



State of Idaho

DEPARTMENT OF WATER RESOURCES

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CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

MEMORANDUM

TO: Dave Tuthill ^{Dro} and Rob Whitney ^{RW}

FROM: John Homan ^{JH}

DATE: April 25, 1994

RE: Water Delivery Instructions for Little Canyon Creek

**THIS MEMORANDUM REPLACES THE PREVIOUS DRAFT MEMORANDUM
DATED APRIL 11, 1994.**

On April 7, 1994, I accompanied Roxanne McCarthy and Rob Whitney on a visit to Sand Springs Gulch to meet with Watermaster Dan Hall and walk the gulch. Sand Springs Gulch is tributary to Little Canyon Creek and waters from the gulch have historically been delivered by the watermaster of Water District 61-D. The watermaster expressed concern that the most recent court decision was being interpreted to require the delivery of water differently than the historical method. The watermaster requested that the Department provide him with instructions to deliver the water in light of the recent court decisions.

After finishing our business with the watermaster at the site, we drove to the courthouse in Mountain Home to search the court files for any additional decisions that addressed water delivery on Sand Springs Gulch. We discovered that the court had appointed Carlyle Briggs, P.E. as Special Master in an attempt to resolve the water delivery problems. Mr. Briggs filed a preliminary report with the court on August 14, 1991 and filed the final report on November 19, 1991. Briggs' report concluded it was not practical to mix and deliver Batruel's reservoir water with Viner's rising and flowing waters in the gulch. Briggs suggested in his final report that a better solution to the problem is to have Batruel construct 400 feet of new ditch to avoid the commingling of reservoir water with Viner's waters. The court issued a supplemental decision and order dated September 14, 1992 confirming and approving in all respects the report prepared by Briggs.

I am not sure what effect the court confirming Briggs' report has on the water delivery issue. Evidently, according to the watermaster, Viner believes the court order entitles her to split all the water that rises and flows in the first reach of the gulch with Batruel. The watermaster has not historically delivered the water in this manner and is concerned that this latest court decision changes the delivery as Viner suggests. Historically, under the 1904 decree Batruel received 100% of the waters rising and flowing in the first reach of the gulch (between the reservoir and the pond diversion) and 50% of the waters rising and flowing in the second reach of the gulch (between the pond diversion and the 50/50 diversion. Briggs' suggestion that Batruel construct a new separate ditch as a solution to avoid mixing his reservoir water with Viner's water ignores the obvious fact that Batruel would also lose all his rising and flowing waters he has historically used in the gulch.

It is difficult for me to believe that the court intended in its order to have Batruels forego their traditional water conveyance route, bear the costs of constructing 400 feet of new ditch and just walk away from all the rising and flowing waters that surface in the gulch. The court's supplemental decision and order only confirms the Briggs' report, it does not order Batruel to take any action or specifically order that the water be delivered in a described manner.

The Second Amended Findings of Fact, Conclusion of Law and Judgment dated July 13, 1987 as later clarified by the Memorandum Decision dated March 21, 1989 determined that some of the water had historically flowed from the first reach of the gulch into the second reach of the gulch. Although the 1904 decree originally awarded all of the water in the first reach of the gulch to Batruel's predecessors, the later court decisions appear to have interpreted the original decree to give Viner the right to water in an amount equal to the amount that has historically flowed past the pond diversion. To assure that Viner receive this amount of water, the court ordered Batruel to either:

(a) Make a reasonable good faith attempt to modify his pond diversion so that approximately the same amount of water is allowed to pass on down the gulch at the point as passed prior to 1984; or

(b) Weir his live reservoir water in and out of Sand Springs Gulch so that he do not divert any of the water that rises and flows in Sands Springs Gulch into his pond.

The watermaster indicated that Batruel had replaced the overflow pipe in the pond diversion presumably to allow water to pass on down the gulch and comply with the 1989 court order. Evidently Viner was not satisfied with Batruel's efforts to comply with the court order and has installed a new headgate at the pond diversion as an alternative. The latest report from the watermaster indicates that Batruel has buried the new headgate

under a large amount of dirt. Except for Batruel's existing headgate, the dirt completely blocks off all water in the gulch from flowing down the gulch past the pond diversion. The watermaster needs to take steps to insure that the headgate at the pond diversion is in working order and can be locked to prevent tampering. The Elmore County Sheriff's Department has informed the Western Region that it intends to explore criminal charges against Batruel for burying Viner's headgate. Batruel has indicated that he is no longer interested in working with attorneys and is ready to go to jail or do whatever to get his water.

Pending further interpretation by the court, the watermaster should deliver the water according to the following instructions assuming the facts remain as described.

A. Viner is presently receiving the entire flow of water in the second reach of the gulch as Batruel has not made a call to the watermaster for water at the 50/50 diversion. As long as Batruel does not make a call to the watermaster for water at the 50/50 diversion, the watermaster need not take any action. The watermaster's inaction will allow Viner to continue to take all the water originating in the second reach of the gulch. In the event Batruel does make a call for water at the 50/50 diversion, the watermaster should deliver 50% of the flow to Batruel but allow an equal amount of water to pass through the headgate at the pond diversion.

B. If Viner attempts to make a call for water at the pond diversion based upon her interpretation of the later court decisions, the watermaster should inform Viner that he, the watermaster, cannot deliver the water unless he is provided with some guidance as to how much water needs to be delivered. Presently the 1904 decree provides that only Batruel is to receive water at the pond diversion. The later court decisions suggest that a certain quantity of water is to be passed from the first reach of the gulch into the second reach at the pond diversion to be split equally between Viner and Batruel. Without a specific quantity of water designated by the court to pass at the pond diversion, the watermaster is unable to effectuate delivery.

If the parties on the creek are still in disagreement on how the water should be delivered either party can file a motion for clarification with the court asking for further interpretation of the court's previous order. To the extent the confusion centers around " excess" water spilling past the pond diversion into the second reach of the gulch or quantifying a specific amount of water passing through a new headgate from the first reach of the gulch into the second reach, the court may need to provide additional direction to the parties. I am not sure whether the court has looked at this issue.

Attachments

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Attachments