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JUN 07 2007
DEPARTMENT OF
WATER RESOURCES

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June 4, 2007

Fritz Haemmerle
PO Box 1800
Hailey, ID 83333

RE: Basin 73 Water Rights Dispute

Dear Fritz,

The purpose of this letter is to memorialize our past conversations in the above entitled matter and to provide a recitation of facts and law concerning the diversion on Big Gulch which exists as recorded in Water Rights 73-187A & B. In order to clarify our position, the same is being sent to the Idaho Department of Water Resources.

Water Rights 73-187A & B

Some confusion exists as to what rights the parties have under each of the above listed claims. The confusion stems from the fact that the Sulphur Creek (73-187A) and Summit (73-187B) ranches were once joined into a continuous piece and that the language in Transfer 814 was designed to make the split fair for the parties that received the individual ranches.

Various positions have been taken by Summit in relation to this matter. The first position was that "Summit Ranch gets 100 inches from Big Gulch unless the combined flow from Hill Creek, Graves Springs and Big Gulch amounts to less than 225 inches. Then, Summit Ranch gets 4/9ths of the combined amount from Big Gulch." See May 15, 2006, letter from Edwin C. Thomas to Watermaster. The next position was that "[the water is] to be divided equal[ly] until the flow [is] 150 inches or less at that time the Summit Ranch [is] to get it all." See June 9, 1999, letter from Jack H. Swauger to 'Bob'. As of recent times, Summit has taken a third position that it is entitled to one half of the water during the irrigation season (4/1 – 10/31), but at an unspecified point in October, all of the water is to be diverted to Summit. See Affidavit of Jim Martiny. Another document, filed by one Dale Hansen, claims that the waters from Big Gulch are split evenly; apparently with no end of season cut-off.

The above differs from Summit's original claim filed as part of the readjudication in which Summit claimed a 2.0 C.F.S. diversion from Big Gulch Creek with a priority date of May 1, 1887, claiming that "the 2.0 C.F.S. may be transferred when total amount available from Hill Creek and Graves Springs equals or exceeds 2.5 C.F.S. When the combined amount from Hill Creek, Big Gulch Creek and Graves Springs is less than 4.5 C.F.S. 100/225 of the combined amount may be transferred if available in Big Gulch Creek."

Given that it seems your client is seeking parties to affy to absolutely anything about the extent of Summit's water rights out of Big Gulch as long as it advances the position of alternate historical past usage, and given the number of differing opinions that have been expressed about the differing degrees of usage, Sulphur Creek does not know what the ultimate position of Summit Creek is in this matter other than it clearly wants as much water as it can get, regardless of the very clear language of Transfer 814.

The IDWR has recommended the following changes as part of the readjudication. First, the IDWR has recommended a change of priority date to June 18, 1909 for both rights. Second, the IDWR has clarified the language encapsulated in Transfer 814, as pertaining to Water Right 73-187B to state:

2. Two (2) cfs of this right may be transferred when the total amount available from Hillside Creek (formerly known as Hill Creek) and Graves Springs equals or exceeds 125 miners inches (2.5 cfs); and when the combined amount from all three sources - Hillside Creek (formerly known as Hill Creek), Big Gulch Creek, and Graves Springs - is less than 225 miners inches (4.5 cfs), 100/225 (2.0 cfs) of the combined amount may be used from Big Gulch Creek, if available, at the point of diversion described below.
3. Right Nos. 73-187B and 73-2073 are limited to the irrigation of a combined total of 209.7 acres in a single irrigation season.

See Adjudication Recommended Right Report, Water Right 73-187B.

The plain language of the above necessarily contains a limitation that is a condition precedent to the usage of water by Summit; namely, that 2.5 c.f.s. be available from Hillside Creek and Graves Springs before any transfer takes place. It is my understanding that the only reason this limitation has not been exercised in the past is because the water has always been available for all parties concerned. This may not be the case into the future, however, as a continuing drawdown of water out of Basin 73 and into adjoining basins has seriously damaged the aquifer. Given this situation, it may be necessary to make a call on 73-187B this year if the overall flow falls beneath 2.5 c.f.s. While it is Sulphur Creek's hope this does not happen, please prepare your client for this possible situation.

The second thing you will note from the above is that Summit is only entitled to its full measure of water if the combined amounts from Hillside Creek, Graves Springs and Big Gulch are greater than 4.5 c.f.s. If the combined flow of Hillside Creek and Graves Springs exceeds 2.5 c.f.s., and Big Gulch Creek flows at a rate of less than 4.5 c.f.s., they are entitled to only 4/9ths of total amount as long as the flow stays above 2.5 c.f.s. If the same falls beneath 2.5, c.f.s. it is our position that you are entitled to no water. As you point out, this has not been accurately measured in the past. My client is prepared to insure that the same is accurately measured into the future, however. In particular, Sulphur Creek is concerned that Summit Ranch is receiving an excess of mid-season flows when the total amount of the water flowing through Big Gulch is less than 2.5 c.f.s., which occurs roughly around August.

Finally, Sulphur Creek is concerned that Summit Ranch may be overfilling its pond and over irrigating its total farmable acreage in excess of its allowable irrigation storage totals as a result of its over appropriation of water out of 73-187B and related spring rights in Basin 33. An analysis of photographs from the late 1960's to date shows very clearly that the original dam site has been worked on and increased in size to allow the existing Summit Ranch pond to be overfilled. When this occurred, the total number of acres farmed also increased and is believed to be in excess of those acres to which the water in 73-187B may be put to beneficial use.

My client is in the process of seeking bids to either (1) line its ditch with Bentonite to prevent late season evaporation loss; or (2) build a pipeline near the point of diversion to prevent the same. To that end, it is not appropriate to engage in further end of season diversions to Summit Ranch that are not in accordance with Transfer 814.

Frankly, what I see occurring is that your client has amassed a series of lesser water rights out of Big Gulch and all of the saber rattling in which your client is now engaging is an attempt to improve on water rights that they do not possess. To the above end, we would ask that your client immediately cease and desist: (1) attempts at taking water in excess of their entitlement out of Big Gulch; (2) attempts at interference in relation to the construction of the new diversion structure their objective of which is to obtain more than 2.0 cfs of water when the creek runs beneath 4.5 c.f.s.; and (3) diverting all of the water to Summit Ranch late in the season. My client is prepared to file for injunctive relief on all three of the above if we cannot reach an agreement for this irrigation season or a proposal to take to the IDWR as part of the re-adjudication.

Endangered Species Act Violations

The Endangered Species Act, 16 USC § 1531, *et seq*, was enacted to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species." See 16 USC § 1531(b). As part and parcel of the same, the act prohibits "any person subject to the jurisdiction of the United States" from "tak[ing] [a threatened or endangered] species within the United States or the territorial sea of the United States." See 16 USC § 1538(a)(1)(B).

The term "take" is defined under the act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." See 16 USC § 1532(19). The term "harm" as listed in the above is defined by the Dept. of the Interior as "Harm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." See 50 CFR § 17.3.

Bull Trout are listed as a threatened species under the Endangered Species Act. See 50 CFR § 17.11(h). Both the Salmon River Basin and Little Lost River basins are listed as critical habitat areas for the Bull Trout. See 50 CFR § 17.95(e)(7). Within those critical habitat areas, various primary constituent elements ('PCE') needed to insure bull trout survival are listed within the CFR by the Department of the Interior. See 50 CFR § 17.95(e)(3)(i)-(viii). Basically, these PCE's describe the various climactic and hydrologic conditions that bull trout need to survive. When fish are diverted onto the Summit Ranch property, they are killed because they become trapped in your client's pond where "permanent water of sufficient quantity and quality" does not exist to allow the trout to overwinter or reproduce. See 50 CFR § 17.95(e)(3)(viii). Similarly, the diversions out of the Pahsimeroi Basin into the Little Lost basin decrease areas where PCE's exist as a whole because they decrease the number of "[s]prings, seeps, groundwater sources and subsurface water [sources that] contribute to water quality and quantity as a cold water source." See 50 CFR § 17.95(e)(3)(v). The fact that the Salmon River basin is particularly dry this

year is a testament to the fact that the Bull Trout face significant hurdles in finding appropriate habitat areas in which they may survive; diverting water into a "dead" basin simply makes the problem worse.

Of interest, and in support of the above, the U.S. Forest Service *does not* designate Summit Creek, or your client's pond as an area where bull trout may survive. See Map of Unit 18 Attached Hereto as Exhibit 'A.' Big Gulch is designated as an existing PCE for Bull Trout. See Map of Unit 16 Attached Hereto as Exhibit 'B.' The more diversions your client takes (especially as Summit Creek seems to wish to transfer roughly 15 c.f.s. seasonally out of Big Gulch into the Little Lost Basin), the more critical habitat area that is affected. Such diversions are directly in contravention of the conservation related policies behind the ESA and cannot continue.

Sulphur Creek is also concerned that the continuing diversions by your client without a mind to conservation also have or will affect Sage Grouse, Chinook Salmon and other aquatic species that are threatened or endangered that may be found in the Pahsimeroi or Salmon River drainage.

Using the Citizen Suit provisions under the ESA my client is determining whether it will be necessary to file an injunction to prevent any diversions onto your client's property to prevent the unlawful takes which are currently taking place, or to use the same to ask the U.S. Department of the Interior to accomplish the same ends. Obviously, if your client can demonstrate that it is using its many water rights in a manner which is environmentally responsible; Sulphur Creek may choose to forego a citizen suit. Sadly, given the irresponsible posturing of your client's desire to use all of its rights, the effect of which will be to drain the entirety of Big Gulch Creek into the Little Lost Basin, Sulphur Creek has resigned itself to the fact that it will likely have to act as environmental steward for the rest of the Pahsimeroi Basin.

Conclusion

The water near the point of diversion freezes in most years until April and then refreezes in November or December. In mid-October 2006, your client began diverting water to his ranch by blocking off the point of our diversion in its entirety. My client attempted to resolve this shortage through negotiation with your client, but each time he would remove the diversion after speaking with the same, he would find that the diversion had been secretly erected to prevent any diversion whatsoever. Throughout Spring 2007, your client has attempted to lobby the Watermaster, Ted O'Neill, into diverting all water from Sulphur Creek to his ranch by piling rocks in the space of the diversion.

It is ironic that your client has chosen to make continuous contact with all available authorities who will listen to his unfounded complaints when he has engaged in a continuous and unlawful pattern of attempting to use any means necessary to drain the whole of Big Gulch into his storage pond, Transfer 814 language and protection of critical Bull Trout habitat notwithstanding. This must stop.

In line with the above, Sulphur Creek makes the following demands:

- (1) From this point forward, Sulphur Creek asks Summit Ranch to act in accord with the decree as recommended and in line with the plain language of Transfer 814;
- (2) Remove any such diversions that restrict the above administration of water rights;
- (3) That Summit Creek stop filling its storage pond in excess of its storage right and stop irrigating in excess of the allowable number of irrigable acres;
- (4) Install fish ladders and other such devices that will allow reasonable access to trout trapped on Summit Ranch property to make their way back to Big Gulch;

- (5) If, as a result of studies commissioned by Sulphur Creek, it is determined that the aquifer is being harmed and the Bull Trout cannot survive as a result of 14.95 cfs diversions, stop your diversions accordingly;
- (6) If, as a result of studies commissioned by Sulphur Creek, you are harming other protected or endangered species stop all diversions accordingly.

As always, our door is open to discuss a fair resolution of this matter that works for all parties as good neighbors. If this cannot be done in good faith, however, it will be necessary for the courts to resolve the same.

Best Regards,

*Dictated by Mr. Kiiha and sent
without signature to avoid delay*

Jay Kiiha

JK/kk
Cc: Client, Don Shaff, IDWR