



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

April 10, 2013

JAMES C SCHEFF
10435 W MARTHA AVE
MOUNTAIN HOME ID 83647

Re: Water Supply Problems in the Cinder Cone Butte Critical Ground Water Area

Dear Mr. Scheff:

This letter is a response to your letter, dated February 22, 2013, to John Westra of this Department regarding water supply problems for your domestic well located northwest of Mountain Home. In your letter, you posed several questions to help you determine your next course of action to resolve your water supply problem.

You requested that the Department stop the land owners adjacent to your property from irrigating their land to prevent further degradation of the aquifer in the Cinder Cone Butter Critical Ground Water Area (CCBCGWA). Idaho Code § 42-233a provides that the Director, upon determination that the ground water supply is insufficient, shall order water right holders to cease or reduce withdrawal of water until there is sufficient ground water to meet the demands of senior water rights. Although continued pumping from any well will reduce the water supply available from the aquifer, that provision of law would not be used to address a well interference problem that may exist from a neighboring well.

The Department's Conjunctive Management Rules provide procedures whereby a water right holder may file a petition with the Director for a delivery call alleging material injury caused by junior priority ground water rights. You may review the Conjunctive Management Rules on the Department's website at: <http://www.idwr.idaho.gov/WaterManagement/WaterRights/>. Alternatively, you may be able file a complaint in District Court to address a well interference problem.

In your letter, you also requested "...a review of all water rights within the CCBCGWA to determine the correct diversion rates and volumes..." I'll assume by review you mean measurement of all diversions to determine total withdrawal from the aquifer and to ensure withdrawals do not exceed water right authorizations. Along those lines, the Department has previously prioritized Administrative Basin 61, which includes the CCBCGWA, for creation of a water district to provide for measurement and control of diversions.

A water district is created under Title 42, Chapter 6, Idaho Code, by order of the Director and notice to water users in the district. Water users within a water district elect a watermaster to distribute water. Watermaster services are paid for by the water users in the district. The Department has delayed creation of a water district in Basin 61 due to resource limitations and conflicting priorities; however, it remains a priority and the Department plans to proceed with creation of a water district as time and resources allow.

You posed several other questions in your letter, most which are related to a determination of injury. The question of injury is dependent on specific facts that would be required as part of a delivery call or court action. The Department cannot provide you legal advice on how to evaluate issues of injury as they might relate to a delivery call or court action. The Department understands that you have retained an attorney to represent you in this matter. Your attorney is in the best position to provide you legal advice on the question of injury as it relates to your specific factual situation.

You also posed questions regarding Article 15, Section 3 of the Idaho State Constitution and a preference for domestic uses. The Constitution does provide a preference for certain water uses over other water uses, but the preference simply provides a right of condemnation and is not applicable to a situation such as yours where a senior water user is alleging injury by junior water users. Under Article 15, Section 3, a *junior* domestic right may be entitled to a preference over a *senior* irrigation right, but it is a preference in the right of condemnation and the junior domestic right must still compensate the owner of the senior irrigation right. Montpelier Milling Co. v. City of Montpelier, 19 Idaho 212, 113 P. 741 (1911). This is made explicit by the last sentence of the constitutional provision: "But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution." Simply because a water dispute involves a domestic right does not mean that a non-domestic water right is automatically curtailed in favor of the domestic right.

I hope this letter addresses your questions. Please feel free to contact me if you want to discuss further.

Sincerely,



Jeff Peppersack
Chief, Water Allocation Bureau

cc: John Westra, Western Region, IDWR
Tim Luke, State Office, IDWR
Mike Lawrence, Givens Pursley