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FROM:

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SENDER: D Jones

COMMENTS: It is my opinion that IDWR should correct the misconception that Rnd Mtn Ranch diverting Settlers Right would injure Jones. The ditch was measured at 12.5 cfs & may hold even more. Joneses' rights total 9.2 cfs but are limited to 310 ac. Sessions' (Rnd Mtn Ranch) rights total 6 cfs. With rotation Rnd Mtn would be delivered 3.4 cfs for 3 days & Jones 7.8 simultaneously; then Jones would get 10.6 cfs for 3 days & Rnd Mtn nothing. IDWR could instruct the watermaster to deliver all of Jones rights & then Rnd Mtn's to the extent available in ditch capacity. Exert control from court.

COPY

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June 2, 1998

Honorable Daniel C. Hurlbutt, Jr.
P. O. Box 2707
253 3rd Avenue North
Twin Falls, ID 83301

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JUN 03 1998

Department of Water Resources
Southern Region

RE: Jones/Sessions
Our File No. 29-001

Dear Judge:

Enclosed is the Order you instructed that I draft. Also enclosed is that transcript of your oral ruling. I am submitting it to the Court, as well as IDWR, because I understand there has been some confusion about what you intended. Specifically, I have been informed that, last week, the watermaster was instructed by IDWR to deliver the Settler's right to Mr. Sessions. I believe that is an untenable directive given the Court's ruling. Tr., p. 3, L. 13 - p. 4, L. 7. I believe the proposed order more accurately reflects your ruling.

Please let me know if you would like the draft Order revised in any way.

Very truly yours,

PARKER, WARR & BROWN



By _____
Patrick D. Brown

PDB/llm

cc: Roger Ling
Doug Jones/IDWR, Twin Falls

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(ORDER MODIFYING)llm

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JUN 03 1998

Department of Water Resources
Southern Region

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re the General Adjudication of Rights to)
the Use of Water from the Snake River)
Basin Water System.)
_____)

HAROLD JONES and RAY JONES,)
)
Plaintiffs,)

vs.)

NAF IRRIGATION COMPANY, a Utah)
Corporation; LARRY KEMPTON in his)
capacity as an individual and as)
president of NAF IRRIGATION)
COMPANY; LAVERNE KEMPTON,)
individually and in his capacity as)
Water Master and Ditchrider for NAF)
IRRIGATION COMPANY; MONTE)
CAMPBELL as an individual; and JEFF)
SESSIONS doing business as ROUND)
MOUNTAIN RANCH,)

Defendants.)
_____)

CASE NO. 92-00014

ORDER MODIFYING
INTERIM ADMINISTRATION
ON CLEAR CREEK

On about May 8th, 1998, this Court entered its "Order for Supplemental Preliminary Director's Report and For Interim Administration." That Order sets forth the terms for interim administration of the waters of Clear Creek and its tributaries. Pursuant to the last paragraph of the Order, this Court held evidentiary hearings on May 11 and May 22, 1998 concerning further limitations or modifications to interim administration. The Court ruled from the bench on May 22, 1998. This order reflects and memorializes that ruling.

IT IS THEREFORE ORDERED that administration shall continue under the May 8, 1998 Order for Supplemental Preliminary Director's Report and for Interim Administration, subject to the following modifications:

1. Harold and Ray Jones may use their following rights on both their "Upper" and "Lower Places," subject to the restrictions recommended by the Idaho Department of Water Resources in its Preliminary Director's Report on those rights: Right Nos. 43-00084, 43-00085 and 43-00286A;
2. Harold and Ray Jones and Round Mountain Ranch shall continue to rotate the use of rights 43-00045 and 43-00037, as long as those rights can be filled. The use of the Jones's other rights, as allowed by paragraph 1, shall not interfere with the continued rotation;
3. Round Mountain Ranch claimed right no. 43-00286B, which shall not be delivered;

4. Ray and Harold Jones shall install a measuring device on the "East Ditch" running from the Idaho Weir, below the split between the ditches leading to Round Mountain Ranch and the Jones' Lower Place;
5. The allocation of flows which exceed the amount of water needed to fill the rights as described above and in the previous Order for Interim Administration shall continue on the basis that has been historically followed, to wit, that excess water shall be allocated on the basis of the percentage of total amount of the rights from Clear Creek, and then if additional water is available, on a "take-as-you-need" basis.

This Order shall continue in effect until modified by further order or final decision of this Court.

Dated this ____ day of June, 1998.

Honorable Daniel C. Hurlbutt, Jr.

Conformed copies to:

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JUN 03 1998

Department of Water Resources
Southeast Region

COPY

5-22-98

JONES v. NAF IRRIG. & SESSIONS

1 THE COURT: Counsel, because of the time
 2 constraints given the seasonality of some of this
 3 water, I feel compelled to rule from the bench this
 4 morning.

5 Essentially the relief requested by Mr. Brown
 6 will be granted; that the Settlers right belonging to
 7 the Joneses can be used on both places, the Upper and
 8 the Lower, with the restrictions recommended by the
 9 department of water resources and accepted by the
 10 Joneses.

11 The parties will be required to continue rotation
 12 of the 70 and 85-inch senior rights while those rights
 13 can be filled. The use of the Settlers right belonging
 14 to the Joneses which they seek to have delivered to the
 15 Lower Place cannot interfere with the exercise of the
 16 senior right.

17 Counsel, with respect to the issue of forfeiture
 18 or abandonment of Mr. Sessions's claim to a Settlers
 19 right, I am proceeding with this order for temporary
 20 relief, temporary administration in an attempt to
 21 approximate what has happened since 1961.

22 For abandonment to be found, an abandonment is,
 23 and forfeiture is, a doctrine in Idaho which is
 24 disfavored by the courts requiring clear and convincing
 25 evidence. It is my determination that this would --

1 first, there's not sufficient evidence to find
2 forfeiture in the context of this litigation; and,
3 secondly, for purposes of temporary relief, a finding
4 of abandonment or forfeiture, I think, would be
5 premature.

6 Therefore I will make no such finding at this
7 time. That issue remains in the case to be determined
8 on final hearing.

9 Counsel, I am going to order that the Joneses
10 install a measuring device, and that be done at the
11 earliest practical opportunity.

12 With respect to allocation of what has been
13 referred to as high flows, or flows which exceed the
14 decreed rights, that can continue on the basis as it's
15 historically been done on a percentage basis, or where
16 the flows are extreme, on a take-as-you-need basis.

17 Mr. Brown, any questions?

18 MR. BROWN: Yes, Your Honor. The first one
19 is: I presume you mean install a device on the East
20 Ditch after it splits between Sessions and Jones?

21 THE COURT: That's correct, as I believe
22 the department had originally either ordered or
23 requested.

24 MR. BROWN: The second question is: I
25 understand you're allowing -- I'm not sure if you

1 addressed how or when the Joneses can take their water
2 to the Lower Place. You're saying "as recommended."
3 They can take not only their Settlers, but their other
4 70 and 90.

5 THE COURT: That's correct.

6 MR. BROWN: Okay. That present a problem
7 in light of the court's statements concerning
8 forfeiture. Because we can't get everybody's water in
9 the ditch. And I think the court resolved that before
10 by doing an 80 inches to the Lower Place, and then it
11 went back and forth on how water could go down there.
12 But I think we need to address that further.

13 THE COURT: Well, I think what my intention
14 was to do it as it's been done since 1961, which means
15 that, without finding abandonment or forfeiture, there
16 would not be a possibility of delivery when the system
17 is full to Mr. Sessions under a claim under the
18 Settlers right.

19 MR. BROWN: I didn't understand what you
20 said. I'm sorry.

21 THE COURT: Well, practically it works the
22 same as if a finding of abandonment or forfeiture was
23 made. What I'm saying is the status quo would require
24 it to be done as it's been done, which means
25 Mr. Sessions would not receive Settlers water.

1 Mr. Sessions could receive Settlers water at the
2 conclusion of the ultimate hearing if the evidence was
3 persuasive that he was entitled to that right.

4 MR. BROWN: So the court is saying in the
5 interim he is not to receive Settlers water to Round
6 Mountain.

7 THE COURT: That's correct.

8 MR. BROWN: That clarifies it.

9 THE COURT: Mr. Brown, would you please
10 prepare the changes I've identified to the order,
11 submitting copies to counsel for review and to the
12 court for ultimate entry.

13 MR. BROWN: I will, Your Honor.

14 THE COURT: Mr. Ling.

15 MR. LING: Your Honor, there's another
16 issue. In the director's report it has points of
17 diversion. And some of the points of diversion are
18 below the Idaho weir; but yet the Idaho weir is where
19 everything is measured as to the water coming to
20 Idaho. And I think historically everything has been
21 measured at the Idaho weir for everybody's delivery for
22 measurement.

23 We didn't get into that; but it seems now that we
24 have something of that nature, we need to clarify that
25 so we don't have the watermaster running water down

1 Clear Creek a couple miles to measure it, even though
2 it has to be measured at the Idaho weir to determine
3 when you go on turns with Utah and et cetera.

4 MR. BROWN: Your Honor, I believe you're
5 referring to the recommendations by the department
6 concerning the Holmgrin rights where the department --

7 MR. LING: Holmgrin has satisfied his by
8 moving it up there. I think there's another one as I
9 recall was -- and we haven't filed the objection to
10 it. I believe it's a Stewart right that has a point of
11 diversion below the Idaho weir.

12 MR. BROWN: I know that Mr. Holmgrin filed
13 an objection consistent with ours. And before the
14 hearing I think we agreed that Mr. Holmgrin's rights
15 would all be measured at the Idaho weir.

16 MR. LING: That's right.

17 MR. BROWN: I don't know anything about
18 Stewart.

19 MR. LING: I'm talking about all the water
20 rights, not just Holmgrin's --

21 MR. BROWN: You're saying Stewart rights,
22 and I don't know about those. The watermaster is here
23 if you would like to ask.

24 THE COURT: Well, I guess my feeling is
25 that to maintain the status quo about which I'm

1 speaking we would be measuring all the rights at the
2 Idaho weir. But Mr. Sundburg is shaking his head.

3 Mr. Sundburg.

4 MR. SUNBURG: Okay. The way the decree
5 reads, to determine the amount of water that is
6 available, it's measured at the Idaho weir. Okay.
7 Holmgrin covers six miles of the creek. And then
8 Stewart's weir is right at the bottom of his place, and
9 that's where his water is measured.

10 Okay. If the creek shrinks in that six miles,
11 Holmgrin stands the shrink. The way the decree reads,
12 as long as the water is measured, as long as there's --
13 okay. Let's say there's 20 feet in the creek. As long
14 as there is 4 second feet measurable that reaches
15 Stewart's weir -- let's say if Holmgrin has 20 feet up
16 here. If 10 of that is lost, that's his problem.

17 THE COURT: Holmgrin's problem.

18 MR. SUNBURG: Yes. But he can use the water
19 anywhere he wants, but he has to deliver Stewart and
20 Arimo's water at their measuring device. But that
21 doesn't affect anybody at the top of the creek.

22 THE COURT: Correct. Does that answer your
23 question, Mr. Ling?

24 MR. LING: Yes.

25 THE COURT: That is the way I'd prefer to

1 doing it then. And that would have no impact on these
2 rights.

3 MR. SUNBURG: That won't impact anybody
4 except Holmgrin.

5 MR. LING: I guess my only other concern I
6 have is that it appears that you have taken the
7 position to, in administration, overturn what the
8 department has said can be the water rights that are
9 going to be used on Round Mountain Ranch. I get
10 concerned with all this jurisdiction with so many
11 different courts. I mean I --

12 THE COURT: Mr. Ling, I have your concern.
13 I have expressed it to the Idaho Supreme Court. I have
14 been reversed no less than three times on the matter of
15 my jurisdiction for administration. The Supreme Court
16 has said the legislature has given it to me. And I
17 don't know what to do about it other than to do it.

18 It is a very unfortunate decision in my opinion,
19 but it is one that I have. And at least on a temporary
20 basis, I certainly have that jurisdiction to enter
21 interim orders of administration after the filing of a
22 director's report. And this is the best I can do under
23 the circumstances.

24 For courts to be involved in this business, I
25 felt as an anathema; but I have so resoundingly been

1 overturned on this issue that I don't know what else to
2 do. I very much agree with your concerns.

3 MR. LING: Well, my concern not only goes
4 to the jurisdiction, but also there doesn't seem to be
5 any consistency in the process. And that goes, I
6 mean --

7 THE COURT: I agree fully. I agree fully,
8 and that's why I think that administration ought to be
9 left to the department of water resources and not the
10 courts. But the court has said to make administration
11 consistent in the SRBA, the court is to be involved in
12 matters of administration.

13 MR. LING: But the court can, in doing
14 that, defer to the department. And you're not doing it
15 in this case. That's my concern.

16 THE COURT: Well, but the Supreme Court
17 said in basinwide issue No. 3 that the court's
18 jurisdiction in the SRBA is the exercise of its plenary
19 jurisdiction. This court certainly will accord due
20 credibility to the department, but not deference
21 because it's not an administrative proceeding. The
22 department's determination in making or issuing a
23 director's report is not an A.P.A. proceeding. It is
24 that of a technical expert.

25 MR. LING: But, Your Honor, the court

1 decision in the transfer proceedings is an
2 administrative proceeding; and findings have been made,
3 although they're on appeal.

4 THE COURT: And the SRBA, by dictate of the
5 legislature, requires that any determination made in
6 the SRBA supersede all prior licenses, permits, and
7 decrees. I share many of your concerns and problems
8 here, Mr. Ling. And, again, my concerns are not shared
9 by the Idaho Supreme Court, presuming they mean what
10 they say.

11 MR. LING: In view of your ruling, is
12 there an opportunity that we should get together and
13 give the court -- or the court can give us some time so
14 we can put this on a fast track and get things
15 resolved? You've cut the man out of 160 inches of
16 water. And I don't think that it's fair to him to have
17 to go through a whole season or two seasons without
18 that.

19 THE COURT: I'm happy to meet with you and
20 set up a very aggressive schedule to try the matters at
21 the earliest opportunity. And I would welcome the
22 opportunity to assist all of the parties in that
23 regard.

24 MR. LING: Do you anticipate -- shall we
25 just do that informally; or would you prefer to have a