

June 13, 1995

Don Shenton
Watermaster, WD 32-D
P.O. Box 33
Dubois, ID 83423

Dear Don:

Last week you indicated that Ted Sorensen wanted to divert water for the purpose of conducting a loss test on Birch Creek. You asked if such a test could legally be undertaken during the irrigation season.

It is my understanding that all of the land to which these rights are appurtenant is currently in the federal conservation reserve program. If this is the case, it appears that the beneficial use associated with irrigation has ended and, consequently, there are no water rights available to be used. The beneficial use associated with an irrigation right is achieved through the production of crops, hopefully for economic gain. The "crop" currently being grown is a federal payment for which arises from not farming or grazing the land. Consequently irrigation does not have the ability to increase this "crop". By statute, the appropriation of water must be for some useful or beneficial purpose. Idaho Code 42-104 says, "when the appropriator or his successor in interest ceases to use it for such [beneficial] purpose, the right ceases".

While I do not understand what information Mr. Sorensen wishes to gain from the proposed tests, you will be authorized to deliver water for this purpose if one of the two criteria are met:

1. All water rights on Birch Creek are being filled; then the amount of water in excess of the current demand would be available for this purpose.

2. All water users on Birch Creek, whose rights would be affected by the test, agree to having their rights reduced for the duration of the test.

If neither of the criteria apply you should not deliver water for the purpose of conducting the proposed test.

Very truly yours,

Ronald D. Carlson
Manager, IDWR Eastern Region