



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

March 31, 2010

Blake S. Atkin
837 South 500 West
Bountiful, Utah 84010

Re: Your Correspondence of March 23, 2010 Regarding Demand for Delivery of Decreed Water Rights from Worm Creek Drainage

Dear Mr. Atkin,

The Director of the Idaho Department of Water Resources (IDWR or Department) received your above referenced correspondence via facsimile and e-mail on March 23, 2010. The Director forwarded your correspondence to me for response.

Your letter demands full delivery of water to seven separate decreed water rights from the Worm Creek Drainage Decree. The decreed source of water for three of these seven rights is Spring Creek, while the remaining four rights are decreed from "Unnamed Streams in Kirby Pond Drainage." The context of your letter appears to focus on delivery of water from Spring Creek with really no additional reference to the Unnamed Streams source. Your letter also makes no reference regarding the fact that about half of the acres described under the seven water rights are located within the service area boundary of the Cub River Irrigation Company. This response is organized according to these sources of water.

Please be advised that the authorized irrigation season for the rights which you have demanded delivery starts on April 1. Obviously neither the Department nor the watermaster can initiate delivery of water prior to April 1.

Spring Creek Water Rights

Rights 13-62, 13-216 and 13-258 are decreed from Spring Creek. Donald and Nona Golightly are listed as the owners of record for rights 13-62 and 13-216. These two rights and right 13-217 authorize the total combined irrigation of 114 acres. The Franklin County Assessor's office shows that E & M Trust owns 50 of the 114 acres under these water rights, and Wheatley Properties LLC owns the remaining 64 acres. May Chadwick is listed as the owner of right 13-258, which authorizes irrigation of 29 acres. The Franklin County Assessor's office lists Chadwick Enterprises as the owner of these 29 acres.

Attachment A to this letter is a copy of a letter dated May 14, 2009 from the Department to Water District 13-A watermaster Troy Foster. This correspondence directed the watermaster to deliver water on Spring Creek in accordance with priority water rights starting in 2009. The Department specifically directed the watermaster to treat any and all water that is spilled or injected to Spring Creek by Preston Whitney Irrigation Company, Preston Whitney Reservoir

Company, or Cub River Irrigation Company as natural flow subject to delivery by priority water rights decreed from Spring Creek. Please refer to the Department's May 14, 2009 letter for further details regarding distribution of rights on Spring Creek. The Department expects the watermaster to follow this same guidance this year.

Attachment B of this letter is a copy of correspondence dated August 28, 2008 from the Department to your client, Eldon Golightly. This letter addressed a number of concerns expressed by Mr. Golightly, including the lack of delivery of water to his Spring Creek water rights. You will note from review of that letter that the Department had concluded that Spring Creek had historically benefitted from waste water return flows but recent changes in irrigation practices by Preston Whitney and Cub River Irrigation Companies had resulted in a reduction of return flows to the creek, thereby significantly reducing the amount of water available to Mr. Golightly and other right holders on the creek. This same correspondence also found that the installation of pipelines by the irrigation companies was lawful and did not require applications or other 'filings' by the companies. The Department's correspondence did find several concerns or questions regarding the companies' water rights. The Department has since notified the companies of those concerns. We understand that some of those concerns have been addressed and others may require some on-going follow-up or investigation, or may be subject to pending water right transfers. The Department does not anticipate that any additional investigation or action taken by the agency will likely increase the available amount of water in Spring Creek.

Please also be aware that based on the list of Spring Creek water rights included in Attachment A, your clients' water rights are among the more junior Spring Creek water rights. It is further noted that right 13-62 has a limited season of use from April 1 to July 1. The rate of diversion under this right, 0.20 cfs, is also very limited, providing less than one-tenth of an inch of water per acre for the total acres described under the right. Based on our visit to Spring Creek in July of 2008 and subsequent discussion with the watermaster, IDWR understands that the Hull diversion (1893 priority right) and Golightly diversion are the only diversions from the creek currently capable of diverting water for irrigation. IDWR required Mr. Hull last year to install a measuring device on his diversion. The watermaster has advised IDWR that a device was installed but some improvement was necessary and the updates are expected to be made before the season starts.

Water Rights from Unnamed Streams in Kirby Pond Drainage

The Department currently lacks specific information regarding any active diversions that your clients may have from Unnamed Streams in Kirby Pond Drainage. Mr. Golightly provided no information about his water right or diversion from this source when I questioned him on this matter during my visit with him on July 18, 2008. However, recent aerial imagery on file at the Department shows that there are two ponds on the Golightly/E&M Trust property with a total surface area of about 2.5 acres. Neither I nor the watermaster know what the source of water is for these ponds, nor do we know what if any use of water there may be from these ponds. While the point of diversion for Mr. Golightly's water right from the Unnamed Streams source is in the vicinity of the ponds, we are not aware of any water rights that authorize the storage of water at this location. Additionally, the watermaster has no knowledge or familiarity with any diversions that your clients may have from the Unnamed Streams in Kirby Pond Drainage. The Department therefore asks that you provide any and all information regarding your clients' ponds and use of water from the Unnamed Streams in Kirby Pond Drainage, or allow the watermaster and

Department staff to coordinate a visit with your clients to inspect any diversions your clients have from the Unnamed Streams.

Cub River Irrigation Company Shares

As noted above, about half of the irrigated acres described under your clients' water rights are located within the service area of the Cub River Irrigation Company. Based on our prior investigation of Mr. Golightly's concerns, we understand that he owns and/or leases shares of water from Cub River Irrigation Company that are used on at least a portion of the lands described by his Spring Creek water rights. Portions of lands owned by your other clients also appear to be located within the Cub River Irrigation Company service area.

The Department is not clear from your letter whether you are alleging the lack of delivery of water represented by Cub River Irrigation Company canal shares. The Department understands that the Water District 13-A watermaster has and continues to deliver water to the Cub River Irrigation Company in accordance with the company's priority water rights and available supply of water from the Cub River. Assuming your clients own company shares, then they should receive a per share supply of water equivalent to other company share holders. Please clarify if you are alleging that your clients' are not receiving proper delivery of their canal shares. If you allege that they are not receiving delivery of their shares, please identify the number of shares owned by each of your clients and the locations of where those shares are used.

Worm Creek Drainage Decree Provisions and Findings of Fact

Your demand letter cites a general provision and several findings of fact from the Worm Creek Drainage Decree which you appear to interpret as a guarantee for delivery of water without regard to the water sources and priority dates given in your clients' decreed rights.

Regarding the general decree provisions that "the rights described in this decree are considered as part of the same system, and shall be distributed as one system when physically practical"; IDWR generally understands this provision to mean that the water rights and water sources in the decree should be administered together, and not separately. In contrast, some water decrees in Idaho provide for separate administration of certain tributary stream sources. The above referenced provision merely means that all the priority rights should be administered with respect to each other and that none of the sources should be administered separately. For example, junior priority rights located in the upper reaches of Worm Creek or a tributary to Worm Creek may be curtailed in order to satisfy a downstream senior priority Worm Creek right.

Findings of Fact 1 and 2 from the Worm Creek Decree are simply factual statements regarding the occurrence of water in the Worm Creek Basin. These facts do not provide a guarantee or entitlement to full delivery of water rights in the lower reaches of the basin, such as Spring Creek. Finding of Fact 1 states that "in the lower reaches the natural water supply is augmented by return flows and water from other stream systems, i.e., Mink Creek and Cub River." Your clients' water rights are from Spring Creek or Unnamed Streams in Kirby Pond Drainage, which are located in the lower reaches of the basin. Your clients do not hold rights from Mink Creek or Cub River except to the extent that they may be shareholders in either the Cub River or Preston Whitney Irrigation Companies. As stated earlier in this letter, and prior correspondence by IDWR, water rights on Spring Creek have long relied upon 'return flows' and waste water from the irrigation companies that have diverted water from Worm Creek and

'imported sources', including Cub River and Mink Creek. The Court obviously recognized this occurrence but there is no provision or language in the decree that requires the irrigation companies or appropriators of either the imported water sources or senior rights on Worm Creek to continue less efficient irrigation practices in order to satisfy more junior priority water rights in the lower reaches of the basin. Likewise, Finding of Fact 2 is merely a fact about water occurrence and conveyance. It does not require the irrigation companies to divert or inject imported water that they appropriate under their own water rights into other natural channels in order to benefit water rights from those same natural channels. Your clients' rights do not include Worm Creek as a source of water. Spring Creek is tributary to Worm Creek in the lower reaches of the basin near the Utah border. Worm Creek is not tributary to Spring Creek and the Preston Whitney and Cub River Irrigation Companies' Middle Ditches are not identified as natural channels or tributaries to Spring Creek in the Worm Creek Drainage Decree, nor are those ditches required to be used for the conveyance of imported or comingled sources of water to Spring Creek or any other unnamed streams in the lower Worm Creek Basin.

Demand to Control Distribution of Water in Worm Creek Drainage

The Department acknowledges that Worm Creek and tributaries have generally not been administered by Water District 13-A. Worm Creek was not officially added to Water District 13-A until 198_. The Department agrees that Water District 13-A needs to assume a greater role in regulation and administration of water rights in the Worm Creek drainage. To that end, and as referenced in this letter, the Department has already instructed the watermaster to regulate water rights on Spring Creek and administer any and all water discharged to Spring Creek by the irrigation companies as natural flow available to satisfy water rights, in priority, held by your clients. Additionally, Department staff last year made an inventory of diversions on Worm Creek to evaluate distribution needs and concerns with an objective towards incorporating these rights and diversions into Water District 13-A. The Department will review the inventory and issue any necessary orders for measuring devices and controlling works contingent on available Department resources.

The Department also recognizes that there are potential water right place of use questions or issues within both the Cub River and Worm Creek drainages that may require some on-going investigation and potential follow-up. Department staff will endeavor to investigate these matters further despite reductions in budget and staff for water distribution matters. While the Department recognizes that water distribution and regulation can be improved on Worm Creek and Water District 13-A in general, we believe that such efforts will do little to provide additional flow of water in Spring Creek for the benefit of your clients who have relatively junior priority rights that have long relied on waste water return flows.

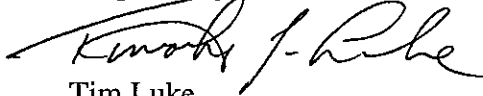
Given the reality that the watermaster cannot likely deliver additional water to your clients, your demands appear in part to represent a request that the Department or watermaster require the Preston Whitney and Cub River Irrigation Companies to discontinue more efficient irrigation practices and continue wasting water to Spring Creek or the Unnamed Streams described in your clients' water rights. The Department cannot require the companies to continue the wasting of water to Spring Creek or other natural channels. Idaho law clearly establishes that a water user relying primarily on return flows or waste water cannot compel another water user to continue less efficient practices giving rise to the waste water or return flows. See *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 101 Idaho 677

(1980); *Colthorp v. Mountain Home Irr. Dist.*, 66 Idaho 173 (1945); *Crawford v. Inglin*, 44 Idaho 663 (1927).

Finally, as stated in the Department's August 28, 2008 correspondence to Mr. Golightly, the Department does not believe that the installation of pipelines by the irrigation companies in the Middle Ditch or the ditch from the Lamont and Johnson Reservoirs constitutes an illegal use of water. Idaho law does not prohibit canal companies or water users from piping their ditches or laterals. However, the Department can investigate questions concerning authorized places of use under the companies' rights or any other water rights within Water District 13-A. For the record, the Cub River Irrigation Company's water right from the Cub River, identified as water right no. 13-26B, does authorize the use of water in Utah. The company also has water rights to divert water from the Bear River for use in Utah.

Please contact me directly at 208-287-4959 to discuss any questions you may have concerning this response or any constructive procedures that may be initiated to help address your clients' concerns.

Respectfully,

A handwritten signature in black ink, appearing to read "Tim Luke", written over a horizontal line.

Tim Luke
Water Distribution Section

Cc: Troy Foster, Water District 13-A Watermaster
Gary Spackman, IDWR Interim Director
IDWR Eastern Region
Cub River Irrigation Company
Preston-Whitney Irrigation Company
Preston-Whitney Reservoir Company

Attachment A



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

May 14, 2009

Troy Foster
Water District 13-A Watermaster
2063 E 1600 S
Preston, ID 83263

Re: Guidance for Delivery of Water on Spring Creek, tributary to Worm Creek

Dear Troy,

On July 18, 2008, Ernie Carlsen and I visited you and toured certain areas of the Cub River water district, including Spring Creek, which is tributary to Worm Creek. During our visit, I instructed you to prohibit Preston Whitney Irrigation Company and/or Preston Whitney Reservoir Company (collectively referred to herein as Preston Whitney) from using Spring Creek to deliver any portion of their water or water rights to Preston Whitney shareholders or any other users on Spring Creek. This guidance was reiterated in a letter from the Idaho Department of Water Resources (Department) to Eldon Golightly, dated August 28, 2008. A copy of that letter was sent to you and Preston Whitney. Since sending that letter, the Department has engaged in several discussions with Preston Whitney and Gilbert Hull regarding Preston Whitney's use of Spring Creek as a conveyance channel for delivery of stored water to Mr. Hull.

On May 5, 2009, Department representatives met with Preston Whitney representatives to further discuss options for using Spring Creek as a conveyance channel for delivery of stored water. This meeting was preceded by several discussions between Mr. Hull, Ernie Carlsen and I. During the meeting with Preston Whitney on May 5th, the Department suggested that Preston Whitney consider filing a water right transfer that would add to their water rights a point of injection and point of re-diversion to and from Spring Creek. The Department also suggested that if Preston Whitney continues to deliver stored water to Spring Creek without updating their water rights to add a point of injection to and point of re-diversion from Spring Creek, then the Department would consider any water entering Spring Creek as waste or return water that is subject to appropriation in accordance with Spring Creek priority water rights. It is the Department's understanding based on our May 5th meeting that Preston Whitney will not immediately add to its' water rights a point of injection to and point of re-diversion from Spring Creek. Until or unless the Department approves a water right transfer that authorizes the use of Spring Creek as a conveyance channel for the delivery of stored water, the Department directs you as follows:

- Any or all water that enters Spring Creek as a result of Preston Whitney delivering or discharging water from its' conveyance systems to the creek channel shall be considered as operational spill, waste water or return flow water. Any such water that enters Spring Creek shall then become the natural flow of Spring Creek and subject to appropriation by the holders of water rights from Spring Creek.

SCANNED

MAY 15 2009

- The Department directs you, as watermaster of Water District 13-A, to deliver water rights on Spring Creek in accordance with the priority dates for those rights. A list of the Spring Creek water rights is attached to this letter along with computer generated summary reports for each right. Any Spring Creek rights that are senior to the right held by Mr. Hull must first be satisfied, assuming that water is available at the points of diversion for those rights and the right holders wish to have those rights delivered.
- As shown on the attached water rights list, Mr. Gilbert Hull is shown as one of three owners of right 13-311 bearing a priority date of February 2, 1893, and a diversion rate of 1.34 cfs for irrigation and stockwater purposes. The attached summary report for this right also shows that no more than 235 acre-feet per year can be diverted for irrigation purposes. This right may be delivered for the irrigation rate of diversion of 1.34 cfs on 67 acres, which equals 0.02 cfs per acre or one inch per acre. In delivering this right, you must assure that the rate of diversion does not exceed the authorized water right diversion rates. The right must be curtailed if and when the 235-acre limit is reached.
- Any water in Spring Creek that may be available for appropriation above and beyond Hull's water right shall be delivered to the next-in-time priority right holder on Spring Creek who requests or seeks delivery of water under their priority right. The Department asks that you communicate with any other users on Spring Creek regarding their interest or ability to divert any additional water that may be available in the creek.
- Mr. Hull must install a measuring device on his diversion from Spring Creek so that you can measure and control the proper delivery of water to him under his right. Separate correspondence will be sent to Mr. Hull requiring him to install a measuring device.
- The Department further directs you to curtail the diversion or use of any water from Spring Creek that is not authorized and/or described in the attached list of water rights.

If you have questions concerning this matter, please contact me or Dan Nelson, IDWR Water Distribution Section, Boise (208-287-4800).

Respectfully,



Tim Luke
Water Distribution Section Manager

Cc: Gilbert Hull
Ernie Carlsen, IDWR Eastern Region
✓ Dan Nelson, IDWR State Office
Lyle Porter, Preston Whitney Irrigation Co.
Rob Harris, Attorney for Preston Whitney Irrigation Co.
Preston Whitney Reservoir Co.

Water Rights from Spring Creek
Sorted by Priority

5/14/2009
IDWR

<u>Water Rt No</u>	<u>Basis</u>	<u>Source</u>	<u>Tributary</u>	<u>Priority Date</u>	<u>Owner(s)</u>	<u>Twp</u>	<u>Rnge</u>	<u>Sec</u>	<u>QQQ</u>	<u>Gvt Lot</u>	<u>Rate (cfs)</u>	<u>Vol (af)</u>	<u>Acres</u>	<u>Water Use(s)</u>
13-247	Decreed	SPRING CREEK	CUB RIVER	1878/04/01	BAKER, ILA L (Current)	15S	40E	30	NWSW	3	0.28	52	14	IRRIGATION, STOCKWATER
13-247	Decreed	SPRING CREEK	CUB RIVER	1878/04/01	BAKER, ILA L (Current)	15S	39E	25	NESE		0.28	52	14	IRRIGATION, STOCKWATER
13-60A	Decreed	SPRING CREEK	CUB RIVER	1886/05/15	RALLISON, FREDRICK W (Current)	16S	40E	6	NWNW	4	0.02	9	22	IRRIGATION
13-60B	Decreed	SPRING CREEK	CUB RIVER	1886/05/15	SHARP, LYMAN J (Current)	16S	39E	1	SWSE		0.08	34	216	IRRIGATION
13-61A	Decreed	SPRING CREEK	CUB RIVER	1888/05/15	RALLISON, FREDRICK W (Current)	16S	40E	6	NWNW	4	0.03	13	22	IRRIGATION
13-61B	Decreed	SPRING CREEK	CUB RIVER	1888/05/15	SHARP, LYMAN J (Current)	16S	39E	1	SWSE		0.17	73	216	IRRIGATION
13-311	Decreed	SPRING CREEK	CUB RIVER	1893/02/04	HULL, GILBERT (Current); HULL, HAROLD M (Current); HULL, ROBERT M (Current)	15S	39E	36	SENE		1.34	242.9	67	IRRIGATION, STOCKWATER
13-237	Decreed	SPRING CREEK	CUB RIVER	1900/04/01	RALLISON, FREDRICK W (Current)	16S	40E	6	NWNW	4	0.15	64	22	IRRIGATION
13-62	Decreed	SPRING CREEK	CUB RIVER	1902/05/15	GOLIGHTLY, DONALD D (Current); GOLIGHTLY, NONA (Current)	16S	40E	6	NWNW	4	0.2	36	114	IRRIGATION
13-258	Decreed	SPRING CREEK	CUB RIVER	1903/08/31	CHADWICK, MAY S (Current)	16S	40E	6	NWNW	4	0.58	102	29	IRRIGATION
13-216	Decreed	SPRING CREEK	CUB RIVER	1903/08/31	GOLIGHTLY, DONALD D (Current); GOLIGHTLY, NONA (Current)	16S	40E	6	NWNW	4	1.8	400	114	IRRIGATION
13-144	Decreed	SPRING CREEK	CUB RIVER	1903/08/31	MOSER, JOSEPH L (Current)	16S	40E	6	NWNW	4	0.2	85	167	IRRIGATION
13-273	Decreed	SPRING CREEK	CUB RIVER	1903/09/01	RALLISON, FREDRICK (Current)	16S	40E	6	NWNW	4	0.24	77	22	IRRIGATION
13-274	Decreed	SPRING CREEK	CUB RIVER	1903/09/01	SHARP, LYMAN L (Current)	16S	39E	1	SWSE		2.85	756	216	IRRIGATION
13-274	Decreed	SPRING CREEK	CUB RIVER	1903/09/01	SHARP, LYMAN L (Current)	16S	40E	6	NWNW	4	2.85	756	216	IRRIGATION
13-239	Decreed	SPRING CREEK	CUB RIVER	1930/04/01	BECKSTEAD, ANNE (Current); BECKSTEAD, LINDEN (Current)	15S	39E	25	SESE		0.8	140	40	IRRIGATION
13-210	Decreed	SPRING CREEK	CUB RIVER	1930/04/01	DUNKLEY, BERNELL (Current); DUNKLEY, LESLIE L (Current)	15S	39E	25	SESE		1	175	50	IRRIGATION

* Water Rights decreed from source Spring Creek in Worm Creek Decree. Note that IDWR database indicates tributary source is Cub River but USGS maps indicate that tributary source is actually Worm Creek.

Attachment B



State of Idaho

DEPARTMENT OF WATER RESOURCES

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August 28, 2008

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

Eldon Golightly
2414 S 1600 E
Preston, ID 83263

Re: Your Prior Correspondence Regarding Delivery of Water Rights from Spring Creek, and
Follow-up to IDWR Visit with you on July 18, 2008

Dear Mr. Golightly,

I am finally writing you as a follow-up to the visit that Ernie Carlsen, Troy Foster and I made with you at your residence on the morning of July 18, 2008. Ernie, Troy and I also inspected most of Spring Creek between Lamont/Johnson Reservoirs and your point of diversion at Whitney along Highway 91. We also toured portions of the diversion/delivery systems and service areas of Cub River Irrigation Company (Cub River Irrigation), the Preston-Whitney Irrigation Co and the Preston-Whitney Reservoir Company (collectively referred to herein as Preston-Whitney). We also toured other parts of the Cub River water district with the Cub River watermaster, Troy Foster. Ernie and I appreciated the time you provided us to explain your concerns about the lack of delivery of Spring Creek water rights that you currently hold.

Before getting into much detail about our visit of July 18th, I wish to raise a few questions or findings concerning the water rights in which you claim to have an interest. Your correspondence to the Idaho Department of Water Resources (Department) dated July 25, 2007 only referenced water right no. 13-62, which is a 1902 priority decreed right from Spring Creek, tributary to Worm Creek. The owners of record for this right as per the Department's records are Donald G and Nona Golightly. This water right is appurtenant to 114 acres in the E1/2NE, the E1/2SE of Section 12, Township 16 South (T16S), Range 39 East (R39E), and the W1/2SW of Section 7, T16S, R40E. Water right 13-216 is a 1903 priority decreed right from Spring Creek, tributary to Worm Creek, and water right 13-217 is an 1872 priority decreed right from an unnamed stream tributary to Worm Creek. Rights 13-216 and 13-217 also show Donald G and Nona Golightly as the owners of record, and both rights are also appurtenant to the same lands as right 13-62. All three rights have a condition that limits the combined annual diversion of water under the three rights to no more than 400 acre-feet per year.

As per the Franklin County Assessor's office, the E1/2SE of Section 12, T16S, R39E is owned by Wheatley Properties LLC. As a result, at least 64 of the 114 acres under the above three water rights are owned by Wheatley Properties. The Franklin County Assessor's office further documented that the remaining lands under the water rights in the NE of Section 12, T16S, R39E and the NW of Section 7, T16S, R40E, are owned by E&M Trust, with the co-trustees being Patricia Vaughn and James Townsend of Preston, Idaho. As per our telephone discussion on August 20, 2008 regarding ownership of the rights, you acknowledged that Wheatley Properties owns a portion of the three water rights appurtenant to the E1/2SE Section 12, T16S, R39E. You also advised me that you have a personal interest in the E&M Trust but that Patricia Vaughn and James Townsend are no longer representatives of the trust.

Given the above findings concerning the ownership of the rights and lands, the Department recommends that you update the ownership of water rights 13-62, 13-216 and 13-217 by filing a Notice of Change in Water Right Ownership with the Department. Ownership change forms can be downloaded from the Department's web site using the following address: http://www.idwr.idaho.gov/water/rights/water_rights_forms.htm .

Concerning our visit with you on July 18, 2008, I understood some of your concerns to be as follows:

- You allege that your water rights from Spring Creek are not delivered or satisfied at your point of diversion from Spring Creek.
- You believe that the earthen ditch, identified as the Middle Ditch on the local United States Geological Survey (USGS) topographical map, which formerly conveyed water from the Lamont and Johnson Reservoirs and which was replaced by a pipeline last year by Preston-Whitney, is a natural channel.
- You allege that the construction of the Preston-Whitney pipeline that replaced the earthen ditch from the reservoirs constitutes an illegal action by Preston-Whitney and interferes with your ability to divert your Spring Creek water rights.
- You allege that a second pipeline installed by Cub River Irrigation, known locally as the Palmer pipeline, out of a ditch from the Cub River that is also identified as the Middle Ditch on the local USGS topo map, was installed without "filing" with the Department.
- You alleged during our visit on July 18th that water from Preston-Whitney that is conveyed through the pipeline that was installed last year is being delivered outside of Preston-Whitney's service area and/or to water users in the Cub River Irrigation Company.
- You alleged during our visit on July 18th and it is implied in your correspondence dated November 19, 2007 to Cindy Bird of the Department that the Johnson and Lamont Reservoirs intercept or interfere with the flow of water to Spring Creek.
- During our phone conversation of August 20, 2008, you stated that water from Preston-Whitney was being injected or discharged to Spring Creek and re-diverted from Spring Creek "around your diversion" this season to satisfy another water user.

I offer the following observations and responses based on our visit of the area on July 18, 2008.

- During our visit we confirmed that there was very little water available to divert at your diversion on Spring Creek. There may have been just a few inches going to your ditch but that quantity would provide little if any beneficial use under your rights. The lack of available water at this location is consistent with Troy Foster's observations over the past few years as well as the observations of IDWR staff member Cindy Bird who visited your Spring Creek diversion last summer. During our visit on July 18, 2008, we found very little water in any portion or reach of Spring Creek above your diversion (note: our

definition of Spring Creek is the creek as located in IDWR water rights and the USGS topo map). This observation is again consistent with the observations of Troy Foster over recent years. The Department understands that very little waste water or return flow from Cub River Irrigation and Preston-Whitney irrigation delivery systems enters Spring Creek above your diversion. The lack of return flow or waste water that may enter Spring Creek appears to be directly related to the general transition of flood irrigation to pressurized sprinkler irrigation within the Cub River Irrigation and Preston-Whitney delivery systems, as well as the installation of pipelines that convey water from Cub River Irrigation's Middle Ditch and from Preston-Whitney's Lamont and Johnson Reservoirs. The Department further understands that the amount of waste water or flow returning to Spring Creek from these irrigation systems was greater before irrigation practices changed and/or irrigation system efficiencies were made starting some ten to fifteen years ago. We believe that the reduction in return flow or waste water to Spring Creek from the Cub River and Preston-Whitney service areas is the primary reason your Spring Creek water rights are not being satisfied.

- The Department does not agree that the earthen ditch used by Preston-Whitney to convey water from the Lamont and Johnson Reservoirs, and identified as the Middle Ditch on the local USGS topo map, is a natural channel or a natural tributary to Spring Creek. This is a man made ditch constructed by Preston-Whitney for purposes of conveying stored water from the Lamont and Johnson reservoirs as well as natural flow that Preston-Whitney diverts from the Cub River and Worm Creek.
- It is the Department's position that Preston-Whitney, or any canal or irrigation company in Idaho, is entitled to pipe or tile their privately constructed delivery ditches. No "filing" with, or authorization from the Department is required for a canal or irrigation company to replace a privately constructed ditch with a pipeline. The Department does not agree with your position that the installation of the pipeline replacing the Preston-Whitney Middle Ditch or the installation of the Palmer pipeline by Cub River Irrigation required a 'filing' with the Department, nor does the Department believe that either pipeline was somehow installed illegally.
- We learned from our visit with the watermaster and subsequent review of water district reports and other documents that you forwarded to the Department that Preston-Whitney uses its' upper Cub River diversion located near the Albert Moser Campground, or the Cub River-Worm Creek Canal (aka the Upper Fill Ditch), to deliver its' 1882 Cub River natural flow priority right no. 13-2. The legal point of diversion for this right is the Middle Ditch from Cub River that Cub River Irrigation now uses under agreement with Preston-Whitney to deliver a portion of Cub River Irrigation's water rights. It is our understanding from the watermaster that Preston-Whitney still uses the Middle Ditch but typically diverts most or all of right 13-2 to the Cub River - Worm Creek Canal, which is then injected to Worm Creek and re-diverted through the Lamont and Johnson Reservoirs to Preston-Whitney's service area. Although Cub River Irrigation obtained an approved water right transfer to add the Middle Ditch as a point of diversion to its' water rights, Preston-Whitney has never filed a water right transfer to add the Cub River - Worm Creek Canal as a legal point of diversion to right 13-2. Preston-Whitney therefore should file a water right transfer to add the Cub River - Worm Creek Canal as a legal point of diversion to right 13-2, update the place of use for the right, and update the

ownership of the right from the Middle Ditch Company to Preston-Whitney Irrigation Company.

- Our visit on July 18, 2008 with Troy Foster also revealed that Preston-Whitney and Cub River Irrigation sometimes engage in a water right exchange. Preston-Whitney water is delivered to certain Cub River Irrigation users at certain times when Cub River is short of water in exchange for an equal amount or volume of water from Cub River Irrigation being delivered to certain Preston-Whitney users at times when Preston-Whitney is short of water. We understood from explanation of Conan Foster, ditch rider for Cub River Irrigation and Preston-Whitney, that the exchange may total a few hundred acre feet of water per year. The details of this exchange are not entirely clear yet to the Department but the Department does not believe that authorization exists for such an exchange nor is there any pending application for exchange of water on file with the Department. The Department therefore intends to instruct the watermaster to discontinue this exchange until the two companies file an Application for Exchange of Water and subsequently receive approval from the Department.
- Relative to your concern about where water is delivered by Preston-Whitney and Cub River Irrigation, the Department has found that Cub River may indeed be delivering water to lands outside of the place of use described under its water rights. In fact we found that Cub River Irrigation delivers shares to a portion of your land in Section 7, T16S, R40E that is not covered by Cub River's water rights. The Department believes that Cub River, and possibly Preston-Whitney may be delivering water to lands that is not consistent with the places of use described by their water rights even though such delivery may have occurred for many years. To this end, the Department will request that both Preston-Whitney and Cub River review their actual service area boundaries with the boundaries identified by their water rights and file any water right transfers, if necessary, to update their respective service areas. The Department will request that Preston-Whitney file a water right transfer at least to update the place of use and ownership for right 13-2.
- We observed no direct diversions of water from Spring Creek during our visit of the creek on July 18, 2008. Since you were not able to physically accompany us on our tour of the creek we could not review with you in the field all of the sites referenced in your November 19, 2007 letter. We did not observe any direct diversion of water from Spring Creek to the Moser pond at the time of our visit. We understand from a previous investigation by Cindy Bird and reports made to her by another local water user that there may have been and perhaps continues to be some unauthorized or out-of-priority diversion on Spring Creek in the vicinity of this pond, and another pond located at or near the Petterborg residence. Although there may be little water to divert in Spring Creek, the Department believes that the creek should be regulated. The Department is prepared to take steps to assure that both Spring Creek and Worm Creek are regulated by the watermaster of Water District 13-A in subsequent years.
- Regarding your allegations that Johnson and Lamont Reservoirs intercept or interfere with the flow of water to Spring Creek. We have no evidence that springs exist in either reservoir but we agree that all or portions of the reservoirs are within the Spring Creek drainage area. We are troubled however that you claim these reservoirs interfere with

your Spring Creek water rights nearly thirty years after the Worm Creek Basin Adjudication and Final Decree. We are not aware that such complaints or objections were raised during the Worm Creek Adjudication and there is no guidance or direction from the Worm Creek Decree regarding this issue.

- Regarding your complaint on August 20, 2008 about the delivery of water from Preston-Whitney to and from Spring Creek. I contacted watermaster Troy Foster who confirmed that storage water from Preston-Whitney was being delivered to and re-diverted from Spring Creek by a Preston-Whitney shareholder along Spring Creek. The irrigated land in question is located within Preston-Whitney's water rights service area. It is the Department's position that Preston-Whitney's water rights do not authorize them to use Spring Creek to convey their water to any of their patrons, even if the water is used within the place of use authorized by Preston-Whitney's water rights. Preston-Whitney's rights do not authorize them to inject and re-divert their water to or from Spring Creek Creek. Consequently, I verbally directed Troy Foster on August 20, 2008 to prohibit Preston-Whitney from using Spring Creek to deliver any portion of their water or water rights.
- During our site visit on July 18, 2008 we identified several concerns regarding administration of water rights in Water District 13-A that are unrelated to any of the issues raised in our meeting with you or in your previous letters. The Department intends to address these other concerns via separate communication directly with the Water District 13-A watermaster and water users between now and the next annual water district meeting.

In summary, I believe the reduced flows in Spring Creek are due primarily to changes in local irrigation practices. Piping private irrigation ditches and converting irrigation systems from flood irrigation to pressurized sprinklers are not actions that require authorization by the Department. The Department will instruct the watermaster, Preston-Whitney and Cub River Irrigation to discontinue the exchange of Cub River water rights until proper authorization is obtained by the Department. We do not believe that discontinuing the exchange will result in additional water to Spring Creek.

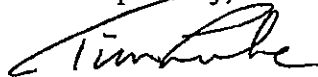
The Department will also instruct the companies to review their water rights place of use and file water right transfers to correct their places of use if necessary. Preston-Whitney must file a water right transfer to add the Cub River-Worm Creek Canal as a point of diversion to water right 13-2. All water right transfers are subject to public notification and may be protested by concerned water users or the public. Water right ownership updates must also be filed for the rights formerly held by Donald and Nona Golightly so that the rights are properly split between Eldon Golightly and Wheatly Properties.

The Department will further instruct the watermaster of Water District 13-A that he immediately begin some regular monitoring and regulation of water use on Spring Creek, tributary to Worm Creek. The Department has already instructed the watermaster to prohibit use of Spring Creek to convey Preston-Whitney project water. While these actions are necessary, we do not anticipate that they will result in improving the water supply of Spring Creek.

Worm Creek and tributaries were added to Water District 13-A by Order of the Director dated February 25, 1983. The Department therefore will advise the watermaster and water users within the Worm Creek drainage that they are subject to regulation and assessments by Water District 13-A. The Department will send notice of the 2009 Water District 13-A annual meeting to right holders within the Worm Creek drainage, as well as other tributaries in the Cub River that are not directly regulated by the watermaster. The Department intends to send one or more orders requiring installation and/or improvement of measuring devices and headgates in the water district.

Please contact Ernie Carlsen or me if you have additional questions related to these issues.

Respectfully,



Tim Luke
Water Distribution Section

Cc: Troy Foster, Water District 13-A Watermaster
Ernie Carlsen, IDWR Eastern Region
Gary Spackman, IDWR Administrator
Cub River Irrigation Company
Preston-Whitney Irrigation Company
Preston-Whitney Reservoir Company