



**State of Idaho**  
**DEPARTMENT OF WATER RESOURCES**

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EASTERN REGION

PHILIP E. BATT  
GOVERNOR

KARL J. DREHER  
DIRECTOR

March 26, 1998

George C. Petersen, Jr.  
PETERSEN MOSS OLSEN CARR ESKELSON & HALL  
485 "E" Street  
Idaho Falls, ID 83402

Re: Delivery of Birch Creek Water Rights in the name of  
D&D Enterprises and LaVar Newman

Dear Mr. Petersen:

Your letter of February 23, 1998, advised of your interest to request delivery of the D&D Enterprise and LaVar Newman water rights from Birch Creek at the old Reno Ditch point of diversion. You ask to be advised if delivery at that point will be contrary to IDWR's position on this matter.

A review of the IDWR files on the above referenced rights indicate that D&D Enterprise and other water users on Birch Creek fully participated in the proceedings through which permits were issued for development of the new Reno Ditch with hydropower facilities by Birch Creek Power. It was clear throughout these proceedings that the effect of building the power plant would be to transfer the diversion of your client's irrigation water to the new Reno Ditch and that the old Reno Ditch would be abandoned. The primary objection to this proposal by the irrigators was not to the change in point of diversion but to the ownership of the water saved by the change.

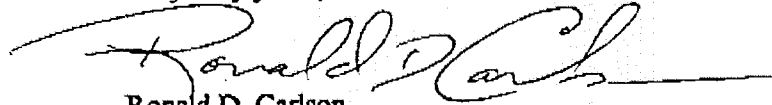
When the issue of ownership of the saved water was appealed to the district court, the issue of changing the point of diversion of D&D's and Newmans' water rights was not raised. In fact, the issue litigated was whether or not a bypass flow down Birch Creek was appropriate, or whether that bypass flow water should be delivered to your clients through the new point of diversion.

The new hydropower point of diversion has been used since April, 1987, by both Birch Creek Power and your clients. Your clients claimed this point of diversion for their water rights in the SRBA pursuant to I.C. §§ 42-1425 and -1427. To now transfer their point of diversion back to the old Reno ditch would require careful consideration of issues such as injury to junior water rights, estoppel or laches based upon your agreements with Birch Creek Power, and the issue of the water delivery losses which would occur by use of the old Reno Ditch. I note that then Watermaster Ben Wilding testified in the hearing on the Birch Creek Power permits that conveyance losses in the old Reno Ditch approached 26 c.f.s. of water. Because IDWR normally does not make determinations regarding issues such as laches or estoppel, an action may first have to be brought in district court.

George C. Petersen, Jr.  
March 26, 1998  
Page 2

Given the history of this matter, IDWR will not instruct the watermaster to deliver the irrigators' rights at the old Reno Ditch absent instructions from a court to do so or approval of the pending transfer.

Very truly yours,



Ronald D. Carlson  
Eastern Regional Manager

NYC/RDC/dde  
cc: Blair Grover  
Kent Foster  
Breck Barton

NAPETERSEN.LTR