

Robert L. Morgan, State Engineer
1594 West North Temple, Suite 220
Box 146300
Salt Lake City, Utah 84114-6300

Dear Mr. Morgan:

This is a formal Request for Reconsideration of the State Engineer's Memorandum Decision to approve Water Right Applications #11-1151 and #11-1152 which were applied for in 1996. A hearing was held on Nov. 20, 1996. The Hearing was audiotaped and I am including some parts of a transcript of the tape.

On page 5, Mr. Wangsgaard explained that applications #1151 and 1152 are for Bitch Creek and Jim and Rice Canyon high water run off. On page 29, Larry Kempton said for these ponds; "That's not on the Clear Creek side there, these are over on My side". On page 53, Coralee Kempton said in answer to Doug Freestones question that they are not going to divert water for these ponds from Clear Creek.

Applications #11-1151 and 1152 do not request a right to divert water from Clear Creek and the State Engineer has no right to expand the purpose, place or Source of the applications.

As Gary Rose pointed out on page 58, there is not enough potential waste water on any of these streams to be worth anybody's time or money to construct the projects which Kempton is asking for in these applications.

Don Barnett explains very clearly on p. 60-64 that irrigation of additional acreage creates depletion which affects not only the ground water downstream, which Stewart, Arimo, Jones and Holmgren pump out of, but also the ability of water to run in the creek channel and reach Idaho. If Kempton transports water from Clear Creek to Rice Creek and irrigates new ground it will deplete the amount of sub water and therefore the ability to cover ground with water in the upper division (Utah). Kemptons are already being sued for interfering with water reaching Jones' ditches and the State Engineer should not approve rights which will agravate that situation until it is resolved. Paragraph 6 of the Christensen Decree states very clearly that the Defendant's successors in interest (Kempton) are enjoined from setting up any claim to or preventing the water from reaching Joneses.

Pages 81-83 of the transcript is my explation of a videotape which I presented as evidence showing that Vern Kempton illegally diverted water both before and after thers applications were made while the rest of the people on Clear Creek have gone without water. Now the State Engineer is

giving Vern Kempton the right to take Clear Creek into Rice Creek whenever Vern decides there is water available.

If you look at Vern's records for 1994-1997 you will see that he did not turn a usable stream to Me any of those years before the water went to Idaho. Now the State Engineer is giving Kempton the right to take all but a minimum flow during the high water in June. Clear Creek is an unusual case in that the water is all in Utah until it rises to 20cfs in the spring and then Utah gets no water until Idaho has received 560 acre feet. In 1998 that was eleven days. During the high water we have to make up for the 11 days and be wet enough to survive 12 days when the creek all goes to Idaho when it drops down 36cfs according to the Federal Decree. If The State Engineer gives Kempton the right to the flow above the "Adjudicated Rights" and develop new ground outside of the Clear Creek aquifer, all of the other farms on Clear Creek will have to be diminished to accomodate these new rights.

In mid-June, 1998 I received the attached water billing which says very clearly that it is not due until May 1st and that the bill for 1997 had already been paid. With this memorandum decision I received a letter from the State Engineer (also attached) threatening to prosecute me because I have not paid my bill for "at least two years". In talking to Lee Sim we found that no such problem exists. When the State Engineer decides to give water rights to his favorite constituents, he should not include threats and lies as a means of intimidating his victims while he takes their water.

In paragraph 5 of the Memorandum Decision the State Engineer says he has reviewed this application and finds that it is on Birch Creek. If and When Birch runs, it empties into Rice Creek about a mile above the point of diversion described in 11-1152. Neither of these applications request water to be diverted from Clear Creek, so it is apparent that the State Engineer has not reviewed the applications very closely. In paragraph 3 the State Engineer quotes Larry Kempton saying the Clear Creek users want to get rid of water. All of the facts which were presented at the hearing and in post hearing brief were apparently ignored. The State Engineer needs to reconsider not only the applications but also the facts which have been presented to him. If the State Engineer considers the facts, he will find that Kempton's expansion will consume water which has been historically consumed by other people and constitutes a nuisance to the other people.

We are hereby requesting that the State Engineer consider the facts and deny these applications.


DAVID SUNDBERG

BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF APPLICATION
NUMBER 11-1152 (A70221)

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MEMORANDUM DECISION

1 Application Number 11-1152 (A70221), in the name of Larry Kempton, was filed on July 8, 1996, to appropriate 60.0 acre-feet of water from overflow runoff located South 1600 feet and West 2300 feet from the NE Corner of Section 31, T15N, R12W, SLB&M, to be used for the irrigation of 120.00 acres from March 1 to October 31, and the stockwatering of 500 head of cattle or equivalent. The water will be stored in an unnamed reservoir.

2 The application was advertised in The Leader on August 14 and 21, 1996, and was protested by Arimo Corporation, Beth R. Jones, Harold Jones, Karen Jones, Ray Jones, James and Peggy Manriquez, Steve and Diane Scoffield, Reid S. Stewart, Reid S. Stewart, Reid S. Stewart, David Sundberg, and John A. Sundberg. A hearing was held on November 20, 1996, in Brigham City, Utah.

3 The applicants were represented by Marc Wangsgaard, attorney. Mr. Wangsgaard explained that the distribution issues on Clear Creek have little to do with Utah using its 43% of Clear Creek under the interstate decree. He feels the applications can be approved and excess water used without impairing existing rights. Mr. Kempton stated that during high flow periods, users on Clear Creek divert to alleviate flooding.

4 Protestants to the application want the water left on the decreed ground. Everyone agreed that additional water should be split on a percentage basis as it was historically.

5 The State Engineer has reviewed this application and finds that it is on Birch Creek tributary to Rice and Jim Canyon Creek. The State Engineer recognizes that distribution of rights on Clear Creek is an intrastate and interstate issue. Distribution systems are being established in Idaho and Utah and distribution practices refined to make an equitable distribution based on historic decrees and determinations. The State Engineer believes that the applicants and protestants agree that excess flows have always been apportioned to the respective right holders on a percentage split. Water rights need to be in place to cover the diversion and use of water in the state.

6 The applicants have indicated that in addition to the natural drainage of Rice and Jim and Birch Canyons, Clear Creek water is available to fill the proposed reservoir at times. Excess water use from Clear Creek is not defined as to place of use or extent of use. The State Engineer does not believe that return flow patterns would be altered and cause impairment the protestants' rights if conditions of diversion are imposed.

7 It is, therefore, ORDERED and Application to Appropriate Number 11-1152 (A70221) is hereby APPROVED subject to prior rights and the following condition:

8 The applicant may divert water from Clear Creek, Jim Canyon Creed, Rice Creek and Clear Canyon Creek under this right as authorized, but Clear Creek water may only be diverted to the reservoir during times when the Clear Creek commissioner determines that excess water is available, meaning all primary decreed and adjudicated water rights are being filled.

Wangsgard:

So one Filing is for Waste Water from Mr. Scoffield's property and we've told him and for the record we want to say again that his use comes first. If he wants to recycle his water or do anything with it before it leaves his property, that's up to him. But, if he turns it down on the Mr. Campbell, he wants to put it to use. He doesn't want to deal with it and import it away somewhere. OK, the other Waste Water Filing by Mr. Kempton - the Waste Water takes Waste Water from Mr. Campbell's farm. It's the same situation. It's water that's forced on him. He recognizes that the field uphill from him, the owner, Mr. Campbell has the prior rights to use the water however he wants.

The third category is this Birch Creek and Jim and Rice Canyon Run-off Water. That's Application 1151 and 1152. The parties that have Protested this one do not have rights in this source. There are many people that do, but there haven't been any Protestants that have rights in those sources except for Mr. Scoffield and again he's going to withdraw his Protest because we've represented to him that we recognized his rights in Birch Creek as being superior and we will have the latest priority.

That third category, the Birch Creek, Rice and Jim Canyon are basically High Water Run-off. Whatever is available and gets to their land they want to be able to use it and store it in a small Reservoir on their property. The reason it's going to be stored is because if there's water available it will be there for a very short period of time. These sources are except for in a very high and erratic run off period they are fully appropriated.

That's all I had to say so I guess you'd like to shift back to Mr. Campbell. Handle it any way you'd like Mr. Jones.

Engineer:

The question? That's the way the system is operating now is that what you? Other than there aren't existing storage Reservoirs or are there?

Wangsgard:

Why don't we ask the people.

Engineer:

OK, let's just go to Mr. Campbell or - let's have you speak to your Applications?

Mont:

The reason for filing these...

the timing. You know it might be 2 days, it might be 2 weeks, but usually 4 to 6 weeks. Doug and I was talking, usually 4 weeks will just about run it out, depending - here you come along with some rain on the tail end, it may last a few days longer. I've seen it when it was time to - you know - to send it all to Idaho - rain come - change the whole thing - you know - lengthen the thing out. The other thing is the acres is what we're after. The way some of these are set up as far as rotating your crops - you know - we're looking back when this Blue Book come out. We're looking back quite a few years. And I can remember when I was a kid, when you got a good stand of hay out in that country, stayed in there for 10 or 12 years. But that's not the way you need to do it. You need to rotate this thing. And so that's why we need some more acres - uh - to go with this situation. Now - uh - as far as the water coming out of the Creek, I've got 2 Diversions that overflow out of - uh - they're existing Diversions. We're not adding no Diversions or anything like that. With any of this situation, and like I say it's nothing that's new, it's something that's been done. As far as the Reservoirs are concerned, the ponds, I won't call them Reservoirs, as far as the ponds are concerned, there's a couple of things, one thing is - uh - I want you to understand it's not the Run-off that I'm worried about. It's utilizing that water and settling it. These ponds will settle it and they will be designed so you can take sediment out of 'er. That's the way it will be. Now anybody that's been around Clear Creek or any of them creeks that run out there, some times there's high sediment so that needs to be settled out. Now that's not on the Clear Creek side there, these are over on my side. OK. Now as far as the water ~~running down~~ to the next guy there, there's very seldom any water comes down out of there that run on past me - uh - and if you settle this thing down like in the Spring of the year, for instance, say you've got 2 foot of snow out there and all at once it goes to raining. You've got frost in the ground, here'll come water I'll tell you. You can ask Merle Jones, he was flooded out many times. Down there on they situation. These ponds to me would just stop that. They're going to run on through. They're going to go right back to the same place they went. And I've got springs, I've also got springs to put into this situation. I really don't understand why some of them protested the ponds and the Rice and Jim Canyon situation at all - uh - Now Mr. Scoffield, he had a protest, but he's going to pull that protest back as we talked to him about this situation. Gary Rose here is going to represent the Rice and Jim Canyon and he can give you a little more history. Maybe you could - you know - find a little more out about the history and there's always people asking well, how much water you going to have this year. Well I'll tell you what, you don't know how much water you're going to have 'cause you can look up there and they can be all kinds of snow. You get the wrong kind of weather, it'll just start out - freeze a night or two - do that about 3 times, the snow moves back and it turns hot - you might not get so much. So it fluctuates bad - you know - it's really a lot of fluctuation. Now I think that's about all.

Freestone:

No, I'm just referring to the Distribution part of it. I mean - you know - as far as the Distribution it could be the measurement up the Canyon, you know, I'm not saying it is.

Coralee:

Now the State Engineer's Office did put this restriction on these Water Rights that they're talking about that it would merely - the difference between being able to utilize the 43% that belongs to Utah. And that we would agree to the percentages in Utah being the same as your recorded Water Rights you would have no protest?

Freestone:

No, it's just that I don't like that figure up there sticking out in front, that 20 - you know we get these different measurements, and I mean I've got a little better understanding of the pond situation over in Rice. You know I mean as far as what little I know about it I don't think that water possibly should be able to be diverted from Clear Creek and run around the ditch and dumped into Rice Canyon and stored. I don't know if that's the procedure or not.

Coralee:

It is not. But if we picked up waste water off of our property that we have always done and had a ditch leading to the pond, but it would not be Decreed Water. It would be waste water that we would take over there, that's all we've advertized for.

Freestone:

A lot of it is misunderstanding and I mean I just don't like that - that 20 - you know, from the different parties, stuck out there, I mean it's scary.

Engineer:

OK. Doug, anything additional?

Freestone:

No, I think that's pretty much for right now.

Engineer:

OK. Harold Jones?

Harold Jones:

I'm a Stockholder of the Naf Irrigation Co. and have Decreed water in Idaho. The way I look at it, all the water has been Decreed before. I don't think there's any surplus water to be Decreed.

FILING FOR WATER IN THE STATE OF UTAH

Rec. by R
 Fee Rec. _____
 Receipt # _____
 Microfilmed _____
 Roll # _____

APPLICATION TO APPROPRIATE WATER

For the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements to Title 73, Chapter 3 of the Utah Code Annotated (1953, as amended).

WATER RIGHT NUMBER: 11 - 1152

APPLICATION NUMBER: A70221

1. OWNERSHIP INFORMATION:

LAND OWNED? Yes

A. NAME: Larry Kempton
 ADDRESS: HC 72, Malta, ID 83342

B. PRIORITY DATE: July 8, 1996

FILING DATE: July 8, 1996

2. SOURCE INFORMATION:

A. QUANTITY OF WATER: 60.0 acre-feet

B. SOURCE: Overflow

COUNTY: Box Elder

C. POINT OF DIVERSION -- SURFACE:

(1) S 1600 feet W 2300 feet from NE corner, Section 31, T 15N, R 12W, SLBM

D. COMMON DESCRIPTION: Clear Creek

3. STORAGE. Water is diverted for storage into:

(1) Unnamed reservoir, from Jan 1 to Dec 31.

CAPACITY: 60.000 acre-feet. INUNDATING: 15.00 acres.

Area inundated includes all or part of the following legal subdivisions:

BASE TOWN RANG SEC	NORTH-WEST ^{1/4}				NORTH-EAST ^{1/4}				SOUTH-WEST ^{1/4}				SOUTH-EAST ^{1/4}			
	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE
SL 15N 12W 31				***			X	***				***				

4. WATER USE INFORMATION:

IRRIGATION: from Mar 1 to Oct 31. IRRIGATING: 120.0000 acres.

BS TOWN RANG SEC

BS TOWN RANG SEC	NW ^{1/4}	NE	SW	SE	NW ^{1/4}	NE	SW	SE	Section Total
SL 15N 12W 31	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
32	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
Group Total:									0.0000

STOCKWATERING: from Jan 1 to Dec 31. EQUIVALENT LIVESTOCK UNITS: 500.

Appropriate

WRNUM: 11-1152 APPLICATION/CLAIM NO.: A70221 CERT. NO.:

OWNERSHIP*****

NAME: Kempton, Larry OWNER MISC:
ADDR: HC 72
CITY: Malta STATE: ID ZIP: 83342 INTEREST:
LAND OWNED BY APPLICANT? Yes

DATES, ETC.*****

FILING: 07/08/1996 PRIORITY: 07/08/1996 ADV BEGAN: 08/14/1996 ADV ENDED: 08/21/1996 NEWSPAPER: The Leader
PROTST END: 09/10/1996 PROTESTED: [No] APPR/REJ: [/ /] APPR/REJ: / / PROOF DUE: / / EXTENSION: / /
ELEC/PROOF: [] ELEC/PROOF: / / CERT/WUC: / / LAP, ETC: / / PROV LETR: / / RENOVATE: / /

PD Book No. Type of Right: APPL Status: UNAP Source of Info: APPL Map: Date Verified: 07/31/1996 Initials: GF

LOCATION OF WATER RIGHT*****

FLOW: 60.0 acre-feet SOURCE: Overflow
COUNTY: Box Elder COMMON DESCRIPTION: Clear Creek

POINT OF DIVERSION -- SURFACE:
(1) S 1600 ft W 2300 ft from NE cor, Sec 31, T 15N, R 12W, SLBM
Diverting Works: Source:

USES OF WATER RIGHT*****

CLAIMS USED FOR PURPOSE DESCRIBED: 1152
Referenced To: Claims Groups: Type of Reference -- Claims: Purpose: Remarks:
###IRRIGATION *---NORTH WEST QUARTER---NORTH EAST QUARTER---SOUTH WEST QUARTER---SOUTH EAST QUARTER--- Section
Tot Irr. Acrg.: 120.00* NW NE SW SE * NW NE SW SE * NW NE SW SE * NW NE SW SE * Totals
Sec 31 T 15N R 12W SLBM * X: X: X: X* X: X: X: X: X* : : : : * : : : : * : : : : * : : : : *
Sec 32 T 15N R 12W SLBM * X: X: X: X* : : : : * : : : : * : : : : * : : : : *
or a Total of .00 acres. Sole Supply: acres Diversion Limit: PERIOD OF USE: 03/01 TO 10/31
###STOCKWATERING: 500 Cattle or Equivalent Diversion Limit: PERIOD OF USE: 01/01 TO 12/31

Storage from 01/01 to 12/31, inclusive, in Unnamed with a maximum capacity of 60.000 acre-feet, located in:
Height of Dam: NORTH-WEST4 NORTH-EAST4 SOUTH-WEST4 SOUTH-EAST4
Area Inundated: 15.00 NW NE SW SE NW NE SW SE NW NE SW SE NW NE SW SE
Sec 31 T 15N R 12W SLBM * : : : * * : : X: * * : : : * * : : : *

OTHER COMMENTS*****

Natural runoff from Rice Canyon, Jim Canyon, Clear Creek and several springs.

***** END OF DATA *****

FILING FOR WATER IN THE STATE OF UTAH

Rec. by R
 Fee Rec.
 Receipt #
 Microfilmed
 Roll #

APPLICATION TO APPROPRIATE WATER

For the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah, application is hereby made to the State Engineer, based upon the following showing of facts, submitted in accordance with the requirements to Title 73, Chapter 3 of the Utah Code Annotated (1953, as amended).

WATER RIGHT NUMBER: 11 - 1151 APPLICATION NUMBER: A70220

1. OWNERSHIP INFORMATION:

LAND OWNED? Yes

A. NAME: Larry Kempton
 ADDRESS: HC 72, Malta, ID 83342

B. PRIORITY DATE: July 8, 1996

FILING DATE: July 8, 1996

2. SOURCE INFORMATION:

A. QUANTITY OF WATER: 20.0 acre-feet

B. SOURCE: Birch Creek

COUNTY: Box Elder

C. POINT OF DIVERSION -- SURFACE:
 (1) N 1700 feet W 1200 feet from SE corner, Section 6, T 14N, R 12W, SLBM

D. COMMON DESCRIPTION: Clear Creek

3. STORAGE. Water is diverted for storage into:

(1) Unnamed reservoir, from Jan 1 to Dec 31.
 CAPACITY: 20.000 acre-feet. INUNDATING: 5.00 acres. DAM HEIGHT: 10 feet.
 Area inundated includes all or part of the following legal subdivisions:

BASE TOWN RANG SEC	NORTH-WEST¼				NORTH-EAST¼				SOUTH-WEST¼				SOUTH-EAST¼			
	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE	NW	NE	SW	SE
SL 14N 12W 6						X	

4. WATER USE INFORMATION:

Water Rights Appurtenant: 11 - 1151, 478, 479, 471, 475, 476

IRRIGATION: from Mar 1 to Oct 31. IRRIGATING: 80.0000 acres.

BS TOWN RANG SEC	NW¼	NE	SW	SE	NW¼	NE	SW	SE	NW¼	NE	SW	SE	NW¼	NE	SW	SE	Section Total
SL 14N 12W 6		X		0.0000				0.0000				0.0000				X	0.0000
	SW¼ NW: 0.0000 NE: 0.0000 SW: 0.0000 SE: 0.0000 SE¼ NW: X NE: 0.0000 SW: X SE: 0.0000																
	Group Total: 0.0000																

STOCKWATERING: from Jan 1 to Dec 31. EQUIVALENT LIVESTOCK UNITS: 500.

WRNUM: 11-1151 APPLICATION/CLAIM NO.: A70220 CERT. NO.:

OWNERSHIP*****

NAME: Kempton, Larry OWNER MISC:
ADDR: HC 72
CITY: Malta STATE: ID ZIP: 83342 INTEREST:

LAND OWNED BY APPLICANT? Yes

DATES, ETC.*****

FILING: 07/08/1996 PRIORITY: 07/08/1996 ADV BEGAN: 08/14/1996 ADV ENDED: 08/21/1996 NEWSPAPER: The Leader
PROTST END: 09/10/1996 PROTESTED: [No] APPR/REJ: [] APPR/REJ: / / PROOF DUE: / / EXTENSION: / /
ELEC/PROOF: [] ELEC/PROOF: / / CERT/WJC: / / LAP, ETC: / / PROV LETR: / / RENOVATE: / /

PD Book No. Type of Right: APPL Status: UNAP Source of Info: APPL Map: Date Verified: 07/31/1996 Initials: GF

LOCATION OF WATER RIGHT*****

FLOW: 20.0 acre-feet SOURCE: Birch Creek
COUNTY: Box Elder COMMON DESCRIPTION: Clear Creek

POINT OF DIVERSION -- SURFACE:
(1) N 1700 ft W 1200 ft from SE cor, Sec 6, T 14N, R 12W, SLBM
Diverting Works: Source:

USES OF WATER RIGHT*****

Table with columns: CLAIMS USED FOR PURPOSE DESCRIBED, Referred To, Claims Groups, Type of Reference -- Claims, Purpose, Remarks. Includes rows for IRRIGATION and STOCKWATERING with acreage and diversion limits.

Storage from 01/01 to 12/31, inclusive, in Unnamed with a maximum capacity of 20.000 acre-feet, located in:
Height of Dam: 10 NORTH-WEST4 NORTH-EAST4 SOUTH-WEST4 SOUTH-EAST4
Area Inundated: 5.00 NW NE SW SE NW NE SW SE NW NE SW SE NW NE SW SE
Sec 6 T 14N R 12W SLBM * : : : * * : : : * * : : : * * : X: : *

***** END OF DATA *****

we feel like we've followed these same practices too. That's the point I'm trying to make, is that we have done this for umteen number of years and didn't know that we was legally not protected under this system, and that is why we have tried to correct it and become legal and to resolve having any more trouble over this or for us to end up in a Federal Court system or trying to fight the State of Utah for our Decreed water or anything like that. We're just trying to maintain our practices, make it legal and put the water to the best use that we can.

Gary:

I have a comment. If this water - waste water let's call it waste water. OK? Were not - first of all by the very definition of it, as we bought that over there it said we own half of the Creek. OK? That's what it says on the Deed. Now, if the State of Utah, particularly your agency, were to come in there and say, "This is all the acres you're going to irrigate." Whatever it was in the Blue Book - there isn't a soul down below there that could afford to put in an irrigation system even if you were to appropriate that water to someone else other than those Rights that have historically used it. There's not an outfit out there that could historically afford to put in a Distribution System to collect that water, that waste water, whether it be on the Clear Creek side or on the Rice and Jim Canyon Irrigation Co. side. They couldn't afford it for the short period of time that water runs, I mean, let's be real about this thing. I mean it might run for 30 days and it may run for 40 days and it may run for not any days that year. And if you're going to go in and re-appropriate, so to speak, that historical use of that water, then you're going to have to appropriate it to someone else. That someone else is not going to have the money to use that water beneficially. Because he can't afford the system, the distribution system for the period of time that you're talking about. Am I right Harold Jones?

Harold:

Ya.

Gary:

That's what we're talking about, we're talking about taking something off of historical use, whether it's in the Blue Book or not. And I refer to the fact of my original statement. They said that wasn't the Bible and it could be changed and that we could be added to and as better use, better irrigation practices were perfected, that more land could be brought in under that Decree, that it could be enlarged. So what I'm saying, my point is, that irregardless of where you take this thing, those individuals that you may say, well we'll File on it. What in hell they going to do with it? They can't afford to come up there and build a pipeline off my land, through Larry's land, down somewhere else because it wouldn't pay. It just wouldn't pay. It would be very idiotic for you people to get into that kind of a situation, see what I'm saying? If we were talking about a river

Wangsgard:
You missed one Application there.

Scoffield:
What was it?

Wangsgard:
Jim and Rice Canyon - is that the same as Birch Creek? No, they were different? Just to make it simple, Steve has withdrawn all of his Protests.

Scoffield:
That's correct.

Engineer:
OK. Reid Stewart.

Reid Stewart:
Don represents me.

Barnett:
As I stated before, my name is Don Barnett. I'm an Engineer and I've been assisting Reid Stewart with his Water Rights for a number of years. Just to make it clear so it's not a Utah - Idaho issue Mr. Stewart's a Utah resident, he just happens to own a farm in Idaho. He has some significant and important concerns. I've heard most recently, and in this hearing, that there's lots of issues and lots of concerns in Clear Creek. Mr. Stewart has not been a party to those issues, has never been a party of a Lawsuit on Clear Creek or any thing else except that most recently he has not received his water and therefore there has been great concern on his behalf, and then these new Applications has brought the issue to the focus with Mr. Stewart and so...Let me indicate that his concerns fall in maybe 4 general areas and let me run through those 4 areas.

First of all, it's Mr. Stewart's position that there is no un-appropriated water in Clear Creek. Any usable reasonable water has been appropriated in Clear Creek. Clearly the State Engineer has taken the policy that once a stream is being used to it's reasonable extent, you don't continue to approve filings over and above that amount. And if it can't be shown that there is un-appropriated water the Application can't be approved. In fact it should be specifically rejected. A couple of things to state to indicate that Clear Creek has been fully Appropriated. First of all as you go though in particular the documentation that was accumulated as part of the Johnson Decree, the Federal Decree in 1937, a number of times the statement is made that Clear Creek has not made it to Raft River since

the 1880's is one of the dates they throw out and even before. The Raft River is just maybe a mile from Mr. Stewart's property and in fact a portion of his ground is irrigated out of Raft River. So, if there was excess water in Clear Creek, that would be flowing across his ground and into Raft River, and it has not done so. It has not done so for a hundred years. So that's one indicator that there isn't any un-appropriated water. Additionally, In the Decree there is an opinion rendered by the Judge. Let me read it, in part. What he said was: "It is undoubtably true that at the present time the demand upon the flow of Clear Creek exceeds the capacity of the stream normally to supply. This condition of over demand, together with the meager supply resulting from the dry seasons preceeding the present year, and beginning in 1926, has brought the situation to a head in this Lawsuit." Meaning the Federal Lawsuit. Then he goes through and he talks about the numerous other Lawsuits to try and deliver and divide up this water supply that is far over appropriated. And I think the State Engineer ought to take the position that it's over appropriated. Therefore, there's no ability to approve more applications to appropriate. One of the things that's been a little confusing and concerns me is that the Federal Decree spells out a very detailed way of dividing up the water. We keep talking about the period when 43% goes to the upper division and 57% does to the lower division, but there are other times and the other periods most critical to the Idaho users are two periods when they receive the entire flow. If there are 20 Second Feet or these types of water available, then that water at those times ought to be going 100% to the Idaho users. So it's not available for appropriation. Then lastly I'd like to, along this point of no un-appropriated water available, have you look to and go through in detail the information that's found in the Documents that were accumulated for the Federal Decree. In that Document, for example, let me just give you as I understand it, not an Attorney's interpretation, but, in the Federal Decree the Judge got involved, looked at the issues, found how limited the water supply was, saw how testy the issue was, and then by order of the Court assigned the State Engineer in Utah and the State Engineer in Idaho to get together to hire an Assistant Engineer to go out and distribute water. He did it for a year, came back, gave a report to the court, they decided to do it another year, same thing happened. They ultimately did it for 4 years, 4 consecutive years. In those 4 years the State Engineers of both States were very knowledgeable on the issues associated with Clear Creek. They knew how much water was there, they ran a number of ...?... studies, they measured acreage, they measured flows, they put in structures, I mean, this was a major, monumental effort that is preserved, that occurred in the 1930's. I think it's important to know that it wasn't just a, you know, I'm hearing different voices. I'm hearing that there is lots of water and it keeps coming down and then I'm , some here say, "Hey, this is just a tiny bit of water." And the old information that I read from the State Engineer's report is that there's just a tiny bit of water and we're trying to spread it as best we can and as effectively as we can in the short period of time. And so, to go out and approve new Applications to appropriate would be contrary to what the State Engineer of both States have already found. And for example, you know specifically, as Mr. Wangsgard indicated in

the Decree, the actual Decree Document, it does not delineate the number of CFS that is divided between the users. But in the information that is tabulated by the State Engineers it's found that 16 1/4 Second Feet in the upper division has been referred to that came into the Blue Book. So I have a hard time believing that all of a sudden, oops, a mistake's been made, the Engineer made a mistake, didn't realize what's going on and left stuff out of the Blue Book, when they've been out tabulating, surveying and making records. The first point is there is no un-appropriated water in Clear Creek and the State Engineer should not approve any new Applications.

The second point is that an application to appropriate should be denied is that it will interfere with Prior Rights. These are significant new appropriations, measured in one of two ways. Either they are significant as to the flow rate, and/or if those flow rates are cut back, they are significant as to the amount of acreage, over and above that which is currently legally allowed within the Water Rights of the State Engineer of the State of Utah and within the Decrees in the State of Utah, and so, however you looked at it, it's significant new appropriations of a very limited resource. One of the things extremely important about the work done by the State Engineers in the past is the study of the relationship between the surface waters and ground waters. They identified that the sub waters and underflows of the stream was extremely critical to the distribution. In fact, one portion of the Decree makes it so that the time when you cut off flows to the lower division is different on the rising portion when you're sending water down, versus after the flow has dropped off. The Decree provides that early in the year when flows are low that the upper division users get all of the water until it reaches 20 Second Feet. The reason is that after many, many experiments they found that until you got the sub water up it wasn't a beneficial use to send it on down to the lower division users. They lost so much that they used such a small percentage of it that it wasn't viable to send it down. But conversely, they found that when the stream was receding, after the water has gone down, brought up the sub, that you could still make good and beneficial use in the lower division at a flow rate of 17 Second Feet. Therefore, there is that compliment of 3 feet of additional water that can be spread that much further by bringing the sub up, increasing the amount of ground water in the area. Now, if there are new applications to appropriate, even if the flow rates are not increased, if the depletion in the State of Utah increases, then the amount of sub water, the underground water that's available to make the distribution occur the way the Federal Judge intended it, and the two State Engineers agreed, will be reduced and the ability to carry forth that Decree will be decreased. Now I've been on Mr. Stewart's property where Clear Creek comes in to his property, and where he has a sump. And then he drops a pump in and irrigates his property. When I have been there, there have been no waters from Clear Creek and yet this sub water, this underflow that's coming in the channel, even though there's not a surface manifestation of it, are live and active in the sump. And so it is very clear that there is a key relationship between these Rights. So, if we were just to say, "We're going to hold you within your diversion rates but we're

going to allow you to increase your depletion," then there would be an impact to Mr. Stewart. Raft River Valley which it empties into is a critical ground water area in the State of Idaho. It has been declared such for more than 30 years and the ground waters in this area are most important. Mr. Stewart diverts from this ground water. So again, any up-stream depletion is important and has a negative impact on Mr. Stewart.

I have some concerns when we talk about picking up waste water, a couple of concerns. First of all, I'm wondering why the water's wasting? I know that irrigation practices can't be perfect...but I'm concerned that if there is a desire to pick up waste water, and waste water becomes a source, one becomes dependant upon that source, that the temptation, to increase or change historic irrigation pattern such that waste water is more often available, will increase. Again, it is contrary to the policy of the State Engineer. Just because one becomes more efficient or better able to capture water, he can't spread it on more ground. Enlargement has never been a principle that we've allowed. So, if the State Engineer found that whatever the number of acres that were under the Decree were being irrigated in the thirties, and now we're saying that with the same water and/or by picking it up or re-diverting it or by stopping it from going into the ground water we can irrigate more acres, that's contrary to the State Engineer's policy. One of the things that is important, and again I haven't found information on the studies and how it goes, so there are people in the room that know better than I do, about the actual - how far water will make it down the various streams, etc. But specifically, in one of the Decrees that talks about the Gunnell Water Right which Mr. Stewart has inherited, the 4 Gunnell Rights, says, in part, that his water, that he developed from Clear Creek, or his Water Right that specifies Clear Creek, doesn't necessarily have to come overland from Clear Creek. That up-stream irrigators can take the water if other sources that are tributary to Clear Creek make up the water. That's a very common principle that we employ through-out the State. But, this is what it says: "That whatever amounts of water are received from Round Mountain and Black Pine Creek by said company shall be considered part of the water distributed by said Decree. (By this Decree) Said Round Mountain Creek and Said Black Pine Creek being deemed, considered and found to be tributaries of said Clear Creek." Again, I haven't been out there to study the measurements, but those people who were involved in these early Decrees, recognized that a ...?... of Mr. Stewart's Water Rights come in from other sources. Certainly we would not tell somebody that just because there are no senior appropriators on a given tributary that we can grant a new application to appropriate the tributary of the stream. We believe that approval of these Applications will be contrary to the Federal Decree. They spent, as I indicated, 4 years. They studied it in great detail, certainly they were not finding at the time excess water. They were not finding that any more water could be approved. That's the whole basis of the dispute. That's why it elevated to the Federal Court. If we're finding at this time, for some reason, that there's un-appropriated water, it would certainly be contrary to what they found in a very detailed study, conducted by them for 4 years. I believe it would be contrary to the Federal Decree.

I think it's important, in paragraph 6 of the actual Decree, it indicates that "Each of the parties hereto his or its agents servants employees and successors in interest be and hereby is perpetually enjoined and restrained from interfering with the Rights of any other parties hereto in and to the use of the waters of Clear Creek as herein Decreed or from interfering with the orderly administration of the stream under the provisions of the Decree." My belief is the Federal Decree is still in force and that if there were to be new applications to appropriate that it would be contrary to the provisions of the Federal Decree. One other thing that is important is that as you look at the detail in the information gathered by the State Engineer and by their Hydraulic Engineer that they put in the field, looking at acreage and the irrigation and that the actual division and percentages, the 43% and 57% were based upon the State Engineers making a number of analyses regarding the amount of irrigated acreage. In each State. So, if all of a sudden the irrigated acreage is to be increased, that would be quite contrary to the way they distributed water, the way they divided it up. Of course, obviously, one would think: Well, if there was all that much more water - ground - in the State of Utah, they should have decreed them more than 43%. It should have been a higher number, but obviously those people knew what was going on at the time they were making the investigations.

4th point is a kind of sensitive point. As I indicated, Mr. Stewart has not been a party to a number of issues associated with the distribution. The distribution is something for a different day and a different forum. I have most recently had conversations with Idaho Officials regarding the issue. It's an extremely sensitive issue. My concern is not to solve the distribution issue today. But to indicate that an approval in the State of Utah of new applications to appropriate would certainly increase the amount of concern and conflict between the States. Certainly that's not keeping with State comity with the Federal Decree that already distributes the meager water supply. Without distribution issues solved I don't think the state Engineer should even consider these applications to appropriate. And if these Applications are approved, my belief is it would increase the temptation to maximize the historic use of the water. I think that we've heard reference to extra water being used to irrigate the fringe area, and now the desire to legalize irrigation of the fringe area, but we're finding that the fringe area may be double or triple the Decreed acreage. Certainly, if one has a legal water right for greater diversion without distribution solved, the temptation... For these reasons we should not chance these Applications to be approved.

Coralee Kempton:

I have a few questions for Mr. Stewart and Mr. Barnett. I would like to know when Idaho issued for everyone to re-adjudicate their water. Do you know the year?

the dates of priority in this decree specified, except that as to one-fourth (1/4) of the proportionate share of the waters of the said stream which was awarded to the plaintiff, Naf Irrigation Company during the period of time when it takes a specified proportionate amount of the entire stream, and as to 2.66 cubic feet per second thereof during the time when a specified number of cubic feet per second of water is awarded to the said Naf Irrigation Company, the title of the said plaintiff is not quieted, but the defendants, and each of them is hereby enjoined and restrained, and they and their employees, servants, agents and successors in interest are enjoined and restrained from in any manner or wise setting up any claim to the said waters, and from in any manner or wise preventing the flow of the same to and from the ditches and diverting works of the said plaintiff and its stockholders, to and upon the lands of its stockholders situated in Idaho, and hereinbefore in this decree described.

7. Each of the parties hereto is required to construct and maintain, at his or its point or points of diversion, at his or its own proper cost and expense, a good and sufficient measuring weir and headgates to enable one charged with the distribution of the waters hereby awarded among the said parties, to measure and to distribute to each the amounts and quantities and proportions of water awarded to him or it respectively, by the terms and provisions of this decree.

8. That a commissioner shall be appointed by the Court annually on the request of either of the parties hereto, without notice to any other part, to distribute and apportion the waters of Clear Creek among the parties hereto in accordance with their rights as defined by this decree, said commissioner to qualify by taking oath of office, and by filing a good and sufficient bond in such a sum as the Court making the appointment may direct, and the costs and expenses of such commissioners shall be borne and paid by the parties hereto in proportion to their respective interest in the waters so distributed.

It is further Ordered, Adjudged and Decreed that each of the parties to this action shall pay his or her, or its own witnesses and the plaintiff herein recover costs and attorneys fees.

Sundberg:

Uh-huh, the back page shows the Idaho Water Rights and the rest of it shows how he distributed the water. OK. If you add up all the acres which Guy recognized as having water Decreed to them, you're going to find that there's more than 4000 acres of ground which has been historically irrigated in the last 33 years on Clear Creek. OK? Now, as I understand it, it is understood that there will be 3 Acre Feet per acre. Is the maximum diversion, or what ever you call it. OK. Clear Creek, if you look at the flow charts and what-not you'll find that Clear Creek in it's history only one year furnished 3 Acre Feet per acre for 4000 acres. We've heard a lot about magnificent torrents flowing all over the place, but the history books say it's not there. I mean there is not 3 Acre Feet per acre for the ground which has been irrigated in the last 33 years. So I would say there is not water available to be appropriated. If it has not been done for 33 years, I'd say it's not there. OK, now, I have a copy of Vern Kempton's records. On the first page, incidentally he submitted this to the Court in Twin Falls, is where I got it from. He shows in 1995, and I believe it has been mentioned several times, this was the biggest water year that we've ever seen on Clear Creek, now he shows 5561.24 hr. Second Feet, which translates to something like 11,000 Acre Feet, which is not 3 Acre Feet for 4,000 acres. So the biggest water year we have ever had on record did not show any sign of surplus water.

(Talking by others)

Sundberg:

I'm trying to think here.

Engineer:

Do you want a question or do you want to keep going?

Sundberg:

I've got several other things. OK. I've also heard mention that this is waste water and what not. I don't know, is it proper to give a Video tape to you? As evidence?

Engineer:

We can accept that if you'd like.

Sundberg:

Basically, I'd like to say what is on the tape, I made this last night and I don't have a copy for you. I'm sorry about that. You can get one from these guys. Basically, what is on the tape is: On May 28, 1995, Mont Campbell and Vern Kempton told Ray Jones, Harold Jones and I that they only irrigate the ground in question with waste water and not measured water. Now, this vidotape will show that they were

diverting water directly from Headgates and running it on the new ground. That's the first thing on the tape. OK? And that was on June 25th, and then again on July 4th it shows water which was being diverted into the Rice Creek drainage out of Clear Creek at a time when, strangely enough, Ray Jones was not receiveing any water. Now Ray Jones owns 50% of Naf Irrigation Company, Larry Kempton owns 10% in July. Yet they were running 20 Second Feet into Rice Creek while Ray was not receiveing any Naf Irrigation Co. Water. That's kind of strange. That's the reason it got videotaped, because it looked strange.

Wangsgard:

Are you saying Rice Creek or Clear Creek?

Sundberg:

Running Clear Creek water into Rice Creek.

Coralee:

How did you do that Dave? How did you get that water over there?

Sundberg:

As far as you can see anyway.

Coralee:

How did we get it to Rice Creek?

Sundberg:

It looked like probably a ditch.

Coralee:

Did it run right into Rice Creek? Where at is Rice Creek at? Surely in July all of Rice Creeks water was in the pipeline. Did you follow the stream? Did you go across the property and follow the stream?

Sundberg:

Jeff Sessions said he was getting water in Rice Creek and it was Clear Creek water.

Coralee:

Did you follow the stream?

Sundberg:
No.

Coralee:
How did you measure 20 Second Feet?

Sundberg:
I looked at it.

Coralee:
OK.

Sundberg:
On July 30, 1995, it has been mentioned that the gauging station, the device has been removed and we put in a board with a ten foot Wier notched out of it, is all it was. On July 30, 1995 that board measured 12 Second Feet. And yet the water had not gone to Idaho yet. It was supposed to go to Idaho when it got down to $17\frac{1}{8}$. And then also on that same day it shows that Kempton's were irrigating the ground which has no water Decreed to it. If you look at Vern's records you'll find that none of the rest of us had received any water for 10 days at that time. None of us got any water for a few more days either, then it went to Idaho so we didn't get any water for a few more days, and in fact according to Vern's records, Ray Jones went 36 days without water, Ward Jensen went 51 days without water, I went 35 days without water, and Scoffield went 35 days without water. Some of us object to that.

ERROR
SHOULD
BE 36

Coralee:
What year was this Dave? What year? What year?

Sundberg:
Last year, 1995.

Coralee:
1995? OK.

Wangsgard:
This is all distribution matters, we're not talking about...we're only talking about flood stage flows...you understand that? We're not asking to have the regular flows during the other part of the year changed at all. And we're not asking to dip into the water that's needed to cover the 4,000 acres or the 12,000 acre feet that isn't there. It's just flood stage that we're talking about.

*****ANNUAL WATER ASSESSMENT NOTICE*****

STATE OF UTAH -- DIVISION OF WATER RIGHTS
 1594 WEST NORTH TEMPLE P.O. Box 146300 SALT LAKE CITY, UTAH 84114-6300

CLEAR CREEK (LOGAN) DISTRIBUTION SYSTEM:

TOTAL SYSTEM ASSESSMENT UNITS = 100 ACRE-FEET

DAVE SUNDBERG
 HC 72
 MALTA ID 83342

ACCOUNT NUMBER	ASSESSMENT UNITS	1998 ASSESSMENT	1998 DELINQUENT PENALTY	PRIOR UNPAID ASSESSMENT	PRIOR DELINQUENT PENALTIES	PAYMENTS MADE IN 1998
12-4	345	\$333.00	0.00	371.68	37.17	408.85
Totals:		\$333.00	0.00	371.68	37.17	408.85

TOTAL AMOUNT DUE = \$333.00

By law, payment is due by May 1st. If not paid by June 1st, a 10% DELINQUENT PENALTY will be added to your TOTAL AMOUNT DUE.
 Make payable to STATE ENGINEER, and RETURN THE BOTTOM PORTION with your remittance.

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State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

Michael O. Leavitt
Governor
Ted Stewart
Executive Director
Robert L. Morgan
State Engineer

1594 West North Temple, Suite 220
Box 146300
Salt Lake City, Utah 84114-6300
801-538-7240
801-538-7467 (Fax)

October 26, 1998

DAVE SUNDBERG
HC 72
MALTA ID 83342

Dear Mr. Sundberg:

Re: Clear Creek Distribution System
Account: #12-4

Our records indicate the distribution assessments associated with your water right on the above distribution system have not been paid for at least two years. **YOUR ACCOUNT #12-4 IS CURRENTLY DELINQUENT IN THE AMOUNT OF \$333.00** which includes current and previous years' assessments and delinquent penalties.

The water user assessments are used to pay the salary of the water commissioner and the actual operating expenses of the distribution system as required by law (Sec. 73-5-1 of the Utah Code Annotated, 1953 as amended). The budget for these items is set at the annual distribution system meeting.

The existence of the distribution system and the presence of a water commissioner assure the orderly distribution of water according to the established priority schedules. The payment of your distribution assessment is important to the continued operation of the distribution system.

The law states that upon failure to pay the assessment the State Engineer may forbid the use of water. To avoid the need for the action, **YOU ARE HEREBY REQUESTED TO PAY THE TOTAL AMOUNT DUE WITHIN 14 DAYS.** If payment is not received within that period, this matter will be turned over to the Attorney General's office for collection. If legal action is necessary, you will be required to pay legal costs for prosecution and collection of the unpaid assessment. We hope these steps will not be necessary.

If you have any questions, please contact me at (801) 538-7380 or John Larsen at (801) 538-7431.

Sincerely,

Lee H. Sim, P.E.

Assistant State Engineer
for Adjudication and Distribution

LHS:kcp

cc: Bob Fotheringham
Vern Kempton