From the desk of
Kerry Carpenter

11-19-02

TO: LEE SIM - DISTRIBUTION

LEE:

MIGHT BE GOOD FOR YOU TO BE AWARE OF THIS BEFORE IT GETS FILED ON FILE 97-64. THE UNDERLYING ISSUE IS WHETHER A CONDITION OF FERC RE-LICENSING CAN REQUIRE BY-PASSING SOME INSTREAM FLOWS. CALL IF YOU WANT TO DISCUSS FURTHER -

KERRY

Michael O. Leavitt
Governor
Kathleen Clarke
Executive Director
Robert L. Morgan
State Engineer

State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

Southwestern Region
585 North Main Street, Suite 1
PO Box 506
Cedar City, Utah 84721-0506
435-586-4231
435-586-2789 (Fax)

19 November 2002

Michael Avant
Garkane Energy
1802 South 175 East
KANAB UT 84741

RE: **F.E.R.C. PROJECT NO. 2219-013 / BOULDER CREEK HYDROELECTRIC**
FIELD INVESTIGATION OF DURFEY CREEK / WEST FORK BOULDER CREEK

Mr. Avant:

This letter is written pursuant to the referenced field investigation conducted on 08 November 2002. The parties participating in this investigation included:

Name	Representing
Mike Ottenbacher	Utah Division of Wildlife Resources / SW Region
Bruce Bonebrake	Utah Division of Wildlife Resources / SW Region
Dan Range	U.S. Forest Service / Dixis N. F. / Escalante
Lisa Young	U.S. Forest Service / Dixie N. F. / Escalante
Michael Avant	Garkane Energy / Kanab
Darin Robinson	Jones & DeMille Engineering / Richfield
Keith Christensen	Utah Division of Water Rights / SW Region
Kerry Carpenter	Utah Division of Water Rights / SW Region

This field investigation was initiated as a result of a recent finding that the flows of Durfey Creek, a natural tributary stream to the West Fork of Boulder Creek, were no longer flowing within the historic channel but were now leaving said channel and flowing into the West Fork channel at a point above Garkane's West Fork Reservoir and intake pipeline. Individuals from Garkane and from Wildlife Resources had both previously visited the site at which the flows were leaving the historic Durfey Creek channel and there was not a consensus as to whether this diversion was a natural or man-made feature.

The following observations were made at the field investigation:

1. There were remnants of at least three old beaver dams in the vicinity of the diversion. Two were located on two forks of the southerly trending historic channel of Durfey Creek and the third was located at the edge of the hill where the current channel appears to have broken out and descended toward the West Fork (Mapped as "Beaver Dam 1", "Beaver Dam 2" and "Hilltop/Beaver Dam 3").

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2. The age of the beaver dams is indeterminate, but all three appeared to be relatively old (probably greater than five years) and all three appeared to be of approximately the same vintage.

3. All three beaver dams appeared to be at approximately the same elevation, indicating that they jointly secured a common impoundment in the meadow area through which the Durfey Creek channel currently meanders.

4. Although the evidence is not conclusive, it appears likely that, with the failure of the third beaver dam near the top of the slope into the West Fork, the flows exiting the impoundment eroded and scoured a distinct channel from the historic Durfey Creek channel's course to the West Fork channel and that all natural flows have been carried in that channel since the impoundment failed..

5. Whether the failure of the third beaver dam was a natural event or possibly caused by human intervention (there was evidence of a fire at this location), it is evident from observed channel conditions (extent of channel erosion, established vegetation along channel) that the flows from Durfey Creek have been carried in this channel for an extended period of time.

As regards the specific legal issues related to water rights, I offered the following opinions:

1. Garkane's water right on the West Fork (Water Right Number 97-64) describes a point of diversion and storage right on the West Fork. While the documents describing this right do not address the several sub-drainages which may be tributary to the West Fork above the point of diversion, it is a generally accepted principle that a water user with a right on a particular source is entitled to any or all waters naturally flowing to that source, subject to the prior rights of other water users located on the same drainage. Therefore, to the extent that Garkane's water right has been developed and exercised in reliance on tributary flows from Durfey Creek, Garkane could claim a right to expect those flows to continue to their authorized point of diversion.

2. Water users with established and recognized rights on the reach of Durfey Creek below the present diversion toward the West Fork could possibly make a Stream Alteration Application seeking to return the flows of Durfey Creek to the historic channel. Such application could possibly be approved, subject to the following conditions:

    a. A determination that the downstream rights of the applicant have not ceased for nonuse because the water user has exercised or is exercising reasonable diligence to recover the lost flows; and

b. the restoration of the historic channel of Durfey Creek will not deprive Garkane (or other water users benefitting from this tributary to the West Fork) from waters on which their rights have lawfully relied.

On the basis of information presently available, it is my opinion that this office would have no legal standing to require Garkane or any other water user to restore the Durfey Creek flows to the historic channel which is tributary to the West Fork below the Garkane diversion.

Sincerely,

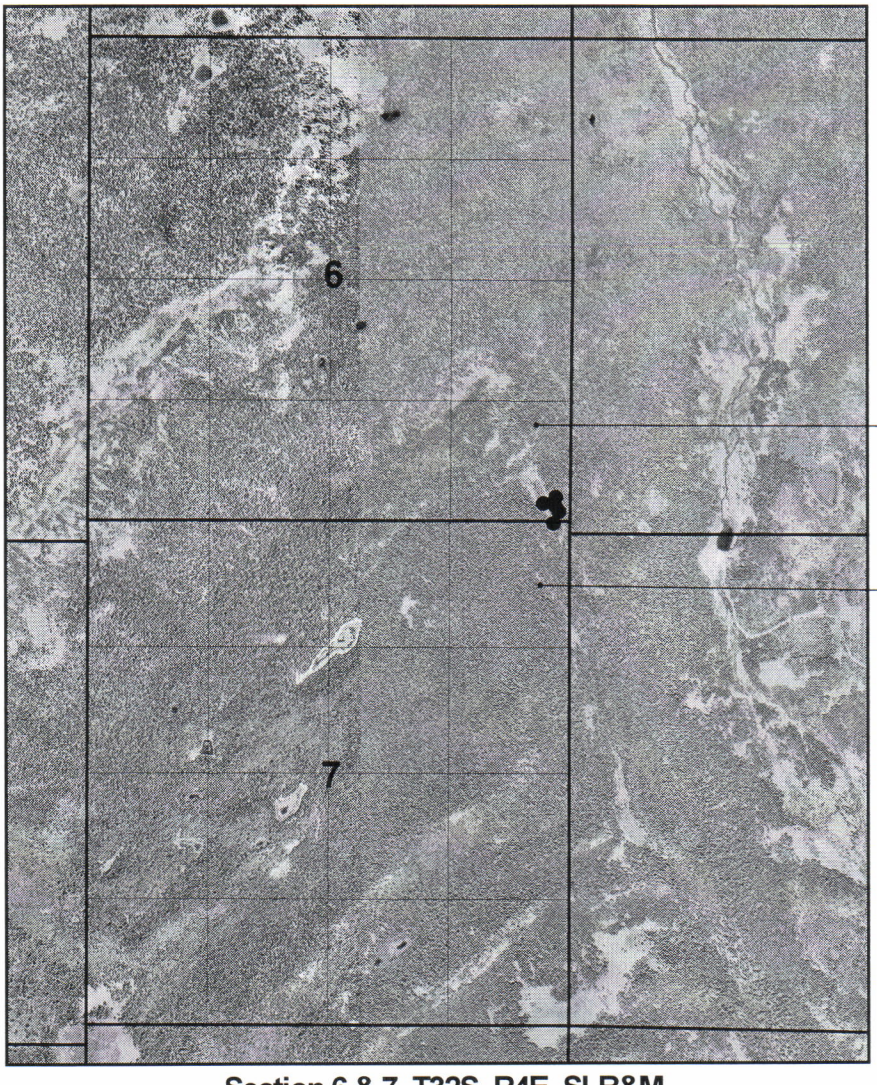
Kerry Carpenter, P.E.
Region Engineer

pc: State Engineer's File 97-64
Bruce Bonebrake / Mike Ottenbacher / Division of Wildlife Resources / PO Box 606 / CEDAR CITY UT 84721-0606
Lisa Young / Dan Range / USFS-Dixie National Forest / PO Box 246 / ESCALANTE UT 84726-0246
Darin Robinson / Jones & DeMille Engineering / 1440 South Pipe Lane / RICHFIELD UT 84701

Encl: Maps (2 @ 8½" x 11")

Results of GPS Survey Conducted 08 November 2002 on Boulder Mtn.

NOTES:
1. Survey performed by Kerry Carpenter, SW Region Office, Utah Division of Water Rights
2. Underlying photo taken from USGS Photo Ortho Quad DEER CREEK LAKE, UTAH.



Section 6 & 7, T32S, R4E, SLB&M
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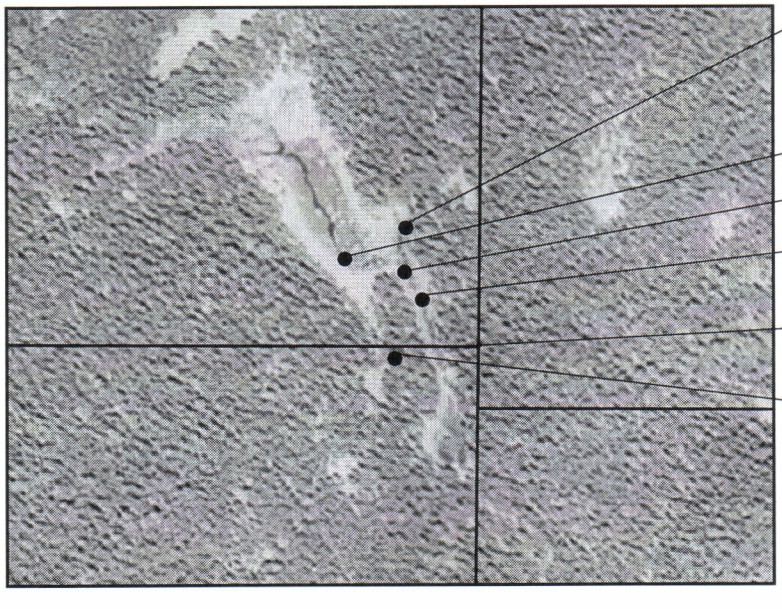

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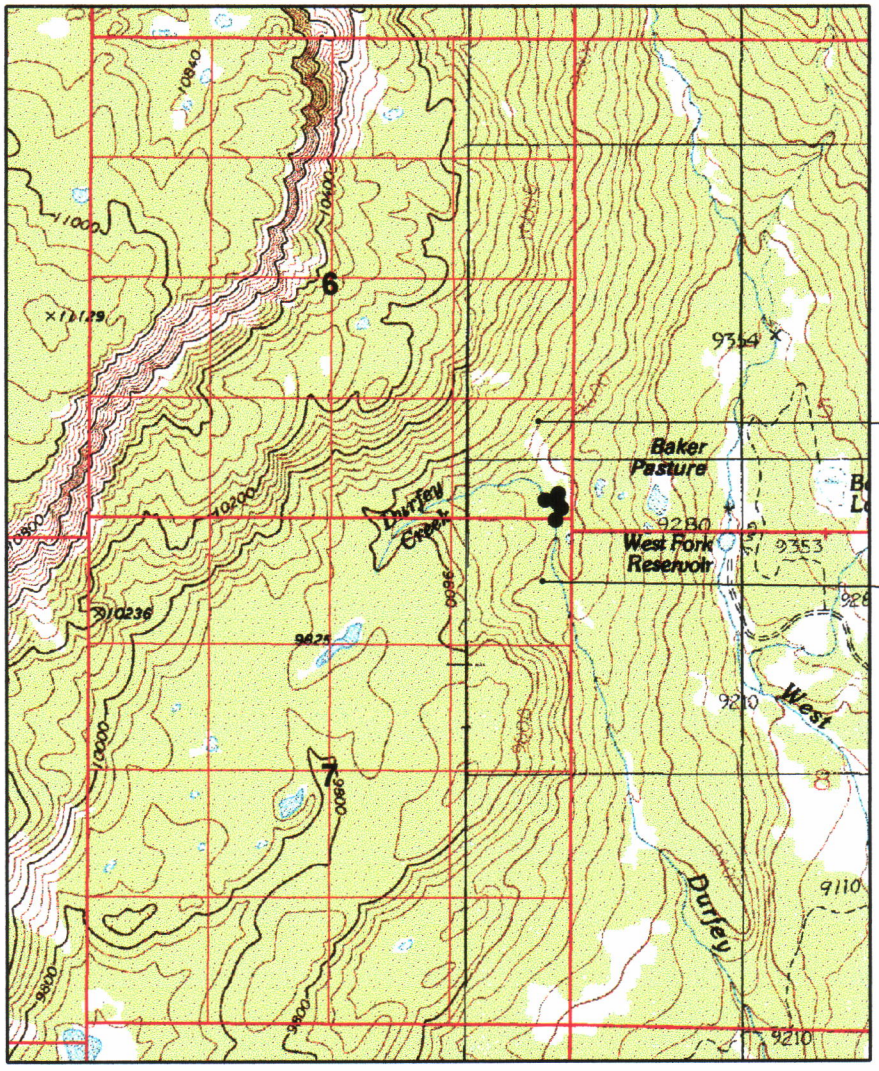
Results of GPS Survey Conducted 08 November 2002 on Boulder Mtn.

NOTES:
1. Survey performed by Kerry Carpenter, SW Region Office, Utah Division of Water Rights
2. Located on the DEER CREEK LAKE, UTAH quad.



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T32S, R4E, SLB&M

NE¼NE¼ Section 7
T32S, R4E, SLB&M

Section 6 & 7, T32S, R4E, SLB&M
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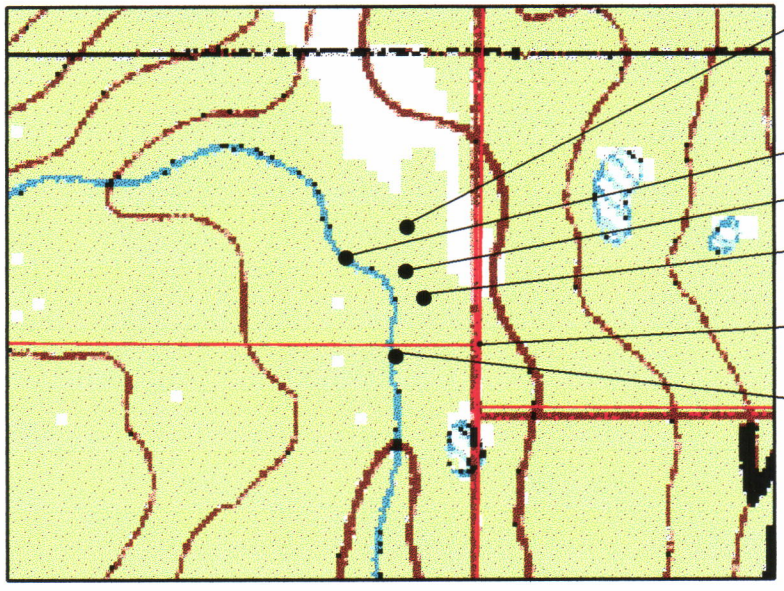

Hilltop / Beaver Dam 3

Point on Durfee Creek 1

Point on Durfee Creek 2

Beaver Dam 1

SE Corner Section 6
T32S, R4E, SLB&M

Beaver Dam 2

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