



State of Idaho

DEPARTMENT OF WATER RESOURCES

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Department of Water Resources

PHILIP E. BATT  
GOVERNOR

KARL J. DREHER  
DIRECTOR

April 25, 1997

Dave Sundberg  
PO Box 1  
Malta, ID 83342

RE: Clear Creek

Dear Mr. Sundberg:

I apologize for the time it has taken to respond to your letter addressed to me which was forwarded to our office in late March. As a matter of explanation, our office received your letter March 28th, but since I was out of state and did not return to the office until April 7th, your letter did not get fully reviewed until April 8th. When I reviewed your letter and determined its serious and complex nature, I forwarded it to our state office for review by our administration and legal staff.

For your reference, as watermaster, please feel free to contact our department directly with future matters. The department does not view the Hurlbutt Order dated May 15th, 1996 to be a prohibition of direct department and watermaster communication. Additionally, pursuant to Section 42-1701(5), Idaho Code, as watermaster, you are covered under the Director's authority for reasonable entry upon lands in Idaho for the purposes of delivery of water according to Title 42, Chapter 6, Idaho Code.

Your letter provides much background information which should be considered in the final adjudication of the water rights involved. Although your letter seeks settlement of water rights issues, the department has determined this is neither the time nor the forum for such a determination. The department understands the proper forum for determination of the water rights in Idaho to be the Snake River Basin Adjudication (SRBA). In formulating the following response, it is the department's desire that the status quo be maintained until ultimate resolution by the SRBA. In reviewing the numerous documents associated with Clear Creek, the department finds that the best definition of the status quo is contained in the May 15th, 1996 "Order Providing for Preliminary Injunctive Relief" signed by Judge Hurlbutt.

I will now focus on the eleven (11) questions you pose in your letter. In some instances your questions have been paraphrased.

(1) *Does Sessions have a right to the Settlers right?*

Answer: This will be resolved in the SRBA. Until this happens the department advises you as watermaster to deliver

the water to Jones and Session pursuant to the Hurlbutt Order, Paragraph 5.

(2) *If he does is it for 4.3 cfs, 3.2 cfs, 40 inches for the 40 acres under the pivot, or is it for whatever his ditch will hold whenever there is 40 cfs in the creek, regardless of who else might have water rights?*

Answer: See answer to question 1. Deliver water based on the order to the extent the ditch is capable of delivering.

(3) *Does Ray have to make a bigger ditch so that Jeff can take his Settlers water?*

Answer: As watermaster you do not need to be concerned about such private matters. Your responsibility is to deliver the water into the ditch according to the Hurlbutt Order to the extent possible. If the ditch needs to be cleaned it is a matter that Jones and Sessions need to resolve privately.

(4) *Should I just let the creek go when there is 40 cfs, to anybody that wants it, or should I measure it to the existing water rights?*

Answer: If all decreed rights that are called for have been filled and there still is excess water, then it appears equitable that the excess should be proportioned out to those who want it and can beneficially use it, based on their delivered decreed amounts.

\*\*\*Please note that it is expected that Clear Creek may flood this year and a question may arise as to the responsibility of people to divert excess water to alleviate flooding. Water users have no legal responsibility to divert water if they do not wish to. All flood waters should remain in the natural flood channel if not diverted voluntarily. For emergency diversion of flood waters to alleviate flooding, no water right is required.

(5) *Should I deliver water according to the Dietrich decree and the list which Guy Sundberg used or should I deliver it to all of the rights in the Jobe Adams decree, including 9600 acres listed under the Settlers right and the other rights which have not been recognized for 65 years?*

Answer: See answer to question 1.

(6) *Will Ray use his share of the 560 acre feet to keep crops alive like Judge Johnson and the Commissioners of Reclamation have ordered, or will the 560 acre feet be used to develop new land and water crested wheat on the upper place?*

Answer: The use of the water should be for lands historically irrigated that are covered under the answer to question 1. There should not be **development of new lands** without proper transfers, etc.

(7) *Do the water users on Clear Creek still have the right to put streams together and trade water, or are we going to put each little stream in a separate ditch this year?*

Answer: To the extent possible, the local practice of rotation

of water should be recognized as long as the rotation does not injure the rights of individuals and the rotation is based on the decrees being delivered.

(8) *Do the Joneses have to run their upper place water out the West side of the creek?*

Answer: I understand the upper place gets both water diverted in Utah and water diverted in Idaho. Since I do not know enough about the system to know exactly which ditch you refer, I would say that water diverted in Utah is a matter which should be dealt with by the Utah Department of Natural Resources, water diverted in Idaho should be at the historically used diversion(s).

(9) *Is it my duty to see that Ray's Naf Irrigation Co. water is delivered to Idaho, or should we just hope that Kemptons let it go?*

Answer: Your responsibility is to deliver the Idaho water to the Idaho users. Additionally you should coordinate with the Utah commissioner to monitor the gauge in Utah so that the turns between the states are made properly.

(10) *Without an automatic measuring device the only way I could tell for sure if the proper amount of water is going to Idaho would be to measure every stream in Utah. What should I do?*

Answer: As watermaster, you have the right to reasonable access to the weirs and ditches in Idaho to assure the rights are being correctly delivered in Idaho. Additionally, under a reasonable interpretation of the federal court decree (Johnson), it appears that you have the right to reasonable access to check the gauge in Utah. You will need to coordinate the measurement of the Utah gauge with the Utah commissioner (Vern Kempton) so that the water is turned properly between the states according to the federal decree. As watermaster in Idaho you are not authorized to check other diversions in Utah. If a dispute should arise, we will work with you, the commissioner in Utah and the Utah Department of Natural Resources to investigate the problem.

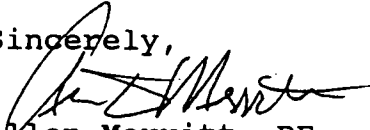
(11) *Certain persons say they are going to kill me or otherwise get rid of me if I interfere with their new water rights or try to measure the water. They are continually waiving phony court orders in my face saying that I can not measure the water. Is there any way to get protection from them?*

Answer: Threats to your personal safety as a state watermaster are viewed by the department as a very serious matter. Please document all such occurrences, and notify me, or other department officials, immediately if you receive a threat to your personal safety that you perceive to present a well-founded fear that violence is intended against you. Such threats should be referred by you or by the department to the Cassia County Prosecutor if the threats arise in Idaho, or to the appropriate Utah authorities if the threats occur in Utah.

By copy of this letter, I will alert the various parties of these

matters so that they may keep fully informed. I also encourage you and the Utah Commissioner to find common ground to work together to defuse the problems which plague the Clear Creek drainage.

Sincerely,



Allen Merritt, PE  
Southern Region Manager

CC:: Vern Kempton  
Ray Jones  
Jeff Sessions  
Pat Brown

Roger Ling  
Bob Fotheringham  
Jay Harper  
Cassia County Prosecutor

Norm Young  
Phil Rassier