



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

January 23, 2004

ROSCOE & JOYCE WARD
BOX 208
ALMO ID 83312

Re: Watermaster for Water District No. 43-B

Dear Mr. and Mrs. Ward:

At the request of Tim Luke, I am enclosing a copy of an email message from Tim to House Speaker Bruce Newcomb, dated January 9, 2004, along with a copy of the Default Order issued October 15, 2003 in the Morgan v. Sundberg, et al case before the First Judicial District for Box Elder County, Utah court matter.

Please contact Tim Luke at (208) 327-7864 upon review of these documents.

Sincerely,

A handwritten signature in black ink that reads "Deborah J. Gibson". The signature is written in a cursive style.

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosures

Gibson, Deborah

From: Luke, Tim
Sent: Thursday, January 22, 2004 9:41 AM
To: Gibson, Deborah
Subject: FW: Clear Creek Issues

Debbie,
I've had a request from House Speaker Newcomb's office to send the attached e-mail and judgment involving Dave Sundberg to Joyce and Roscoe Ward. Neither I nor the Speaker's office have an e-mail address and we've had difficulties contacting them by phone. I promised the Speaker's office I would send a hard copy of both this e-mail and the judgment document to the Ward's. I don't believe we've done this already. Could you please make a copy of both and send via regular mail? The Ward's address should be in the list for water district notices for WD 43-B.

Tim

-----Original Message-----

From: Luke, Tim
Sent: Friday, January 09, 2004 10:31 AM
To: 'bnewc@pmt.org'
Cc: 'jludwig@house.state.id.us'; Spackman, Gary; Merritt, Allen; Saxton, Glen; 'deltafarms@pmt.org'
Subject: Clear Creek Issues

Honorable Bruce Newcomb
Dear Mr. Speaker,

I am finally getting back to you regarding the Clear Creek issues that were the subject of our visit at your office this past fall. I apologize for the delay in responding to your inquiries. The delay was due in part to waiting on some information from the State of Utah as well as a hectic December schedule. I believe that I agreed to look into and report to you the status of any lawsuits or Court judgments recently issued against Dave Sundberg in Utah, and provide you with some information or summary about water use on the creek.

Last month I received from the Utah Department of Water Resources and the Utah Attorney General's Office a copy of a court judgment against Dave Sundberg, the Idaho watermaster for the Upper Raft River (Water District 43-B). The judgment was issued on October 15, 2003 by the Box Elder County District Court, First Judicial District, State of Utah (Robert Morgan, Utah State Engineer, Plaintiff vs. Dave Sundberg, Defendant). A scanned copy of this order is attached.

This court case was initiated by the State Engineer (Utah Division of Water Rights) in May of 2001 against Mr. Sundberg for Sundberg's failure to pay water district assessments to the Utah Clear Creek water district (delinquent annual charges of just a few thousand dollars). Sundberg filed answers to the State's complaint that were counterclaims against the State Engineer and certain third party Defendants (other Utah Clear Creek water users). Among other things, Sundberg sought to remove the Utah Clear Creek water commissioner. Various court hearings and proceedings ensued over the next two plus years between Sundberg and the Plaintiff State Engineer as well as the other Utah Clear Creek water users or Defendants in Sundberg's counter complaint. The findings of facts in the case reveal that Sundberg failed to provide expert witnesses or reports, "filed improper motions", provided "untimely and incomplete responses", and "prejudiced the parties and compromised the dates in the discovery schedule."

The Court ruled that Sundberg "intentionally attempted to confuse the issues, increase litigation costs, and waste judicial resources by submitting volumes of procedurally and substantively defective filings and irrelevant materials. Sundberg's intentional and repeated violations give the Court no choice but to issue a sanction against Defendant Sundberg that is sufficient to end his abuse of the judicial system." The Court dismissed Sundberg's complaints against the State and third-party defendants and awarded Judgment in favor of the State and against Sundberg for the amount of delinquent water commissioner assessments plus other fees, court costs and attorney's fees in the amount of \$28,739. The Court also awarded judgment in favor of the third-party defendants and against Sundberg for attorney's fees in the amount of \$6,884. Sundberg was also ordered not to divert any water from Clear Creek until his judgments are paid in full.

In addition to the above case, Sundberg was also summoned to appear in the Box Elder County Justice Court in November of 2002 to answer charges on "Wanton Destruction of Protected Wildlife", a Class B misdemeanor in Utah (23-20-4, U.C.A). Sundberg filed a motion to dismiss this case and entered a plea of not guilty. This matter has been set for trial on January 16, 2004.

Given the above litigation issues with the State of Utah and the significant monetary judgments against Sundberg, I feel it would be best if Sundberg were not elected watermaster and would recommend that IDWR probably not appoint him even

if he were elected again this year. I am concerned that Sundberg may not be able to serve as watermaster even if IDWR appointed him given his legal and potential financial problems. I am further concerned that Utah may not respect any complaints or concerns expressed by Idaho water users or the State of Idaho as long as Mr. Sundberg remains in the Idaho watermaster position. I also believe that the overall situation on Clear Creek cannot possibly improve by letting both Sundberg and the current Utah commissioner remain in their respective positions. The two have never been able to work together in the past and I see no realistic opportunity that this will ever improve especially since one of the Defendants in the above referenced case was the Utah Commissioner himself, Vern Kempton.

This week I've spoken with two of the Idaho Water District advisory committee members (Mike Lewis and Reid Stewart) and expressed IDWR's concerns about Mr. Sundberg's situation. I advised that IDWR may not appoint Sundberg this year and suggested that the committee may wish to find another candidate. Mike agreed to contact other advisory members and discuss this matter with them. I believe there has been some thought given already by the users toward finding an alternative candidate. It appears that the Idaho users may have some trust issues with the Utah Clear Creek commissioner. I share this same concern with the Idaho users and expressed this to the UDWR in some past correspondence. Mike also discussed with me some other concerns about diversions from the Upper Raft River in Utah, an area that is not currently regulated by Utah. I called a counterpart of mine at the UDWR and invited them to come to the Idaho Upper Raft River water district meeting on January 20th in Malta and/or meet separately with the advisory committee prior to the regularly scheduled annual meeting. This will provide an opportunity for users to ask questions directly of UDWR about these issues. IDWR will have one or more representatives at the meeting. UDWR indicated that it will send a representative but requested that Mr. Sundberg not be present.

The UDWR reported to me that they have not yet received the Clear Creek commissioners 2003 water use report. The UDWR also informed me that they removed the data collector at the Utah gage site on Clear Creek last year (2002). There is no other 2003 monitoring data on Clear Creek other than what will be reported by the Utah Clear Creek commissioner. The UDWR advised me that they removed the monitoring equipment because they needed it elsewhere and that the past recorded data validated the measurements and actions by the Utah Clear Creek commissioner. I asked UDWR for a copy of the 2003 Clear Creek report when it becomes available. Our regional office in Twin Falls has received 2003 water diversion information from Mr. Sundberg for the Idaho Clear Creek and Upper Raft River water users.

As I think I mentioned to you during our last visit, neither I nor our regional office received any specific complaints or calls from any Idaho Clear Creek or Raft River users this last year. My last involvement on Clear Creek was in 2001 when I looked into some complaints from Mr. Sundberg about the Utah Commissioner not following the interstate water decree and the protocol established and agreed upon by the Utah and Idaho water agencies. I did find and Utah did acknowledge that the Utah Commissioner was about three days late in turning water down to Idaho in accordance with the decree but that Idaho did receive it's proper allotment of water immediately after the three day delay. It appears Sundberg alleged in his court case that additional water was stolen by the Utah commissioner and Utah users a little bit later that year but I did not review that matter as it was not brought to my attention at the time.

I hope I have provided you with some of the updates that you were requesting. Please advise me if I have not given you the information you were seeking and/or let me know if you need any additional documents. Please call me directly at 327-7864 if I can be of any further assistance.

Regards,

Tim Luke
Idaho Department of Water Resources
1301 N Orchard
Boise, ID 83706
208-327-7864
tluke@idwr.state.id.us



Sundberg Order.pdf