



State of Utah  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF WATER RIGHTS

RECEIVED

FEB 28 2002

Department of Water Resources

Michael O. Leavitt  
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State Engineer

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February 22, 2002

Tim Luke, Manager  
Water Distribution Section  
Idaho Division of Water Resources  
P.O. Box 83720  
Boise, Idaho 83720-0098

Dear Tim:

As you are probably aware, the State of Utah has litigation ongoing with Dave Sundberg in regards to his unpaid assessments for the distribution of water in Utah on Clear Creek.

As part of those proceedings, Dave recently filed the enclosed memorandum with the court. Most of the memorandum will not be of interest to you but I thought you might be interested in a statement that Dave makes on the next to the last page; it is paper-clipped and highlighted.

Dave uses strong language, but I hope this level of mistrust does not exist between our two states. However, I am fairly certain that this is Dave's perception of the situation and how he sees his responsibility.

If you have any questions or comments please contact me at (801538-7380).

Sincerely,

A handwritten signature in black ink, appearing to read "Lee H. Sim".

Lee H. Sim, P.E.  
Assistant State Engineer for Distribution

BRIGHAM DISTRICT

FEB 5 10 44 AM '02

Dave Sundberg  
Box 1  
Malta, Idaho 83342  
Telephone 435-827-5511

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IN THE FIRST JUDICIAL DISTRICT COURT  
IN AND FOR BOX ELDER COUNTY, STATE OF UTAH

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ROBERT L. MORGAN  
STATE ENGINEER,  
Plaintiff,

v.

DAVE SUNDBERG,  
Defendant.

) DEFENDANT'S MEMORANDUM  
) AGAINST PLAINTIFF'S MOTION TO  
) DISMISS COUNTER COMPLAINT/  
) PETITION FOR THE REMOVAL OF  
) WATER COMMISSIONER  
)  
) Civil No. 010100466MI  
)  
) Judge; Clint S. Judkins  
)

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The Defendant, Dave Sundberg submits the following Memorandum against the Plaintiff's motion.

FACTS

1.) On May 24, 2001 the Plaintiff filed a Complaint against Dave Sundberg to collect money to pay Vern Kempton. Although in her various documents Ms Shilton appears to represent different things, the *de facto* Plaintiffs named in the Complaint are named in paragraphs 1, 2 and 5 as follows: (1) Robert L. Morgan, (2) The Division of Water Rights, and (5) Laverne Thomas Kempton, as Water Commissioner appointed by the State Engineer. The Attorney General's office is representing Morgan as State Engineer and Director of the Division of Water Rights and Kempton as Water Commissioner, but is not representing either personally.

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2.) The allegations in the Complaint can be grouped in the following numbered paragraphs;

6, 8, 9, 10, 11, 12, 13, 14, The Plaintiff is collecting money to pay Vern Kempton.

7, The Assessments are based on the Established Rights of the users.

16, The Plaintiff sent a letter to the Defendant on October 6, 2000 which says in the middle paragraph, "The existence of the distribution system and presence of a water commissioner assure the orderly distribution of water according to the established priority schedules." He includes the letter as exhibit C to the Complaint.

17, On Dec.20, 2000 the State Engineer sent a Notice of Agency Action offering, among other things, to use the district court to collect Kempton's unpaid salary. (paragraph 4)

18, On January 8, 2001, the Defendant sent a letter suggesting that the district court is the only way to obtain justice in this matter.

19, 21, The Defendant diverted water into his ditch on April 22, 23 and May 9, violating an order given by the State Engineer on April 10 to not divert water.

3.) On June 15, 2001 the Defendant filed his Amended Answer to the Complaint, with Affirmative Defenses related to the following issues. Although each Defense states a separate fact, they can be grouped together as follows;

2, 10, 11, 12, allege that the State Engineer knows that Vern Kempton is making false reports

3, 5, 6, 8, 9, 10, 15, allege that Vern Kempton and his freinds have consistently been diverting water wrongfully and illegally in violation of the established rights.

10, 11, 12, 13, 15, 16, allege that if the billing had been corrected in conformity with

actual water deliveries the assessments would have been paid.

6, 7, 8, 9, allege that while Campbell, Kempton and Scofield were making movies of tiny streams of water in a ditch which they claim belongs to the Defendant, they were in fact themselves illegally diverting large streams of water. Affirmative Defenses # 6, 7, 8, and 9 are necessary pleadings against the Plaintiff's Complaint paragraphs 19 and 21, besides going to the issues of Removal of the Water Commissioner and Conversion.

3, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, Allege that the assessments and water deliveries were not made according to the established rights of the users nor according to the established priority schedules.

13, 14, Allege that the State Engineer is giving new rights to consume the water which Kemptons are wrongfully diverting, thus converting Sundberg's and other people's property value into Kempton's property.

4.) On September 5, 2001 the Court told the Defendant that if he wanted to he could file a counter complaint, otherwise the court would accept the Affirmative Defenses as they were submitted with the Amended Answer. The Counter Complaint should be filed within 30 days.

5.) On October 5, 2001, the Defendant filed his Counter Complaint with numbered paragraphs which can be grouped together as follows;

1, 2, 3, 4, Allege that Vern Kempton and Mont Campbell have invited the Defendant and other people to join them in illegally diverting water from Clear Creek when the water in fact should be going to other people.

5, 6, 7, Allege that Harold and Ray Jones each year have objected to the State Engineer

appointing Vern Kempton as Water Commissioner. Each year the Plaintiff has refused to notice their objection because they were only stockholders in Naf Irrigation Co. even though they had the biggest single water right on the creek.

8, 9, 10, 11, 13, 14, Allege that Kempton, Campbell and Scofield are wrongfully diverting water from Clear Creek, irrigating ground which does not have water decreed to it while the rightful users of the water are not allowed to irrigate their crops and the State Engineer is granting new water rights to accomodate the water which they are wrongfully diverting, causing a conversion of the Defendant's property value and productivity to the property of Kempton, Campbell and Scofield.

12, 15, 16, 17, 18, Allege that the Defendant and other people have wasted a lot of money and time trying to convince the State Engineer to resolve these problems and the State Engineer does not provide documents or facts or responsible answers to any of the requests but instead gives spiteful and malicious answers and false accusations.

6.) The Plaintiff filed a motion to strike the Defendant's Affirmative Defenses and Counter Complaint and requested a hearing. The hearing was held on December 27, 2001 and the court ruled that the motion was granted with the exceptions of two issues; Conversion and the Removal and Replacement of the Water Commissioner, with the condition that the Defendant is required to join Campbell, Kempton and Scofield as parties to this lawsuit by Jan.26, 2002.

7.) On January 23, the Defendant filed third party Complaints against Campbell, Kempton and Scofield and the Sheriff's office agreed to deliver the complaints and summonses.

7.) On January 25 the Plaintiff filed a Motion to Dismiss Counter Complaint/Petition for

Removal of Water Commissioner.

### ARGUMENT

After all of the crying that Ms. Shilton has done because the Defendant filed a 4 page memorandum which was not completely double spaced and might exceed 10 pages if it were double spaced, now, in violation of UCJA Rule 4-501 she files this motion with it's 12 page memorandum for the obvious purpose of showing her contempt for the Court Rules. Judged by her own standards, this Motion should be denied.

Accompanying the Memorandum are two exhibits which should be explained. Exhibit "A" shows 6 private water rights and 6 rights for Naf Irrigation Co., of which the largest stockholder was Harold Jones until last year when he died and his place was sold. Harold and his son Ray were suing Vern Kempton and Mont Campbell *et al* from 1995 until last Summer when Harold died, for misappropriating Joneses water.

Exhibit "B" is an affidavit from Lee Sim which says that everybody on Clear Creek is happy with Vern Kempton and nobody has ever complained except Dave Sundberg. This is obviously not true because Joneses were suing Vern and each year at the annual water meeting they specifically objected to Vern being appointed Water Commissioner. Also, even though Vern was watermaster for the Idaho users for 2 years they have unanimously voted to remove him because he was not delivering their water and was using it to develop his new ground in Utah. The Idaho users have asked Dave Sundberg to be their watermaster even though he lives in Utah, because he can see what is happening with the creek. Lee Sim is the same one who has destroyed most of the records which the Defendant has requested.

On Dec. 27, 2001 the Court ruled that if the Defendant joined Campbell, Kempton and Scofield as parties in this Lawsuit that the issues of Removal of Kempton as Commissioner and Conversion will be accepted as legitimate issues. So in reality this motion is a *Res Judicata* and should be denied because it was already denied in the previous hearing.

In her "Alleged Facts" Ms. Shilton says that Mr. Kempton has not been made a co-defendant or served with process. A copy of the third party complaints was mailed to her on Jan. 23 in the morning in Brigham City and I am fairly certain that she had it in her possession on Jan 25. Her claim was unripe because Kempton was not required to be joined until Jan. 26.

#### In her Argument

1.A. She claims that petitions must be signed by all or at least a majority of the water users of the system. I have never heard of a petition that had to be signed by all of the voters in order to be considered, or even a majority. 73-5-1(4)(a) says "A commissioner may be removed by the state engineer for cause." This does not require a majority vote. All of the users have the right to petition the court, individually or in groups. We can hardly assume that just because Campbell, Kempton and Scofield out vote Sundberg that they have an inalienable right to take his water or any body else's water contrary to state law or contrary to the existing decrees. And yet that is what they are doing.

B. Campbell, Kempton and Scofield have been sent summonses, bur in reality the Court has not set a hearing so it would be hard to notify the users when it will be. Normally the Court notifies people about it's hearings. The State Engineer could provide names and addresses. In the Christensen Decree which governs the distribution of Clear Creek in Utah, paragraph 8 it says;

"That a Commissioner shall be appointed by the court annually on the request of either of the parties hereto, without notice to any other party, to distribute and apportion the waters of Clear Creek among the parties hereto in accordance with their rights as defined by this decree." A copy of this decree is attached to this Memorandum.

II. Vern Kempton is a party in his capacity as Commissioner since this lawsuit was filed to collect money for him. A third party complaint has already been filed against Campbell, Kempton and Scoffield notifying them of the request. Naf Irrigation Co. is now owned by basically these same people and Ward Jensen. I personally have nothing against Ward Jensen and don't believe he has done anything against me. He would not have to be a party to give his opinions. I am sure that he would not want to hire a lawyer. In the Plaintiff's Answer to the Counter Complaint in his 14th Affirmative Defense he reserved the right to join those not immune from suit as additional defendants. If Ms. Shilton thinks Mr. Jensen may be injured she may invite him to join the lawsuit if he wants. I think he would lose more than he could possibly gain. The issue of Conversion may require a general adjudication of water rights, in which case the State engineer would provide names and the Court would issue summonses to all affected parties.

#### THE REST

The rest of the Plaintiff's memorandum is just a rehash of the 13 page memorandum which accompanied the Plaintiff's motion to strike affirmative defenses and dismiss counter complaint with the exception that she is now apparently claiming that Vern Kempton is an employee of the State of Utah which she appeared to deny in the other Memorandum. Actually he has been a sort



of contract worker according to what they have told us in the water meetings, which means most of the laws Ms. Shilton quotes and misquotes do not apply to him.

In the Defendant's Affirmative Defenses and Counter Complaint the circumstances surrounding the alleged fraud are stated with sufficient particularity to conform with URCP Rule 9(b). Malice and knowledge were averred generally but affirmatively in sufficient detail to conform to the rules.

As far as a *prima facie* case for negligence goes, Kempton's misrepresentations have been intentional, deceitful and malicious. No claim of negligent misrepresentation was intended.

The Defendant wrote many pages of complaints to the State Engineer in the year 2000, including requesting that Kempton be replaced and the billing be corrected, none of which were given any consideration. In fact, when the Defendant complained and gave a detailed account of Kempton's dishonesty and showed how much water Kempton and Campbell were diverting on to ground with no water rights in March of 2000, the State Engineer did not answer the letter, but immediately gave Kempton a new water right and doubled the Defendant's assessment.

Ms. Shilton's claim that the December 20, 2000 Notice of Agency Action was the proper time to raise the issue of replacing Kempton is ridiculous. A hearing with the State Engineer would have been another shouting match with Campbell and Kempton doing all of the shouting, just like the other hearings we have had. The fact is, the State Engineer wants Vern to take Idaho's water and I have been hired to try to stop him from taking it and the State Engineer is going to kick me in the face every chance he gets.

### CONCLUSION

On December 27, 2001 the Court ruled that if the Defendant joined Campbell, Kempton, and Scoffield into this lawsuit that the issues of Conversion and Replacing the Water Commissioner will be valid issues. The Defendant has filed third party Complaints against Campbell, Kempton and Scoffield within the time limit set by the Court. The allegations given in the Plaintiff's 12 page Memorandum are basically the same as the allegations made in the 13 page Memorandum which accompanied the Motion to Strike Affirmative Defenses and Dismiss Counter Complaint and the Court should make the same decision; that the issues of Conversion and Replacing the Water Commissioner are valid issues in this lawsuit.

SIGNED this 31st day of January 2002.

  
\_\_\_\_\_  
DAVE SUNDBERG