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SEP 27 2006

Department of Water Resources
Aquiduction Bureau

Edwin C. Thomas
107 Defiance
Sun Valley, Idaho 83323
(208) 622-8852
ethomas@lordbissell.com

September 26, 2006

IDWR Regional Office
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098
Attn: Ms. Roxanne Brown

Re: Water Right Numbers 73-187B, 73-11953 and 73-2073

Dear Ms. Brown:

Enclosed please find Triple T Summit Ranch's executed Notice of Error reply forms for the captioned water rights.

As you will note, we have no problem with 73-11953 or 73-2073. However, as you know from our meeting at May Grange Hall last Wednesday, 73-187B is another matter altogether. With respect to this right, we have prepared a detailed and somewhat legalistic response, including the representation that further materials in the form of affidavits from Messrs. Whitworth, Hansen and Martiny will follow as soon as they are received from the affiants.

We were unable to prepare, mail and serve these affidavits in the time allowed from last Wednesday, September 20, 2006. However, we have spoken to each of these potential witnesses and have set forth in our response the substance of their expected testimony.

While we realize that our objections to preliminary recommendation 73-187B are detailed, that is because the stakes are so very high given the extreme and unwarranted loss we will suffer if the objected to interpretation is not corrected.

Thank you for your attention to this matter.

Very truly yours,



Edwin C. Thomas

ECT:rr

Enclosures

08/31/2006

NOTICE OF ERROR
REPLY

Please type or print clearly, fill out this form completely and mail.

Return this reply form to IDWR by the deadline date printed below if you want IDWR to change your recommendation or you want to let IDWR know that you agree with its recommendation.

YOUR DEADLINE FOR RETURNING A NOTICE OF ERROR REPLY IS: September 29, 2006

Water right number: 73-187B

TRIPLE T SUMMIT RANCH
C/O EDWIN C & LINDA M THOMAS
PO BOX 1842
SUN VALLEY ID 83353
Telephone Number: (208)622-8439

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Department of Water Resources
Adjudication Bureau

1. Describe the portion of the proposed recommendation with which you disagree (e.g. priority date, period of use, source):

A. The qualifying statement under "other provisions" that: This right may only be used when the total amount available from Hill Creek and Graves Springs equals or exceeds 2.5 CFS (emphasis added); and B. Priority date other than 5/01/87.

2. Describe the changes you wish to make in the proposed recommendation:

A. Priority Date of 5/01/87.

B. See Exhibit A attached.

3. Give a brief explanation as to why you disagree with these portions:

See Exhibit B attached.

____ I AGREE with this proposed recommendation: no changes need to be made.

DATE:

8/26/06

SIGNATURE:

Edwin C Thomas

Please print your name:

EDWIN C. THOMAS

IDWR Regional Office, 322 E Front St
PO Box 83720, Boise, ID 83720-0098, 2082874800

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Department of Water Resources
Adjudication Bureau

EXHIBIT A

If Hill Creek and Graves Springs yield less than 125 CFS, then the difference should be obtained by Sulphur Creek Ranch (or its successor) from the waters of Big Gulch Creek. After that, Summit Ranch is entitled to fill its 100 CFS right from the water remaining in Big Gulch Creek. Thereafter, and subject to Summit Ranch's water rights Nos. 73-11953 and 73-2073, any water left in Big Gulch Creek should be divided $\frac{5}{9}$ to Sulphur Creek Ranch (or its successor) and $\frac{4}{9}$ to Summit Ranch. Provided, however, that when the combined amount of waters available from Hill Creek, Graves Springs and Big Gulch Creek is less than 4.5 CFS, then $\frac{100}{225}$ ($\frac{4}{9}$) of that combined amount may be used by Summit Ranch from the waters of Big Gulch Creek.

EXHIBIT B

The qualifying statement identified in Paragraph No. 1 of the Notice of Error form is erroneous because:

1. The first condition set forth in Transfer Right No. 814 does not contain the word "only". In fact, the word "only" does not appear at all in the 814¹ document. Moreover, insertion of the word "only" into the first condition is anything but "user friendly" as it converts an unqualified grant to the Summit Ranch of 100 CFS of the waters of Big Gulch Creek to a defeasible right triggered by a contingency can never be fulfilled. That is, the preliminary recommendation, if implemented, would entirely eliminate Summit Ranch's vitally important rights to the waters of Big Gulch Creek which it has enjoyed and depended on since at least 1921. (See affidavit of Jack Swauger dated August 4, 2004 attached hereto as Exhibit B-1.)

2. The interpretation of Transfer Right No. 814 mandated by the objected to preliminary recommendation is contrary to the long-standing interpretation of that same right as expressed and implemented by the State of Idaho through its official representatives for at least the last 41 years. In March, 1965, the then reclamation engineer for the State of Idaho, Ralph W. Thomas, acknowledged in writing that Transfer No. 814 conferred on Summit Ranch a clear right to receive 100 CFS of the total 225 CFS awarded under the 1910 Pahsimeroi Decree. The engineer's letter says not one word to the effect that said grant is defeasible in any way and certainly not that it is void from the inception (see letter dated March 31, 1965 from Ralph W. Thomas to M.B.

¹ Note also that the insertion of the word "only" in the first condition attached to the 814 transfer effectively eliminates the second such condition in its entirety.

Hiller attached hereto as Exhibit B-2). That same year, the then duly appointed watermaster for Basin 73, Louis Gassi, explained in writing that Summit Ranch's right to Big Gulch waters is the same as claimed by Summit Ranch in its answer to Paragraph 2 of the Notice of Error form. (See letter from Louis Gassi to R.M. Hiller dated May 1, 1965, attached hereto as Exhibit B-3). Based on this undisputed official record, Summit Ranch believes and asserts that IDWR is legally bound to its previously stated and implemented interpretation of Summit Ranch's right to Big Gulch waters under the 814 Transfer and that its preliminarily recommended interpretation of water right claim no. 73-187B is invalid.

3. The interpretation of Transfer No. 814 mandated by the objected to qualifying statement is contrary to the actual practice and delivery of Big Gulch waters to beneficial owners since at least the mid-1940s.

a. In a letter dated June 9, 1999 (see Exhibit B-4 attached), Jack Swauger, now deceased, but then the last living member of the Swauger family, (previous owners of Summit Ranch and principles under the 814 Transfer Right), recalled that since 1943 or 1944, Big Gulch waters had been divided equally between Summit Ranch and Sulphur Creek Ranch until the flow was 150 inches or less; after that, Summit Ranch received the entire flow from Big Gulch Creek. The delivery practice thus described by Mr. Swauger is substantially the same as that related by Watermaster Gassi in his 1965 letter.

b. Dale Hansen acquired Summit Ranch in January 1958. He will testify that although he does not recall the precise details of the Big Gulch water

transfer, he does recall that no claim was ever made nor did any circumstance ever arise under which Summit Ranch was not entitled to and did not receive its approximate one-half share of the waters of Big Gulch Creek. (Mr. Hansen has agreed to provide an affidavit to this effect which, when executed, will be forwarded to IDWR).

c. Jud Whitworth informed IDWR representative on Roxanne Brown on September 19, 2006 at the May Grange Facility that he has lived in the Pahsimeroi all of this life; that in about 1960 he observed that Mr. Fife, the then owner of the property that would later become Sulphur Creek Ranch, had installed a six to eight inch pipe for the purpose of transferring all of the water of Hill Creek to the use of his property; that said pipe is still in use and is sufficient to contain and transport all of the water of Hill Creek; that Hill Creek does not now nor has it ever contained more than 20-35 CFS of water flow; that Graves Springs does not now nor has it ever contained more than 10-12 CFS of water flow; that Hill Creek and Graves Springs together have never produced a combined water flow of 125 CFS; that Louis Gassi (now deceased) was the Basin 73 watermaster for many years; that in 1983 he leased the Sulphur Creek Ranch property and several years later (before November 1987) became an owner of that ranch; that since at least 1983, Big Gulch water has been divided 4/9 to Summit Ranch and 5/9 to Sulphur Creek Ranch; that no claim was ever made nor did any circumstance occur under which Summit Ranch was denied its 4/9 share of the waters of Big Gulch Creek; and, that in the latter part of each season, when the Big Gulch water flow

diminished to the point that Sulphur Creek's share became insubstantial, Summit Ranch received all of the waters of Big Gulch Creek. (Mr. Whitworth has agreed to provide an affidavit to this effect which, when executed, will be forwarded to IDWR).

d. James Martiny will testify that he twice served as the Basin 73 Watermaster, first from approximately 1977 through 1983, and again from approximately 2001 through 2005; that at all times during these periods of service Big Gulch waters were divided approximately equally between Summit Ranch and Sulphur Creek Ranch; that no claim was ever made nor did any circumstance occur under which Summit Ranch was denied its share of the waters of Big Gulch Creek; that late in the season when the flow from Big Gulch Creek had diminished, Summit Ranch received the entire flow from Big Gulch Creek (Mr. Martiny has agreed to provide an affidavit to this effect which, when executed, will be forwarded to the IDWR).

AFFIDAVIT

I, Jack Swauger, make this affidavit at the request of Ed and Linda Thomas, the present owners of the Summit Ranch.

My family owned the Summit Ranch from the early 1920s until 1951.

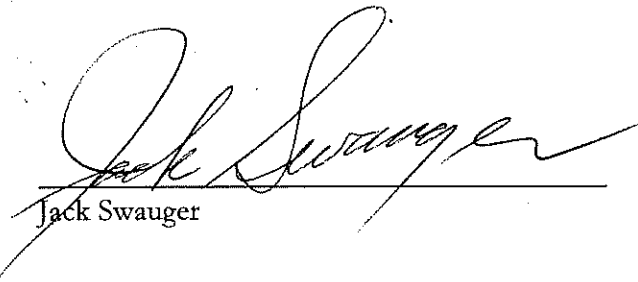
I was born August 17, 1929 and was raised on the Summit Ranch.

I have personal knowledge that the diversion ditch from Big Gulch Creek Pahsimerol was in existence at least as early as 1933 or 1934 and that the water carried in the ditch was used for irrigation, stock watering and reservoir storage on the Summit Ranch.

I was informed and have always understood that the Big Gulch diversion ditch and the dam which created the storage reservoir were built by my family sometime in the early 1920s.

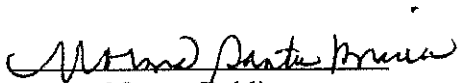
All of the waters diverted through the Big Gulch diversion ditch were used for stock watering and irrigation on both the upper and lower parts of the Summit Ranch.

Further Affiant sayeth not.



Jack Swauger

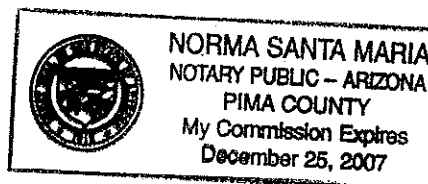
Signed and Sworn to
before me this 4th
day of August, 2004.



Notary Public

State of ARIZONA County of Pima
Subscribed and sworn to before me on 8/4/04

(Notary Signature)
Norma Santa Maria



ROBERT E. SMYTHE
Governor



CARL E. TAPPAN
State Reclamation Engineer

STATE OF IDAHO
DEPARTMENT OF RECLAMATION
107 STATE HOUSE
BOISE, IDAHO 83701

March 31, 1965

Re: Summit Ranch

St. Clair, St. Clair & Hiller
Attorneys at Law
P. O. Box 29, Idaho Falls, Ida.

Attn: M. B. Hiller

Dear Mr. Hiller:

In answer to your letter of March 29th in regard to water rights on Summit Ranch.

The Little Lost Decree awarded Swauger Land & Livestock Company 50 inches from springs on property, priority May 1, 1914, for irrigation of $\frac{1}{2}$ Sec. 9, T. 11 N., R. 25 E. Also awarded John W. Swauger and Fred Koblenzar 1208 acre feet storage in Summit or Pass Creek, priority January 28, 1921, for irrigation of same land.

A decree on the Pahsimeroi River awarded 225 inches from Grave Springs, Hill Creek and Timber Gulch or Big Gulch Creek to C. B. Graves. By Transfer of Water Right No. 814, O. H. Swauger transferred 100 inches or 100/225 of amount available to Lots 3, 4 and 5, & Fr. $\frac{1}{2}$ Sec. 6, T. 11 N., R. 25 E. and Lot 1, Sec. 1, T. 11 N., R. 24 $\frac{1}{2}$ E.

The above described land includes land not shown in the description you submitted, except possibly the Forest Homestead Entries 257, 261 and 262 covers the land. We would have no way to determine the amount of water for each of the subdivisions shown.

I find no other recorded water rights.

Very truly yours,

Ralph W. Thomas

RALPH W. THOMAS, Deputy
State Reclamation Engineer

RT:ew

May, Idaho

May 1 - 1965

R M. Hiller

Dear Sir

I will give you what information
I have on the Summit Ranch.
If Mr. Hife can not get enough
water from Hill Creek and Grange Springs
to fill his 12.5 inch right. The balance
should be obtained from Big Luteh Creek.
Any water left after Mr. Hansen's 100 inch
right is filled should then be divided
 $\frac{5}{8}$ to Mr. Hife and $\frac{3}{8}$ to Mr. Hansen.
If the total flow of Big Luteh Creek
Grange Springs and Hill Creek will not fill both
rights, then the water would be divided on
the $\frac{5}{8}$ to $\frac{3}{8}$ ratio, with Mr. Hife getting what
water is available from Hill Creek and Grange Springs
and the balance of his $\frac{5}{8}$ from Big Luteh Creek.
Yours truly, Louis S. Goser - Water Master.

6/9/99

Bob. I don't know for sure but do not believe the big gulch water was ever decreed. When my Father & uncles separated in sometime around 1943 or 1944 the water was divided and a agreement should be on record in Challis Idaho on record. As I recall it was to be divided equal until the flow was 150 inches or ~~less~~ less at that time the Summit Ranch was to get it all.

In the early days before it was customary to follow boundary & section lines fences were put up by what was called (Leaps & Bounds) which is the way the Summit & Lower ranch were fenced in case they ask about property over

lines not being on section lines,

I can't remember my Father ever stating anything about buying the Summit or Lower Ranch but him & my uncles and a man named (Fred Roberger) homesteaded the property. My Father fought Freds homestead some time around 1943 or 1944.

I hope this information will be of interest to you.

Respectfully
Jack Swauger

S

Mr. Jack H. Swauger
1730 W Jagged Rock Rd
Tucson, AZ 85737-2309