should not divert more than their authorized flow rates. Tim Luke, or other IDWR personnel, will be happy to assist.

The December 6, 1996 deadline for removal of fish from raceways is delayed for all water users holding valid water rights pending the receipt of a written call. The Department records do not reflect that you have a water right to divert water for fish propagation after the end of the irrigation season. Your fish should be removed by December 6, 1996, and the water you are diverting shut off unless you arrange another solution with IDWR. After receipt of the written call, owners of water rights which may be affected will have approximately two weeks from the

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date of notification to remove the fish or make other arrangements with the Department. I will fix a date for removal when I notify you of receipt of a written call.

Sincerely,



Gary Spackman

- c. Robert Tupper
- Ken Ellis
- Big Spring Waterusers Association
- Don McFadden
- Rangen, Inc.
- John W. Jones
- Buckeye Farms
- City of Hagerman
- Southern Region
- Tim Luke



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DIRECTOR

John Simpson, Attorney at Law
1221 W. Idaho, Suite 600
P.O. Box 2139
Boise, ID 83701-2139

Dear Mr. Simpson,

After cordially conversing with you on November 25, 1996, I was surprised by the tone of your letter dated November 26, 1996.

Enclosed is a letter to George Lemmon that delays enforcement of Aqua Life's call for water until a written request is received from Aqua Life. A written request is not normally required when a water user requests delivery of his water within a water district, however. The delay is a courtesy extended because of verbal discussions that a call would not be enforced until submitted in writing.

I want to reiterate the content of my earlier letter and our telephone conversation. I don't view the positions stated in the letter to be erroneous. Aqua Life owns surface water rights within an active water district. Aqua Life stated (in writing last spring, and verbally this fall) that it is not receiving water pursuant to its water rights because water is being diverted pursuant to later priority water rights. IDWR instructed George Lemmon, watermaster for Water District no. 36A, to deliver the rights according to their priority. The prior written calls and conversations with Aqua Life do not express or imply an intent to petition for delivery call pursuant to IDWR's Conjunctive Management Rules. IDWR has a responsibility to all water users to properly manage the water resources of the state and to protect prior water rights. Nevertheless, IDWR will treat a call for delivery of a water right within a water district as an exclusive remedy separate from a petition for delivery call from the Eastern Snake Plain Aquifer. If regulation by the watermaster does not satisfy Aqua Life's water rights, or if Buckeye Farm's rights are not satisfied, Aqua Life or Buckeye may petition for delivery call as described in the Conjunctive Management Rules.

The watermaster and IDWR do not know at the time a senior right holder calls for his water whether the water will be beneficially used. IDWR cannot predetermine waste before delivery. IDWR will act to prevent waste if water is being wasted following delivery.

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You raise issues of forfeiture or partial forfeiture of the Aqua Life water rights. Tim Luke informs me that he has evidence showing that water was being diverted by Aqua Life in 1995. The burden of proof regarding forfeiture rests with the person alleging forfeiture. Furthermore, the forfeiture issue probably needs to be raised in a proceeding that brings the validity of the rights into question. I don't believe a call for delivery of water in a water district is the proper proceeding to raise the issue. However, I am willing to listen to contrary arguments if supported by legal authority.

IDWR will notify you promptly when a call for water is received.

Sincerely,

A handwritten signature in cursive script that reads "Gary Spackman". The signature is written in dark ink and is positioned above the printed name.

Gary Spackman