

MEMORANDUM

TO: Files 75-4471 and 75-10475

FROM: Monica Van Bussum

DATE: November 21, 2008

RE: Discussion of Austin rights from Jesse Creek

I met with Ron Austin of Silver Peak Ranch Trust on November 6, 2008, and with Bob Blackadar on November 7, 2008. Bob Blackadar filed objections to IDWR's recommendations for Silver Peak Ranch Trust's water rights 75-4471 and 75-10475.

This memo serves to document my current understanding of how water has been used on the Silver Peak Ranch land, and to better analyze if and how the recommendations for 75-4471 and 75-10475 should change.

75-10475

75-10475 is a combined claim for decreed rights 75-3 and 75-9. 75-3 is known as the Boomer right and 75-9 is known as the Gilmore & Pittsburg (G&P) Railroad right. For clarity, both 75-3 and 75-9 had an April 1, 1894, priority date. 75-3 was decreed for 1.44 cfs (72 inches) and 75-9 was decreed for 1.5 cfs (75 inches).

Bob Blackadar objected to IDWR's recommendation for 75-10475 stating 75-10475 should be disallowed. Mr. Blackadar's reason supporting the objection was: "Case No. 94-00004 In the District Court of the Fifth Judicial District of the State of Idaho, In and for the County of Twin Falls Memorandum Decision and Order Granting Partial Summary Judgment."

Case No. 94-00004

Case No. 94-00004 came about when Bob Blackadar sued Myrthus Austin when Mr. Austin allegedly damaged Blackadar's property through ditch maintenance activity. While the scope of the case was not to determine the state of the Austins' water rights, it did address 75-3 and 75-9. The Memorandum Decision and Order Granting Partial Summary Judgment and Order Denying Motion to Suppress Evidence of July 7, 1995, stated, "Matthias Austin, however, received no right to the use of water from the deed which conveyed land to him from the Gilmore & Pittsburgh [sic] Railroad...The deed conveying that particular property to Matthias Austin specifically reserves all decreed water rights from Jesse Creek. Myrthus Austin can possess no Jesse Creek water right by his successive interest in the land. This court finds water right no. 75-00009 to have been reserved by deed."

Thus, the court found “because of the Railroad’s reservation, water right no. 75-00009 is not appurtenant to the Austin land, and has most likely been forfeited by the Railroad.” However, the court found insufficient evidence existed to determine the status of 75-3.

It appears IDWR reached this understanding sometime in 1994, as evidenced by a letter from Tim Luke to Myrthus Austin from August 2, 1994, which stated, “We find that our records do not show that you have had any interest and/or use of water right 75-0009 prior to 1992...The watermaster’s daily log books do not indicate that more than 1.5 cfs was delivered under your name in that year.”

A subsequent letter from Tim Luke dated December 23, 1994, stated, “IDWR records indicate that you have used right 75-0003 and that you do have a possessory interest in this same right. Past water district records show that up to 1.44 cfs of water has been delivered to you under right 75-0003.”

Boomer right

It seems clear 75-10475 should be considered a claim solely for 75-3, at least in terms of SRBA review. 75-3 was decreed to William Boomer for the S1/2NE and the N1/2SE Section 31, Township 22 North, Range 22 East of the Boise Meridian, excepting three parcels of land. A cursory examination of this legal description shows the decreed place of use (POU) covers the current Austin property east of Highway 93, as well as ground west of the highway. It is Mr. Blackadar’s contention that Boomer only owned land west of the highway and, as such, the Boomer right was not appurtenant to the current Austin/Silver Peak Ranch Trust property. It is also Mr. Blackadar’s contention that Mr. Boomer sold the water right before selling his property.

To support his assertion of the water right sale, Mr. Blackadar supplied a deed between William and Della Boomer and the City of Salmon dated November 6, 1937. The deed states the Boomers sold the City of Salmon a water right for \$4,400. The deed states, “All the right title and interest of the parties of the first part in and to the water of Jesse Creek, Lemhi County, State of Idaho, and herein warranted to be not less than 22 inches, said waters having been decreed by the District Court of the State of Idaho and recorded in Book A of Judgments on Page 251, and the land on which this water has been used for irrigation purposes being a part of the S1/2NE1/4 and the N1/2SE1/4 of Section 31 in Township 22 North Range 22 East of the Boise Meridian, Lemhi County, State of Idaho. This is first right water.”

The Boomer deed is problematic in several respects.

- The Boomer right 75-3 is actually 8th right water, not first right, from Jesse Creek. 75-3 has been delivered as 8th right water historically, per a 1992 Jesse Creek watermaster document.
- Per 1973, 1987 and 1992 Jesse Creek watermaster records, 75-3 has been assessed and delivered to the Austin/Silver Peak Ranch property. The 1973 document showed 72 inches under 75-3 being delivered to Myrthus Austin, and listed 75-9

but did not list a recipient. The 1987 document showed 75-3 being delivered to Emerson Hill (7.5 inches) and Myrthus Austin (72 inches). The 1992 document showed 75-3 and 75-9 being delivered to Myrthus Austin, but a handwritten note next to 75-9 read, "May be forfeited." We have records from three decades showing 75-3 being delivered to the Austin/Silver Peak Ranch property.

- The Boomer deed states the water right was not less than 22 inches. The Boomer right was, in fact, 72 inches. It seems odd a deed would not more fully describe the amount of the water right when it had only 12 years previous been decreed to the owners and conveyors.
- The Boomer deed states the water right was recorded in Book A of Judgments on Page 251. This description is the location of the first Jesse Creek decree, of which this water right was not part. The Boomer right was recorded as part of the second Jesse Creek decree in Book C of Judgments on pages 294-297.
- The City of Salmon has not claimed 75-3 in any respect. There is no historical record of delivery of 75-3 to the City of Salmon.

Conclusions relevant to 75-3

Based on the memorandum decision of 1994 and IDWR records cited by Tim Luke, 75-9 appears to have been forfeited by the Gilmore and Pittsburg Railroad. We now take up 75-3. Three decades of watermaster records and IDWR correspondence show delivery and use of 75-3 by the Austins. If possible, I would recommend renumbering 75-10475 to 75-3 to preserve the water right record and recommending 75-3 to the Austin/Silver Peak Ranch property.

Mr. Blackadar's assertion that the Boomer right was not appurtenant to the current Austin property but was only appurtenant to lands west of Highway 93 is an ambiguous area. The decree only gave a standard legal description and made no mention of exceptions for the highway. The Austin/Silver Peak Ranch claim to 75-3 would be strengthened by the existence of a deed between Boomer and Matthias Austin, or Matthias Austin's predecessor. However, evidence of delivery to the Austin/Silver Peak Ranch property does support transfer of the right under the accomplished transfer statute.

75-4471

75-4471 is a claim by Austin/Silver Peak Ranch Trust with the elements:

- Priority date: 4/1/1941
- Basis: Statutory Claim
- Source: Waster water tributary to Salmon River
- Diversion rate: 2.5 cfs
- Place of use: Same as 75-10475

75-4471 was recommended much the same way in the Basin 75 Director's Report. Mr. Blackadar filed an objection, stating the POD should be SWSESW Section 31, T22N, R22E, B.M. This relates to what is known as the "Blackadar source issue" and will be addressed separately from the validity of the Austin rights. In short, Mr. Blackadar is

trying to establish the point of diversion for what is historically known as Farmer's Ditch as the actual natural conveyance of Jesse Creek.

Mr. Blackadar's objection also stated, the POU should be, "Limited to property South and West of the Norton Ditch About 15 acres." For reasons supporting objection, Mr. Blackadar wrote, "Waste Water is Not Subject to Demand; Since the Norton Ditch bisects the property, it constrains area of use; This water right has the potential to be a liability for the public and I would encourage the State of Idaho, Dept. of Transportation to intervene on behalf of the public."

There are several issues to be addressed from Mr. Blackadar's objection:

- Waste water being subject to demand
- Limiting the POU to that constrained by the Norton Ditch
- The water right posing a liability for the public

Aside from Mr. Blackadar's objection, priority date also needs to be addressed.

Mr. Blackadar is correct – waste water is not subject to demand. During my meeting with him, Ron Austin, Myrthus Austin's successor, agrees and has a clear understanding that Mr. Blackadar can stop wasting water at any time. However, waste water rights are still considered valid and have been recommended by IDWR and partially decreed by the SRBA District Court previously.

During initial hearings in September 2008, Ron Austin agreed he does not irrigate land east of the Norton Ditch with Jesse Creek water. I subsequently met with Mr. Austin on November 6, 2008, and we redrew the POU to be recommended for 75-10475 (or 75-3) and 75-4471. It is now satisfactory to Mr. Austin and myself.

The issue of the water right posing a liability for the public is more problematic. During my meeting with Mr. Blackadar on November 7, 2008, he showed me a video he took in the early 1990s of the ditch conveying Mr. Austin's water. Mr. Blackadar also drove me along the path of the ditch, showing me it runs in front of a preschool building. Mr. Blackadar is concerned with the safety of having a ditch running so close to a highway and businesses, particularly a preschool. I understand Mr. Blackadar's concern, but I do not believe the SRBA Court is the appropriate venue for such a contention and suggested Mr. Blackadar speak to the Idaho Department of Transportation about his grievance. Mr. Blackadar stated he intended to bring this matter before the SRBA Court.

75-4471 was also addressed in case 94-0004. In that case, Austin stated he irrigated under 75-4471 from 1941 or 1942 to June 1989. Myrthus Austin is no longer alive, but per his testimony in 94-0004, we can establish evidence of priority to 1941 or 1942. Per usual procedures, barring additional evidence, priority date in cases like this is the first day of the irrigation season in the later year – in this case, the recommended priority date would be April 1, 1942.