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DEPARTMENT OF
WATER RESOURCES

Law Offices

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July 8, 2009

Garrick Baxter
Greg Taylor
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720

Re: Carmen Creek

Dear Garrick and Greg,

Travis was kind enough to provide us with copies of the memoranda he recently provided the Department. Enclosed please find a copy of a memo one of our clients, John Burns, prepared. We recognize that the department's report will likely be mostly complete by the time this reaches you, but he drafted it for us in response to the recent memorandum and after reviewing it we thought it might be useful for the Department.

Thank you for your time and please contact me if we can be of any assistance.

Sincerely yours,



Hyrum Erickson
HE/md

Cc: Travis Thompson
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Comments on ERQ memo of June 22, 2009
(David Shaw to Travis Thompson)

July 7, 2009

To: Hyrum Erickson, Rigby, Andrus & Rigby

Re: Carmen Creek Water Rights

Mr. Shaw discusses the 1947 Watermaster Daily Record which indicates daily delivery of 45 inches of water to Frank Parmenter for August, September, and October. Mr. Shaw states that the referenced record does not indicate delivery of decreed water prior to 1885 for that period.

Assuming this to be correct on its face, it does not provide information as to the place of use for the water or proportion of the water distributed via the several points of diversion in use on both the north and south sides of Carmen Creek serving the Parmenter (or any other) property. Parmenter purchased contiguous property on both sides of the Creek totaling about 350 acres in 1946, and obviously would have utilized his available water to meet his needs at any given time.

The record referenced by Mr. Shaw has some uncommon characteristics that raise further questions. It should be noted that the daily records do not vary one inch from the first of August to the end of season in October. Carmen Creek is a dynamic stream with significant diurnal fluctuations, rainfall concentration, and variations due to drying fields for hay harvest, shifting diversion points to correspond to production plans, and so on. The streamflow also tapers downward as the season progresses. In short, the cited daily record does not reflect physical reality, but merely reflects the approach used to prorate the tax bill at the end of the year.

Parmenter acquired significant additional contiguous acreages on both sides of Carmen Creek in 1951 and 1954, bringing his total ownership to about 640 acres. In 1979 Maurice Foland acquired and subdivided a portion of the land (following several intermediate owners.)

As Mr. Shaw notes, Foland owned no land on the South side of Carmen Creek in 1982. However, he had also sold 14 lots on the North side prior to 1982, leaving 5 lots to be sold in 1994.

Mr. Shaw does not identify his reference for the discussion pertaining to the "...45 inches of water being received by Mr. Foland in 1982..." Presumably he is suggesting that all rights on the original homestead have now been condensed to the five lots of the subdivision still owned by Foland, and which are clearly on lands not included in the 1902 decree.

It should be noted that considerable activity involving the Carmen Creek water rights was underway during the period up to and including 1982, and culminating in the 1982 IDWR Abstract of Water Rights. The development and review of the abstract involved the "watermaster" and Department personnel and included discussion and documentation of 1875 and 1882 exchange rights. At no time did the "watermaster" suggest, nor did the Department find evidence, that any of the rights decreed for the original Palmer homestead (including exchange rights) had been expanded or transferred to lands not included in the place of use identified in the 1902 Decree. The lands including the subdivision lots within the Desert Land Act 40 (Govt. Lot 2 - Fols lots 18 and 19, etc.) were within the place of use for the 1910 license water but not within the place of use for the 1902 Decree.

Mr. Shaw places great reliance on the 1947 aerial photograph which was included in the aeriels we provided to the Department that cover a span of years from 1947 to 2004. (Note: The 1947 photo was misidentified as 1946 in our material.) Extrapolation of a single year of photography to imply a continuing circumstance, trend, or conclusion is not generally valid. One can, however, develop a reliable sense of conditions from a series of photos over a considerable time. To that end, the photos do illustrate that the lands on both sides of Carmen Creek have been under continuing irrigation over the last half century. One can not deduce from the photos what vintage of water has been applied, nor can one deduce the amount applied. Appearance of irrigated tracts in aerial photos depends on many factors including timing, amount applied, vegetative type, grazing or harvest, and so on.

Further, since the water district ignored a number of rights over the years, such as the 1910 license, and has frequently ignored the use of water by some individuals in an irregular fashion, it is very difficult if not impossible to determine timing and distribution with any accuracy from the "records."

The affidavits referred to by Mr. Shaw must be considered in light of the fact that the "watermaster" affiants are directly and personally involved in this situation, and have been for many years. In addition, other affidavits are available which counter the assertions referenced by Mr. Shaw.

John Burns
July 7, 2009