



State of Idaho

DEPARTMENT OF WATER RESOURCES

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BY FAX

Lee Leininger
P. Fritz Holleman
Dept. of Justice
General Litigation Section
Environmental and Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663

Dear Mssrs. Holleman and Leininger:

This letter is the response to your request for a written summary of the Department's current policy for recommending competing claims. The Department arrived at this new point after considering many possible alternatives and receiving input from several parties, including the United States. As you are aware, after Special Master Haemmerle issued the Order on Second Summary Judgment in the Joyce Livestock subcases, the Department initiated a re-evaluation of its policy for recommending water rights to the landowner when the landowner and a third party such as a lessee file competing claims to the same water right.

The Department's policy at the time it published the first five Director's Reports was to recommend the water right to the landowner and recommend the court disallow the competing claim. At the monthly informational conference on May 20, 1997, the SRBA District Court expressed strong concerns over the Department's policy in this regard. Both the Department and the court found the chief deficiency with the Department's policy was that it did not include a detailed investigation into the possibility of lesser estate owners having valid water rights on another person's land. In fact, the Department has expended very little of its resources investigating the legitimacy of either competing claim. Along the way, given the adjudication scheme of the SRBA, the Department's recommendation created an unfair advantage for landowner-claimants because their water right recommendations carried *prima facie* weight despite the lack of investigation. The Department explored alternatives with the potential to remedy this problem that also would not become a large drain on Department resources.

With these goals in mind, the Department currently is expecting to apply a new procedure when publishing Director's Reports in upcoming reporting areas. The new procedure works for *de minimis* claims as follows: If competing claims are identical with respect to every element except ownership, the Department will recommend one right identifying both competing claimants as potential owners. If a claimant files a claim where no other claims assert identical elements, the

Department normally will consider and recommend the claim independent of any other claim or claimant. This way the Department may avoid making possibly arbitrary judgments as to whether two claims are for the same water right. However, the Department will consider evidence in its possession that may indicate that claims truly are to the same water right. For example, if the United States, acting through the Bureau of Land Management, files a claim for a stock water right licensed in the name of the BLM, and a private individual files a claim to the same license, the Department may recommend the court disallow the private claim, because the license identifies the appropriator. Aggrieved parties still may work out ownership issues through the objection process, but by applying the additional evidence, the Department is spared endorsing multiple claims from one beneficial use in those situations where the Department does have sufficient information to identify when claims represent a single beneficial use.

Where claims assert some non-*de minimis* use, such as irrigation or power production, the Department may perform a more considered investigation into ownership. Because of the smaller number of these claims and the larger quantities diverted, there is greater justification for the expense. Generally, better records exist detailing the historical use of these lands, which allows the Department to make more accurate and complete recommendations.

The Department expects this new policy to produce generally more fair litigation, with each party subject to identical standards of proof before the court, which will proceed in a manner consistent with a common quiet title action. Also, the Department can produce such recommendations without excessively depleting its resources. In Reporting Area Six, (Basins 51, 55 and 61) the Department anticipates about 500 of such potentially competing claims, most of which are small domestic and stock water claims. The long term impact of this policy should be minimal. All of the other basins appear to contain significantly fewer competing claims. This means that once the small domestic and stock claims in Reporting Area 6 are completed, the new policy will have diminishing impact over the course of the SRBA.

By recommending water rights to lesser estate owners, the Department gives greater recognition to what has been long-standing law in Idaho - that lesser estate owners may hold title to water rights independent of the title to the appurtenant real estate, even in the cases of lessees and licensees on the federal public lands. The Department, however, will not prevent any potential theory of water right ownership available to the landowner-claimant. This procedure also does not appear to contravene any of the Department's obligations under Idaho Code Title 42.

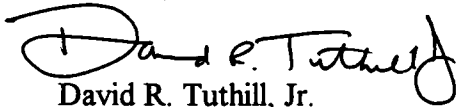
Although your suggestion to delay reporting these competing rights holds some appeal, the Department will not pursue that option at this time. After careful consideration, I do not believe that such a delay is in the best interests of the Department. One important reason with going forward with the domestic and stock water right Director's Report in Reporting Area 6 is that it allows the Department to spread out its future work load. Because the Western Region office is already committed to a reporting schedule, a delay now only will add work on top of the projects scheduled later. The Western Region office is already operating at its resource limit, and will be while producing the following non-*de minimis* report.

You should be aware that you will have an opportunity to construct pre-negotiation

settlements with claimants during the 120 day objection period after publication of the Director's Report recommendations. During this period, claimants may withdraw claims or change the listed owner to "United States," whatever your settlement entails. Regardless of how much time you have to reach these settlements, however, there could be potential hold-out claimants that will litigate the ownership issue.

As always, comments or suggestions on this process or any IDWR action may be directed to myself or Peter Anderson, at (208) 327-7929 and (208) 327-7975 respectively. Because the Department is working to meet established deadlines for the completion of the domestic and stock water recommendations for Reporting Area 6, you should submit your comments or suggestions prior to July 12, 1997 or as soon as otherwise possible. I hope this satisfies your request for a written statement.

Sincerely,

A handwritten signature in cursive script that reads "David R. Tuthill, Jr." The signature is written in dark ink and is positioned above the printed name.

David R. Tuthill, Jr.
IDWR Adjudication Bureau Chief

cc: Bill Ferry
Randy Bramer