



State of Idaho
DEPARTMENT OF WATER RESOURCES

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December 17, 1996

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

Distribution of Water from Billingsley Creek and Tributaries

Dear George:

On December 6, 1996, the Department of Water Resources received four letters from C. Tom Arkoosh, an attorney representing AquaLife, Inc., calling for delivery of water from Billingsley Creek and tributary springs pursuant to water rights owned by AquaLife. Copies of the letters are enclosed. This letter provides instructions to you for delivery of water. Enclosed are summaries of the water rights authorizing diversions from Tupper Springs, Big Spring, and Billingsley Creek upstream of the AquaLife diversion.

Tupper Springs

IDWR's records show that AquaLife is entitled to divert 4.0 cfs from Tupper Springs pursuant to water right no. 36-02414, priority date of December 21, 1959. On December 12, 1996, Tim Luke of this office measured 3.23 cfs diverted from Tupper Springs by AquaLife. He also measured 1.83 cfs diverted by Bob Tupper. At present, Bob Tupper has a right to divert 1.0 cfs for fish propagation from Tupper Springs pursuant to water right no. 36-07841, priority date of February 12, 1979. Reduction of Bob Tupper's diversion to 1.0 cfs should provide sufficient water to AquaLife. If spring flows diminish, however, you may have to further reduce Bob Tupper's diversion to satisfy AquaLife's water right.

Big Spring

IDWR's records show that AquaLife is entitled to divert 54.68 cfs from springs tributary to Billingsley Creek, including Big Spring, pursuant to water right no. 36-02338, priority date of August 5, 1954. On December 12, 1996, Tim Luke of this office measured 50.0 cfs diverted from Big Spring by AquaLife. Tim also measured 2.60 cfs diverted by Billingsley Creek Ranch.

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Billingsley Creek Ranch filed adjudication claim nos. 36-11060 and 36-15462, which, when combined, claim a right perfected by beneficial use to divert 2.04 cfs. Adjudication claim nos. 36-11060 and 36-15462 bear proposed priority dates of March 1, 1971 and June 1, 1977, respectively. When delivering during times of shortage, claims based on beneficial use are delivered last by the watermaster, regardless of the claimed priority. You should shut the diverting works of Billingsley Creek Ranch until all other decreed, permitted, and licensed rights are satisfied.

Tim Luke also measured 8.67 cfs diverted by Big Spring Water Users Association pursuant to water right no. 36-00022, which authorizes diversion of 12.90 cfs for irrigation, municipal and stockwater, priority date of March 1, 1901. Of the 8.67 cfs, 1.86 cfs is diverted by the City of Hagerman pursuant to right 36-00022. The difference between the measured flow of 8.67 cfs and the municipal diversion of 1.86 cfs is 6.81 cfs. Of the 6.81 cfs, approximately 2.0 cfs was diverted through your raceways. You were extracting a small quantity of water for stock with a garden hose. Other water users may be using a portion of the 8.67 cfs for stockwater purposes. IDWR believes 6.81 cfs is an excessive flow for the delivery of stockwater and the diversion must be reduced. IDWR will further investigate to determine the proper quantities to be diverted.

You should be able to deliver AquaLife's entitlement at the present time from the above instructions.

Billingsley Creek

AquaLife can divert water from Billingsley Creek pursuant to water right no. 36-02734, which authorizes the diversion of 100.0 cfs, priority date of October 5, 1965. AquaLife also claims the right to divert 50.0 cfs based on beneficial use pursuant to water right claim no. 36-04011, claimed priority of December 1, 1965. Because water right claim no. 36-04011 is not a decreed, licensed, or permitted water right, it should be delivered last behind all other decreed, licensed, or permitted water rights, regardless of priority.

On December 5, 1996, Tim Luke and Dave Shaw, an engineer hired by Buckeye Ranch, measured a flow in Billingsley Creek of 94.0 cfs at AquaLife's point of diversion. After AquaLife is diverting water, please measure the quantity of water diverted by AquaLife. If AquaLife's right is fully satisfied, no curtailment of existing rights is necessary. If there is insufficient water to satisfy AquaLife's water right, you should determine the flow rates being diverted by other water users with water rights bearing priority dates that are junior to AquaLife's water rights and determine in reverse chronology of priority which diversions of water must be curtailed.

Tim Luke measured 33.0 cfs diverted into the Curren Ditch on December 12, 1996. We understand that Curren Ditch was only delivering fish propagation water to Buckeye Ranch and

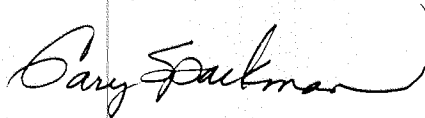
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perhaps winter stockwater to Buckeye Ranch and other users. Buckeye Ranch is only entitled to divert 20.0 cfs for fish propagation pursuant to water right nos. 36-08730 and 36-07742 during the nonirrigation season, and Buckeye Ranch's diversion for fish propagation should be limited to 20.0 cfs regardless of AquaLife's call. Limiting Buckeye Ranch to its authorized flow rate may supply AquaLife with its full entitlement.

Please notify the owners of water rights whose diversions must be shut down or curtailed that they have until December 30, 1996, to remove fish from raceways, unless other arrangements are made with the Department. Despite the fact that Buckeye Ranch is diverting a greater quantity of water than authorized by its water rights, past letters did not clearly instruct you to immediately limit Buckeye Ranch's diversion. Buckeye Ranch should prepare as rapidly as possible to limit its diversion for fish propagation to 20.0 cfs. Please limit Buckeye Ranch's diversion to 20.0 cfs no later than December 30, 1996. After limiting Buckeye to 20.0 cfs, you may need to further reduce Buckeye Ranch's diversion if AquaLife is not receiving its full entitlement. Do not curtail any authorized diversion of water upstream of the AquaLife diversions if the water is diverted and fully returns to the water source prior to diversion by AquaLife. Water users should not divert more than their authorized flow rates. Tim Luke or other IDWR personnel will be happy to assist. Please call if you have any questions.

Thank you for your attention in carefully delivering water within Water District 36A.

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
C. Tom Arkoosh
John Simpson

John LeMoyné

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source and determine who should be entitled to water. Water users should not divert more than their authorized flow rates." Only diversions exceeding water rights or diverting without any authority should be immediately curtailed. Now that AquaLife has requested delivery in writing, the watermaster should further curtail valid junior water rights if diversions of water pursuant to senior rights are not being satisfied, and if curtailment of those junior rights would help satisfy the senior rights.

Mr. Lemmon was asked to cease diversion of water from Big Spring and remove fish from his own hatchery using Big Spring water because he does not have a valid water right for fish propagation or any other water right that would authorize him to divert water in the non-irrigation season.

2) Why didn't the call also affect pumpers on the Aquifer directly above the springs?

AquaLife's written requests for delivery of water were not calls on the aquifer pursuant to conjunctive management rules.

3) Is IDWR ignoring the 1932 decree which does not limit the time of use for the decreed water rights?

Although the 1932 decree does not specify dates for irrigation or non-irrigation seasons, the decree refers at least once to stockwatering and domestic use "during the non-irrigation season." When a decree does not describe a season of use, IDWR has regulated pursuant to the seasons of use that are applied in water right licensing. A water user cannot divert water pursuant to decreed water rights during the winter for irrigation when there is no irrigation demand. IDWR recognizes that some season of use issues are presently being reviewed by the courts. Nonetheless, IDWR should not allow diversion of water for irrigation when there is no irrigation beneficial use.

A fish propagation use initiated in 1989 cannot assume the same priority date as a 1881 or 1903 decreed right when the fish propagation facilities did not exist at that time or any time prior to 1932.

4) Have the rights in question been changed and finalized by the Adjudication Court? If not, isn't the 1932 decree still the one we must adhere to?

The SRBA court has not entered an order for interim administration of water rights in Basin 36. The court has not generally decreed water rights in Billingsley Creek or in Basin 36 (except for domestic and stockwater rights). IDWR has advised water users and the watermaster that rights should be delivered according to the 1932 decree and will continue to do so until the SRBA court issues either an interim or final order.

John LeMoynes

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5) Late this summer George tells us that he met at Tupper's with you, Norm Young, Bob Tupper and Ken Ellis and that you all agreed to wait until the Supreme Court ruled on the appeal from the adjudication court rulings. Is that the way you remember the meeting?

I believe the meeting you refer to was conducted on May 7, 1996. I did not attend the meeting. Tim Luke and Norm Young attended the meeting. I spoke with Tim Luke about this matter and he does not remember the outcome as you described. Tim stated that IDWR and the users agreed to allow Bob Tupper to divert 1.6 cfs during the irrigation season and for a length of time which would allow the users to research past warranty deeds and documents concerning water use from Tupper Springs and to allow the users time to possibly resolve the dispute concerning use of the springs. Tim does not recall that the parties agreed to wait for some Supreme Court ruling, or that IDWR would wait for Mr. Tupper's claims to be finalized by the SRBA court. When Mr. Ellis visited our office on November 15, he indicated that no settlement had been made with Mr. Tupper. He further indicated that he did not believe Tupper had water rights which were senior to Aqualife's.

Robert and David Tupper visited this office on December 2, and met with Tim Luke and a staff member from the Attorney General's office to discuss their claims and my prior correspondence. Tim reports that the Tuppers seemed to be under the impression that their diversion would not be curtailed below 1.6 cfs until their claims were finalized by the SRBA court. Tuppers reported that George Lemmon had visited their diversion last week and measured 1.6 cfs, and that the diversion presently remains at 1.6 cfs. Tim again reiterated that he did not believe that the parties at the May 7th meeting agreed to keep the diversion at 1.6 cfs until the Tupper claims were finalized.

Tim explained to the Tuppers that the Tupper fish propagation diversion should be limited to no more than one cfs during the non-irrigation season, which is the amount authorized by their 1979 priority licensed right for fish propagation. If the flow of Tupper Spring is less than the combined flow of Aqualife's water rights and Tupper's water rights, then the Tupper diversion may have to be limited further.

Thank you for your interest in this matter.

Sincerely,



Gary Spackman

cc: George Lemmon