

SERVICE, GASSER & KERL

Attorneys and Counselors at Law

P.O. Box 6009 • 2043 East Center Street
Pocatello, Idaho 83205-6009

Telephone: (208) 232-4471
Facsimile: (208) 232-1808



*Also Member D.C. Bar

Archie W. Service
Clark Gasser*
Ron Kerl
Steven V. Richert
James A. Spinner
Kay M. Christensen

February 12, 1996

RECEIVED

FEB 14 1996

Department of Water Resources

Idaho Department of Water Resources
Office of Director
1301 N. Orchard St.
Boise, ID 83706-2237

Re: Petition for Enforcement of Decree and Order
McCammon Ditch Company, Water District 29A

Dear Sir:

This firm represents McCammon Ditch Company located in Water District 29A. You will find enclosed with this letter the original Petition for Enforcement of Decree and Order which I have prepared at the request of McCammon Ditch Company. Please file this Petition with the Director of the Department of Water Resources pursuant to Reocedure Rule 8, IDAPA.

If you have questions or concerns with regard to the above, please do not hesitate to call. Thank you for your assistance in this matter.

Sincerely,

SERVICE, GASSER & KERL

Kay M. Christensen
Kay M. Christensen

KMC/jlh

Enc.

cc: Howard Hall
06-15-02.043

Kay E. Christensen, Esquire
SERVICE, GASSER & KERL
2043 East Center - P.O. Box 6009
Pocatello, Idaho 83205-6009
Telephone: (208) 232-4471
FAX: (208) 232-1808

RECEIVED

FEB 14 1996

Department of Water Resources

Attorneys for McCammon Ditch Company

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION
OF McCAMMON DITCH COMPANY FOR
THE ENFORCEMENT OF DECREE AND
ORDER

)
)
)
)
)
)
)

CASE NO. _____

**PETITION FOR ENFORCEMENT
OF DECREE AND ORDER**

The Petitioner, McCammon Ditch Company, an Idaho corporation, hereby submits the following petition for consideration by the Director of the Idaho Department of Water Resources (hereinafter "IDWR") as follows:

1. McCammon Ditch Company is a corporation duly organized under the laws of the state of Idaho with its principal office located at 1361 E. Dixon Road, McCammon, Idaho.

2. McCammon Ditch Company is the owner of Water Right Nos. A29-00057 and A29-00058 decreed by that certain amended Final Decree entered August 6, 1932, in *Union Grain & Elevator Co. v. McCammon Ditch Co. et al.*, Case No. 2203 in the District Court of the Fifth Judicial District of the State of Idaho (hereinafter referred to as "the Decree"). True and correct copies of the Amended Decree and the IDWR Adjudication Claims Proof

Reading Reports for these water rights are attached as Exhibit "A" and "A-1," respectively, to the Affidavit of Byron K. Allen in Support of Petition filed herewith. Under the terms of the Decree, McCammon Ditch Company is entitled to 50 c.f.s. with a priority date of June 11, 1889, and 18.95 c.f.s. with a priority date of June 28, 1901, for the irrigation of approximately 2,600 acres of land situated in Bannock County as follows:

The Southwest quarter, Lots 5, 6, and 7, the West half of the Southeast quarter, the East half of the Northwest quarter, Section 12; Section 13; the Southeast quarter of the Southeast quarter, the Southwest quarter of the Southeast, the Northwest quarter of the Southeast quarter, the South half of the Southwest quarter and the Northeast quarter of the Southwest quarter, Section 14; a tract East of Marsh Creek in the Northeast quarter, and the East half of the Southeast quarter, Section 22; Section 23; Section 24; the West half of the Northeast quarter, the Northwest quarter, Section 25; the Northeast quarter, the Northwest quarter, the Southwest quarter, the Northwest quarter of the Southeast quarter, Section 26; Lot 3, the Southeast quarter of the Northeast quarter, the North half of the Northeast quarter, Section 27, all in Township 9 South, Range 36 East; Lots 6, 7, 8, 9, 10, and 11, Section 18, all that portion of Section 19 lying west and south of the Portneuf River; Lot 5 Section 20; Lots 5 and 6, Section 21, all in Township 9 South, Range 37 East.

McCammon Ditch Company's water right is diverted from the Portneuf River at the following point of diversion:

The Southwest quarter of the Northeast quarter, Section 21, Township 9 South, Range 37 East. From the South quarter corner of Section 21, the point of diversion bears North 22 degrees and 45 minutes East, 3,020 feet.

3. The Decree adjudicated the rights to the use of the waters of the Portneuf River and its tributaries.

4. The Portneuf River and its tributaries are included in Water District 29, which is an active water district under the laws of title 42, chapter 6 of the Idaho Code.

5. On October 5, 1990, an Order was entered by the Director of IDWR (hereinafter "the Director's Order") finding that proper measuring devices, headgates and

controlling devices had not been installed on all diversions from the Portneuf River and its tributaries, and directing that the waterusers and watermaster in Water District 29 take certain actions to rectify the deficiencies. A true and correct copy of the Director's Order is attached as Exhibit "B" to the Affidavit of Byron K. Allen in Support of Petition filed herewith.

6. In his Order, the Director of IDWR expressly required:

"1. That all waterusers diverting water from the Portneuf River and tributaries ... shall install measuring devices, headgates and /or controlling works of a type acceptable to the Department on or before June 1, 1991. Individual users diverting from a canal upstream from the main canal measuring device must install individual measuring devices."

7. The installation of measuring devices was required because the Director expressly ruled that such devices were essential for the watermaster to measure water flow and properly distribute the waters of the Portneuf River and tributaries. In addition, the provisions of *Idaho Code* §§ 42-701, -702 and -703 require the installation of such measuring devices.

8. The Decree quantifies the irrigation water rights of Portneuf Marsh Valley Canal Co. (hereinafter "PMV") and Portneuf Irrigating Company (hereinafter "PIC"). To fill the water rights of PMV and PIC water users, water is diverted from the Portneuf River and carried approximately one mile to a headgate where water is then diverted for use by PMV water users and for use by PIC water users. Under the terms of the Decree, water users other than PMV and PIC are entitled to divert over this one-mile stretch of canal to fill water rights up to a total of 11 c.f.s. The Decree provides that in the event these users do not divert the full 11 c.f.s to which they are entitled, the difference between 11 c.f.s. and

the amount of water actually diverted shall be made available for use by PIC and then by McCammon Ditch Company.

9. To date, measuring devices have not been installed by all waterusers diverting from the Portneuf River and its tributaries. Specifically, there are no measuring devices to measure what portion of the 11 c.f.s. is actually being diverted by the water users on the one-mile stretch of canal between the Portneuf River and the headgate for the PMV and PIC diversions.

10. The Decree also required that measuring devices be installed at the PMV reservoir:

"Suitable measuring devices shall be installed on the Portneuf River above the flow line of the Portneuf-Marsh Valley Irrigating Company reservoir, and immediately below the dam of said reservoir, at which point the water comes into the reservoir, that the water released may be more accurately determined, in order that the normal flow of the Portneuf River may not be obstructed by the reservoir, with reference to the amount of water delivered through same during the irrigating season."

Such a measuring device is necessary to ensure that "[n]o charge shall be made against the normal stream flow through out this distance, the point of intake and the point of outlet of the reservoir" to the injury of McCammon Ditch Company and other water right holders diverting from the Portneuf River. See amended Final Decree entered August 6, 1932.

11. In addition, the Director's Order provides that:

3. Measuring devices shall be installed and located so that the inflow to and outflow from all reservoirs can be measured in such a manner that natural flow and storage water releases below the reservoir can be determined. Specifically, a staff guage-storage relationship must be established by the owners of the Portneuf Reservoir."

12. To date, a measuring guage has not been installed at the Portneuf Reservoir by the owners so that a staff guage-storage relationship can be established.

13. Under the terms of the Director's Order the watermaster of Water District 29 was ordered to stop the delivery of water to any diversion that does not have adequate measuring devices, headgates and/or controlling works. No water was to be delivered to offenders after June 1, 1990, however delivery of water has continued in spite of the Director's Order.

14. As a result of the waterusers' failure to comply with and IDWR's failure to enforce the terms of the Director's Order and the Decree, McCammon Ditch Company has suffered and will continue to suffer material injury to its water rights because of the watermaster's inability to accurately measure the diversion of water by other waterusers and to deliver water in District 29 in accordance with established water rights.

15. The Decree quantifies the storage water rights of PMV and also provides that the delivery of storage water to PMV shall be free from loss from the reservoir to the point of diversion on the Portneuf River through Portneuf Marsh Valley Canal Co.'s drainage canal and the Portneuf River channel.

16. PMV has expanded its storage and irrigation water rights from that awarded under the Decree and water under these expanded rights has been improperly delivered free from loss to PMV, thereby diminishing the water available to deliver to McCammon Ditch Company and other water right holders diverting from the Portneuf River.

17. The names, addresses and description of the water rights of the water users who are causing material injury to the rights McCammon Ditch Company include, but may not be limited to, the following:

Portneuf Marsh Valley Canal Co.
ATTN: Erwin Gilbert
Virginia, Idaho 83234

Portneuf Irrigating Company
ATTN: Roger Johnson
3369 East U.S. Highway 30
McCammon, Idaho 83250

18. The allegations set forth above are supported by the Affidavit of Byron K. Allen in Support of Petition filed herewith.

WHEREFORE, the Petitioner, McCammon Ditch Company, requests that the Director of the Department of Water Resources of the State of Idaho take such action as is necessary to enforce the terms of the Order dated October 5, 1990, and the amended Final Decree entered August 6, 1932, in *Union Grain & Elevator Co. v. McCammon Ditch Co. et al.*, Case No. 2203, and to insure compliance with all provisions of said Order and Decree by all the waterusers in Water District 29 who are diverting from the Portneuf River and its tributaries.

DATED this 12 day of February, 1996.

SERVICE, GASSER & KERL
Attorneys for McCammon Ditch Company

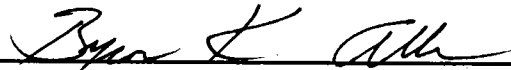
By 
(Kay M. Christensen)

STATE OF IDAHO)
 SS
County of Bannock)

BYRON K. ALLEN, being first duly sworn, deposes and says:


That he is the President of McCammon Ditch Company in the above-entitled and foregoing action; that he has read the foregoing Petition, knows the contents thereof, and that the facts therein stated are true as he verily believes.

DATED this 30 day of January, 1996.


Byron K. Allen

SUBSCRIBED AND SWORN to before me this 30 day of January, 1996.

(SEAL)


NOTARY PUBLIC for Idaho
Residing at: Pocatello
Commission Expires: 4/9/97

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 12 day of February, 1996, served the foregoing Petition for Enforcement of Decree and Order upon all parties of record in this proceeding, by mailing a copy thereof by U.S. Mail, first class, properly addressed with postage prepaid to the following:

Portneuf Marsh Valley Canal Co.
ATTN: Erwin Gilbert
Virginia, Idaho 83234

Portneuf Irrigating Company
ATTN: Roger Johnson
3369 East U.S. Highway 30
McCammon, Idaho 83250

Arlin G. Olson
Watermaster District 29
P.O. Box 644
Lava Hot Springs, Idaho 83246

By: Kay M Christensen