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RECEIVED
JUL 15 2002
Department of Water Resources
Southern Region

Allen Merritt
Department of Water Resources
1341 Fillmore Street, Suite 200
Twin falls, Idaho 83342-3380

Re: Letter to David Ogren dated May 31, 2002 concerning Jones diversion for water right # 43-10356

Dear Mr. Merritt:

As you probably know, last winter the Department requested that I look at Bill Jones'es diversion and comment on it as it relates to Raft River and the new point of diversion at which Joneses are pumping the water. Again this Summer some of the Raft River users have asked me to look at the new developments which have happened since then and your letter to Mr. Ogren with it's accompanying letter from Roger Ling. Since your letter was based on your interpretation of Ling's letter, I will address Ling's letter first.

As could be expected, Ling misrepresents both the law and it's application to Jones'es diversion. Idaho Code 42-105 says that a water user may put private water into a stream channel and then reclaim it provided that the water in the natural channel is not diminished and that proper measuring devices are installed and the diversion is controlled and reported by the watermaster. When I looked at the project about June 17 there was an earthen dam across the creek channel and a very tiny amount of water flowing eastward in the ditch over to Jones'es fence and thence southward to where their pump is located and right at the side of the pump it goes through a weir and back into the creek channel. The amount of water going through the weir was so tiny that it could not be measured. It was less than a quarter of an inch deep. This operation is certainly not what is described in 42-105.

There was much more water leaking through the dam at the old point of diversion than there was in the ditch. In fact there was so much water leaking through the dam that the back of the dam had holes washing out of it. There is also water coming into the creek from the West. None of this water is being measured. The fact is that Joneses are still running a twenty horse pump pumping unmeasured water from the illegal point of diversion. The tiny amount of water in the ditch has no relevance. If they were only pumping the water in the ditch they would never have to turn the pump on because there is more leaking through the dam at the pump site than there is in the ditch. If they ever turn the pump on it would certainly exceed the amount which is in the ditch,

which would not be in compliance with the provisions of the second paragraph of page 2 of your letter to Mr. Ogren. Therefore your Jan. 24, 2002 letter telling Joneses to cease the use of the pump should still be enforced.

The Photographs show #1. The dam at the pump site, #2. The ditch going away from the old point of diversion, #3. The ditch where it enters Jones'es property, and #4. The ditch at the old point of diversion, looking at it from the East. These photos were provided to Roscoe Ward by Roger Ling. As can be seen from the photos, the ditch is very deep and wide where it goes away from the creek and becomes quite small where it crosses into the Jones property. It is so flat that there is no ripple or hardly any sign of movement in the water. The bank is so low at the dam that if 1 cfs of water were to come down Almo creek and go out the ditch it would overflow and wash the dam out. In the meeting in Burley with Joneses and the Transfer protestants it was agreed by everybody that Almo Creek is in fact at times a tributary to Raft River

In your letter, second paragraph, you quote the Jobe Adams decree, which says in part, "that the users of water from Raft River and its tributaries have no interest whatever in the use of the waters of Almo Creek in accordance with the priorities hereafter decreed." I understand that the Almo Creek rights which were decreed in 1928 have absolute priority over Raft River regardless of their priority dates. Of course a water right which was denied by the court would not have priority over any decreed right.

I have attached a copy of a Note to file by Vickie Hancock dated 3/8/00 in which she explained to Joneses that both the Almo Creek decree and the Jobe Adams decree deny the existence of this water right. It is hard to believe that this recommended right should have priority over Raft River now, after being denied in the previous decrees. Assuming that the right exists, it is certainly junior to both the Almo Creek decreed rights and the Raft River decreed rights.

Idaho Code 42-604 says, in part, "any stream tributary to another stream may be constituted into a separate water district when the use of the water therefrom does not affect or conflict with the rights to the use of the water of the main stream;" The use of Jones's new right does not affect the Almo Creek decreed rights, but it certainly does affect the use of the Raft River rights. Right now, if Joneses removed their dam the water would go to Roscoe Ward's 1872 rights, which are receiving very little water. Earlier this spring it would have gone mostly to Nolan Branch's and Olene Warr's 1871 rights, which were never filled. According to 42-604, Jones's new right could be separated from District 43-D because it does not affect any right in 43-D. The ground being irrigated does not border on Almo Creek, but rather it lies along the banks of Raft River. The ground being irrigated can not all be irrigated from the old point of diversion, because even with the perfectly flat flowing ditch some of the ground is higher than the ditch and can only be irrigated by pumping the water uphill and was probably never irrigated before the pump was installed.

According to 42-604, this new right can not be separated from the Raft River Water District 43-B because it affects the prior rights on the main stream and the ground is physically on Raft River. Although Almo Creek was decreed to be a separate water district in the Jobe Adams decree, this claim, if it was claimed, was denied and was obviously not part of that water district and should not share in the absolute priority which was granted to the decreed rights on Almo Creek. I think that the new right which Joneses are claiming should only be used when the Raft River rights are all being filled.

The last sentence of the first paragraph of 42-604 indicates that baby water rights are not rigidly installed into any particular water district, and the first sentence of the second paragraph of 42-604 says that the director should change the boundaries of the water district if it provides better administration of the water rights. I think that if Joneses were to accept the junior nature of their right that most of the dispute would be over with. The biggest problem with this right is that Joneses are developing new ground claiming absolute priority over the decreed rights. I hardly think the wording in the Jobe Adams decree supports their claim.

A last point of contention which bothers the Raft River users is that Joneses have decreed rights to Raft River water and throughout most of the 1990s water was available for them to take and it would have benefitted the Raft River Valley's water supply if they had taken their water, but they refused to take it. I personally, and others from Raft River District, encouraged Joneses to take their water, but they let it run down the river to waste while they pumped their wells. Now, when the people with decreed rights need the water, Joneses hire Roger Ling to write falsehoods to deceive you while Joneses take this water and pump it into corners which have never been irrigated before and want absolute priority over everybody else, claiming that they somehow fit into the Almo Creek decree.

In summary,

1. In spite of Ling's misrepresentations, Joneses are still pumping unmeasured water from the illegal point of diversion, most of which either leaks through their dam at the recommended POD or comes into the stream below it. The tiny stream in the ditch is irrelevant. They are not in compliance with your instructions or state law.

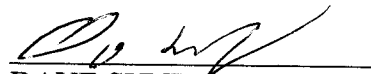
2. The Jobe Adams decree sets the Almo Creek decreed rights off as a separate district with absolute priority over Raft River because the Almo Creek decree was already in force before the Raft River decree was made. However, both decrees deny the right which Joneses are claiming.

3. The ground which Joneses are irrigating is physically outside of the area described in the Almo Creek decree and borders on Raft River, not Almo Creek. The recommended POD is downstream from anything else in the Almo Creek decree and does not affect the Almo Creek users but it does affect the Raft River users so according to 42-604 if this right is recommended it should be in the Raft River district.

4. While Joneses refuse to take their decreed Raft River water, they and their lawyer are picking this fight over their presumed right to irrigate new ground with absolute priority over the people who have used the water consistently for over 130 years. It looks like Joneses have hired Ling to find laws and misrepresent them so that they can intentionally violate them while they defy their neighbors to do anything about it.

In my opinion, Joneses should either comply with the law or stop using the water altogether but, in any case, they should not participate in the priority which Almo Creek decreed rights have over Raft River and should be part of District 43B so they can be governed with the rights which their use affects.

Sincerely,


DAVE SUNDBERG