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Department of Water Resources
Adjudication Bureau

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DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED *Q*

Memorandum

To: Clerk of the District Court
From: Leo and Bonnie Lewis
Date: 9/23/2007
Re: Rebuttal to Response to Objection to Subcase 29-13728

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Water in a stream is property that is independent of privately owned real estate through which it flows. The right to divert and/or use that water for any reason is regulated by law. Some people feel that because the water flows through their property they have a right to divert and/or use it as they choose. However doing so without legally owning the water being diverted and/or used is stealing and is thus illegal.

Rebuttal to respondents' statements relating to my objection:

1. La Rue Whitworth states, "*My parents did use the creek to irrigate a garden...*" I stand by my original statement that, "If [the creek was diverted] it was done without any recorded right."
2. "*Mr. Lewis mentioned he has only a trickle of water flowing into his property and this is not a sufficient amount for his fishpond.*" And then further, "*We pasture livestock to help pay for property taxes, the livestock require water on a daily basis, we feel the livestock should take priority over the fishpond.*" What I stated was, "...this [pumping water from Indian Creek...to irrigate] has frequently resulted in barely a trickle of water flowing through my property... [This denied] me the water to which I was entitled through decree 29-606A." I made no mention of either cattle or a fishpond in my objection so I don't see the point in the stock issue being brought up. But since the issues were raised I will state that I have had no fish for the past two years in my pond because all the fish were killed two summers ago by the constant flow of silt and cow dung down the creek that settles in the pond during the weeks when a large herd of cattle are in the creek on the Whitworth property. I also did not mention the property damage caused by various cattle being in my yard due to a section of poor fence that was never repaired in spite of my verbal requests to do so. And finally, the only water right requested and recommended by the court for the Whitworth's, to which I objected, is for irrigation and not for stock water. However they are actively using the creek for both.
3. La Rue Whitworth states, "*Times have changed, Indian Creek does not flow like it has in the past, and Mr. Lewis doesn't need as much water as did his mother.*" My decree of 22 March, 2004 reduced my water right from the original 2.08 cfs to 0.08 cfs from April 1 through October 31 to irrigate 2.7 acres but retained the original priority date of 1 June, 1908.
4. "*If granted the right to use the water, we would be willing to rotate water days with all that have water rights.*" In my objection I provided the history of my water right along with the costs, frustration and effort that been spent to maintain it by prior generations. My right has already been diminished by the court to a mere fraction of the original right and I am unwilling to see that right further eroded.

In summary, I am taking a day off from work plus the added expense of traveling to Twin Falls to seek to establish what is already decreed to be mine. As I pointed out in my objection, Idaho Code 42-106 states that the first in time is the first in right. Furthermore, Idaho code 42-1505 states that water is not available to fill any priority date if diversion of that water will decrease the flow in the stream and not allow a downstream user with an older priority date the amount decreed to them.

The day before my objection was received in the mail by the Whitworth's on 16 July, 2007, was the last day that the gasoline pump ran this summer. Up until that day the allotment requested of 0.03 cfs was either misunderstood or ignored as the pumping rate and frequency had not changed from previous years. Whatever means is now being used has not drawn the stream down to the previous trickle but there is still insufficient flow left to meet my right. Any claim that can be asserted is both junior to mine and is for high water only. High water on Indian Creek only lasts for a few weeks in the early spring.

Included are photo exhibits A-F:

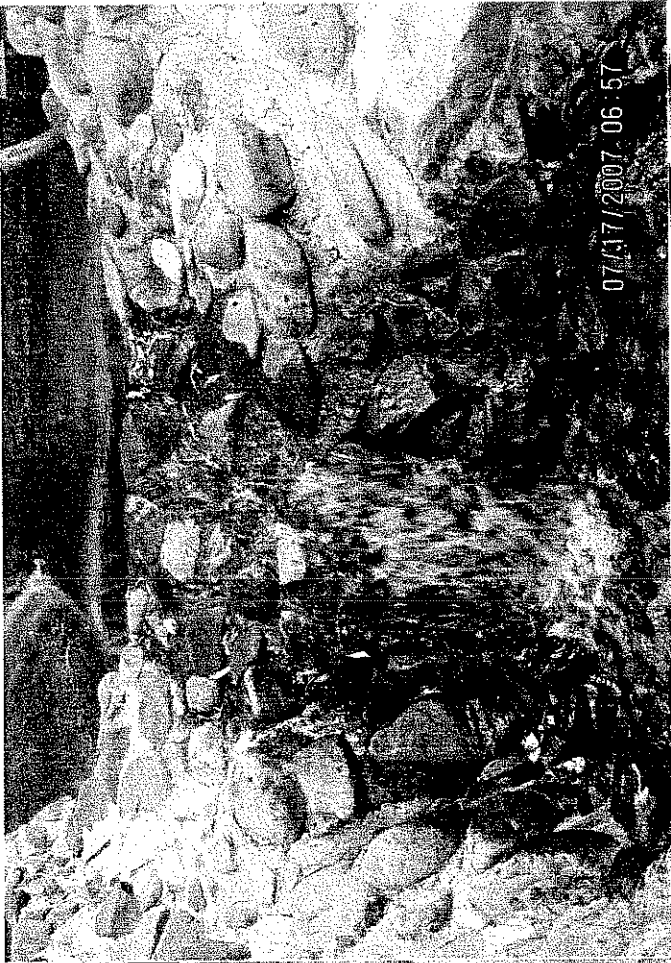
- A: At 10 PM on 16 July 2007 this was the status of water at my diversion dam with the Whitworth pump running. There is no water over the dam and the pond level is slightly dropping due to leakage through the culvert head gate.
- B: Water flow over the dam when the Whitworth pump is shut off the next day on 17 July, 2007.
- C: Small temporary dam to measure total Indian Creek stream flow on 22 Sept, 2007.
- D: Total stream flow in Indian Creek is 1.5" deep in a 4" pipe on 22 Sept, 2007.
- E: Indian Creek flowing into the county road culvert on the Whitworth property side on 22 Sept, 2007. Compare with:
- F: Indian Creek flowing immediately below the county road culvert on my property on 22 Sept, 2007. There is no obvious difference between E and F. The special master could order more precise measurements if desired.

A



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B



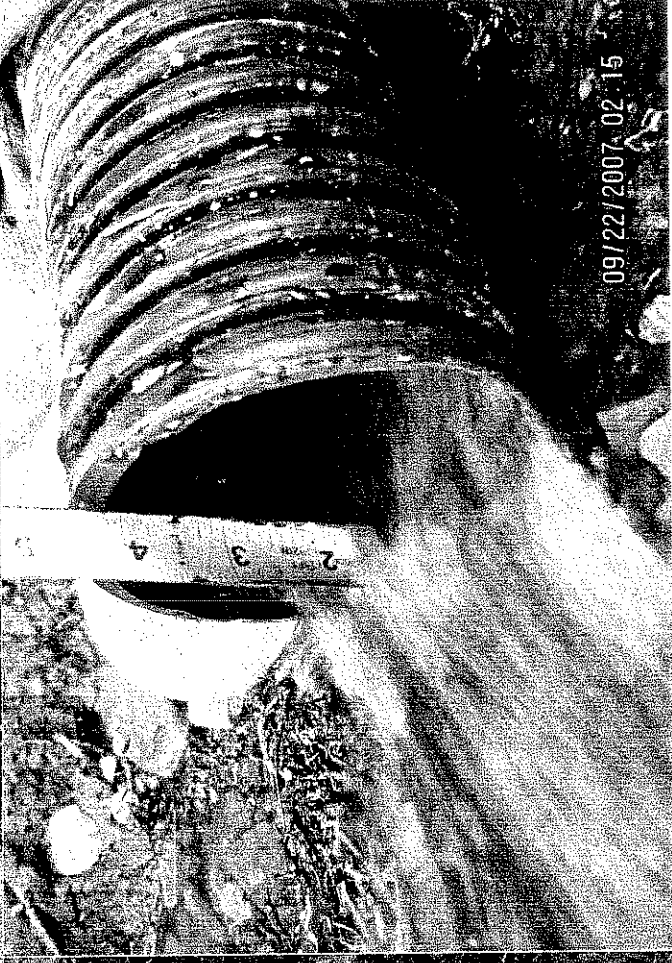
07/17/2007 06:57

C



09/22/2007 02:18

D



09/22/2007 02:15



E



F