



PUBLIC NOTICE
Special Meeting of the:
Honey Lake Valley Resource Conservation District

Date: Monday, Oct. 8, 2018
Location: USDA Service Center
170 Russell Avenue, Suite C
Susanville, Ca. 96130
(530) 257-7271 x100
Time: 10:00 am

AGENDA

NOTE: THE HONEY LAKE VALLEY RESOURCE CONSERVATION DISTRICT MAY ADVISE ACTION ON ANY OF THE AGENDA ITEMS SHOWN BELOW.

NOTE: IF YOU NEED A DISABILITY-RELATED MODIFICATION OR ACCOMMODATION, INCLUDING AUXILIARY AIDS OR SERVICES, TO PARTICIPATE IN THIS MEETING, PLEASE CONTACT THE DISTRICT OFFICE AT THE TELEPHONE NUMBER AND ADDRESS LISTED ABOVE PRIOR TO THE MEETING.

I. CALL TO ORDER, PLEDGE OF ALLEGIANCE, ROLL CALL

II. APPROVAL OF AGENDA

III. PUBLIC COMMENT

Per RCD Board Policy No. 5030.4.1, during this portion of the meeting any member of the public is permitted to make a brief statement, express his/her viewpoint, or ask a question regarding matters related to the District. Five (5) minutes may be allotted to each speaker and a maximum of twenty (20) minutes to each subject matter.

IV. ITEMS FOR BOARD ACTION AND/OR DISCUSSION – RCD

A. MOTION TO OPEN PUBLIC HEARING ON JAY DOW COMPLAINT APPEAL FILED 7/31/18
(Attachments) – Otto/Sims

B. MOTION TO CLOSE PUBLIC HEARING ON JAY DOW COMPLAINT APPEAL FILED 7/31/18 –
Otto/Sims

C. CONSIDERATION AND APPROVAL TO UPHOLD, MODIFY, OR REVERSE WATERMASTER’S
DECISION

V. ADJOURNMENT

The next Honey Lake Valley RCD meeting will be **Oct. 30, 2018 at 5:30 pm.** The location is the USDA Service Center, 170 Russell Avenue, Suite C, Susanville, CA.

I certify that on Thursday, Oct. 4, 2018, agendas were posted as required by Government Code Section 54956 and any other applicable law.



Mitch Otto
Susan River Watermaster
Honey Lake Valley RCD

Public hearing agenda oct 2018

Jay Dow Items:

July 31, 2018

Bradley J. Herrema
Attorney at Law
805.882.1493 tel
805.965.4333 fax
bherrema@bhfs.com

Honey Lake Valley Resource Conservation District, Susan River Watermaster
Watermaster Board
170 Russell Ave.
Susanville, CA 96130

RE: Notice of Appeal in re Jay Dow June 6, 2018 Complaint

To the Susan River Watermaster:

This letter is sent on behalf of our client Jay Dow and the Dow-Bonomini Family 2013 Trust ("Dow"). Pursuant to Rule 6.3 of the Honey Lake Valley Resource Conservation District Susan River Watermaster Rules and Regulations (the "Rules and Regulations"), Dow hereby appeals the informal dispute resolution report¹ regarding Mr. Dow's June 6, 2018 complaint² ("Complaint") and requests that the Watermaster schedule a public hearing on the Complaint within 90 days of receipt of this notice.³

This Notice of Appeal is timely filed, pursuant to Rule 6.3 of the Rules and Regulations, which provides that in order to proceed with a complaint process, a complainant must file a written notice of appeal within seven days of receipt of the written report issued following an Alternative Dispute Resolution Meeting regarding a complaint. While the written report is dated July 18, Mr. Dow received this report on July 25, 2018 by email.⁴

The Watermaster has not followed its Rules and Regulations in regard to a determination as to the Complaint. The factual background regarding the Complaint is as follows: On June 6, 2018, Mr. Dow submitted the Complaint on the Watermaster's Water Rights Dispute Form. Following the filing of the Complaint, an informal meeting was held on June 14, 2018 at the Honey Lake Valley Resource Conservation District ("HLVRCD") office to discuss the resolution of the Complaint. Upper Susan River Water Advisory Committee ("WAC") Member Mike Bartley, HLVRCD District Manager Ian Sims, Susan River Watermaster Mitch Otto attended the meeting. The parties were unable to resolve the Complaint at the meeting. Rule 6.3 of the Rules and Regulations requires that if the informal dispute resolution is unsuccessful, "the WAC representative will provide the Complainant and the Watermaster Board with a

¹ The written report is attached hereto as Attachment 1.

² Mr. Dow's June 6, 2018 complaint is attached hereto as Attachment 2.

³ "On receipt of a notice of appeal regarding a Complaint, the Watermaster Board shall schedule a public hearing regarding the matter. The public hearing shall be conducted during a regular meeting or a special meeting called for that purpose. In no event shall the Watermaster Board commence the public hearing regarding the appeal more than ninety (90) days from the date of the notice of appeal." Rule 6.4 of the Rules and Regulations.

⁴ The July 25, 2018 e-mail transmitting the written report is attached hereto as Attachment 3.

written report regarding the outcome of the meeting within 3 days of the meeting.” No such written report was provided to Mr. Dow at that time, and the report transmitted to Mr. Dow on July 25, 2018 was only transmitted to him after he requested clarification as to the manner in which the Watermaster was processing the Complaint.

On June 26, 2018, HLVRC District Manager Ian Sims emailed Mr. Dow, informing him that Mr. Sims had requested a legal opinion from Lozano Smith on June 21, 2018.⁵ Mr Sims’ email stated that “[y]ou will be the first to know inline with notification to the WAC when I have received notice from Lozano Smith.” He also stated that “[p]er section 6.4, the WAC is required to hold a public hearing within 90 days from when the Watermaster Dispute was filed which was 6/6/18. The WAC will need to convene by 9/4/18 to discuss this specific complaint regardless if we have received a legal opinion or not.”

In response to this e-mail, Mr. Dow sought clarification from Mr. Sims regarding the status of the Complaint in the process prescribed under Article VI of the Rules and Regulations, and inquired as to whether and when a written report would be issued following the June 14, 2018 Alternative Dispute Resolution meeting.⁶ Mr. Dow also reiterated that since he had not received a written report, he had not had the ability to determine whether to file a notice of appeal in response to the same, and that he had not waived any right to file such a notice of appeal once a written report was properly issued.

Nearly two months after he submitted the Complaint and over a month following the Alternative Dispute Resolution Meeting, Mr. Dow received a summary of the informal meeting from Mitch Otto on July 25, 2018. As described above, this letter constitutes Mr. Dow’s Notice of Appeal in regard to the Complaint and he requests that the Watermaster schedule a public hearing on the Complaint within 90 days of receipt of this notice.

Watermaster’s failure to follow its own process has delayed the resolution of the Complaint, both procedurally and practically. It has allowed time to pass in the irrigation season, depriving Mr. Dow of the opportunity to be made whole through the repayment of water that he should have been receiving before and during this process. On behalf of Mr. Dow, we respectfully request that the Watermaster transparently and diligently follow the process prescribed in Article VI of the Rules and Regulations in the future processing of the Complaint.

Sincerely,



Bradley J. Herrema

BXH:prh

17129846

⁵ A copy of Mr. Sims’ June 26, 2018 e-mail is attached hereto as Attachment 4.

⁶ A copy of Mr. Dow’s July 9, 2018 e-mail to Mr. Sims is attached hereto as Attachment 5.

ATTACHMENT 1

Honey Lake Valley Resource Conservation District



170 Russell Ave., Suite C.
Susanville, CA 96130
(530)252-7271

www.honeylakevalleyrcd.org

July 18, 2018

Re: Informal Meeting Following Watermaster Dispute Complaint

Mr. Jay Dow,

On June 16, 2018 an informal meeting was held at the Honey Lake Valley Resource Conservation District (HLVRCD) office to discuss a resolution to the current Watermaster Complaint issued by Jay Dow. The meeting was attended by Upper Susan River Water Advisory Committee Member Mike Bartley, HLVRCD District Manager Ian Sims, Susan River Watermaster Mitch Otto and the complainant, Jay Dow. A resolution was not reached during the meeting and the HLVRCD has decided to seek out a third party legal opinion from the law firm Lozano Smith. Jay Dow may file an appeal to this decision within 7 days of receipt of this written report.

Sincerely,

A handwritten signature in red ink that reads "Mike Bartley". The signature is written in a cursive style.

Mike Bartley, Upper Susan River Water Advisory Committee Representative

ATTACHMENT 2

**HONEY LAKE VALLEY
RESOURCE CONSERVATION DISTRICT**

Water Rights Dispute Form

Please make sure you have taken the following steps before submitting a Water Rights Dispute/Complaint Form:

1. Have you attempted, to the best of your ability, to resolve this problem with the Deputy Watermaster? **YES**
2. Have you brought this dispute to the attention of your Watermaster Advisory Committee (WAC) representative in order to obtain their assistance in resolving the matter? **NO**

If you have taken the preceding steps and were not able to resolve the issue, please fill out the attached form in full. Forms that are not filled out completely will be returned to the complainant and not forwarded to the WAC.

If your form is complete, it will be forwarded to the WAC, who will consider the complaint within ten (10) days from the date of the complaint and provide you with at least three (3) days prior written notice of the date, time, and location of the hearing. Please refer to Article VI (attached) of the Honey Lake Valley Resource Conservation District Susan River Watermaster Rules and Regulations for additional information regarding Dispute Procedures.

On 5/30/10 (date), I, JAN DOW (complainant name)

received a copy of the Susan River Watermaster Rules and Regulations Article VI, Dispute Procedures.

**HONEY LAKE VALLEY
RESOURCE CONSERVATION DISTRICT**

Water Rights Dispute Form

Name: JAY DOW Date: 6/6/18
Address: 726-200 MAPES LN
WENDEL, CA 96136
Telephone: 530-260-6267 E-mail: dowranch@gmail.com
Approximate Date of Dispute: 5/7/18

1. Describe the disputed action, omission, or decision of the Watermaster staff, agent, or designee, including, but not limited to the Deputy Watermaster.

SEE ATTACHMENT A #1

2. Provide the grounds or basis for Complaint (attach any additional reports, charts, photos, and other documents, as needed).

SEE ATTACHMENT A #2

3. Describe your suggested solution.

SEE ATTACHMENT A #3

Official Use Only:

Date Received: _____ Received by: _____

Forwarded to Watermaster Advisory Committee (WAC) on: _____

Meeting to Discuss Dispute Scheduled on (within 10 days of date received): _____

Other Action Taken: _____

Attachment A

1. The watermaster permitted Lassen Irrigation Co. (LIC) to concurrently divert under its schedule 6 right and store under its paragraph 50 right in April and May 2018. This reduces the water that is available to my ranches pursuant to my water rights in Schedule 3, schedule 5 priority 3, and schedule 6.
2. The appellate court decision in Jay Dow v. Lassen Irrigation Company, Third Appellate District Court (C068550)(attachment B) to which Mr. Sims refers to in his May 7, 2018 letter(attachment C) allows LIC to either (1) divert under its schedule 6 right or store up to the capacity of its reservoirs under its paragraph 50 right. The appellate court defines “or” as “a choice between alternatives” (page 24 appellate judgment). LIC’s right to divert under schedule 6 is subject to the terms in paragraph 21 of the Susan River Decree #4573. The Appellate Court states paragraph 21 “qualifies or limits rights granted elsewhere in the decree and specifies when those rights can be exercised” (page 21 appellate judgment). Therefore the watermaster is in error to allow LIC to concurrently both store under its paragraph 50 right and divert under its schedule 6 right, when minimum flows are met above the confluence with Willow Creek, for the period of March 1st through October 31st. The appellate decision allows LIC to choose one or the other – not do both. LIC’s right to store to its reservoirs capacities under its paragraph 50 right has priority over irrigation rights (direct diversion) from November 1st through the last day of February the succeeding year (Susan River Decree paragraph 21).
3. The watermaster is obligated to follow the Appellate judgement. The watermaster must allow LIC to either (1) divert under its schedule 6 rights or (2) store up to the capacity of its reservoirs (paragraph 50 right) from March 1st until October 31st as long as minimum flows in the Susan River are met immediately above the confluence with Willow Creek, not do both. Under the supervision of the watermaster, LIC shall release into the Susan River an amount of water equal to what they improperly diverted into Leavitt Lake in April and May of 2018 for use by the Schedule 3, Schedule 5 priority 3, and schedule 6 users deprived of their water rights. In the past, DWR when acting as watermaster required LIC to release improperly diverted water into the Susan River for the use of other users deprived of their right.

ATTACHMENT 3

Mitch Otto <watermaster@honeylakevalleyrcd.us>

Wed, Jul 25, 2018 at 12:17 PM

To: Jay Dow <dowranch@gmail.com>, TERRY BARTLEY <flyingbranch@yahoo.com>

Cc: Ian Sims <isims@honeylakevalleyrcd.us>

Afternoon, Jay.

Here is the summary of our informal meeting from June 14, 2018.

We have not heard any word from our attorney on the status of their determination of the appellate decision.

Let me know if you have any other questions or concerns.

*Mitch Otto
Deputy Water Master
Honey Lake Valley RCD
170 Russell Ave., Suite C.
Susanville, CA 96130*

<http://honeylakevalleyrcd.org/>



June 16 Meeting Summary- Signed by Bartley.pdf
166K

ATTACHMENT 4

Ian Sims <isims@honeylakevalleyrcd.us>

Tue, Jun 26, 2018 at 3:41 PM

To: Jay Dow <dowranch@gmail.com>

Cc: TERRY BARTLEY <flyingbranch@yahoo.com>, Mitch Otto <watermaster@honeylakevalleyrcd.us>

Good afternoon Jay,

Per section 6.4, the WAC is required to hold a public hearing within 90 days from when the Watermaster Dispute was filed which was 6/6/18. The WAC will need to convene by 9/4/18 to discuss this specific complaint regardless if we have received a legal opinion or not.

However, I contacted our attorney's with Lozano Smith on 6/21/18 regarding your dispute as well as requested direction regarding the public dissemination of the BBK legal opinions from 2013.

You will be the first to know inline with notification to the WAC when I have received notice from Lozano Smith.

[Quoted text hidden]

Ian Sims

District Manager

Honey Lake Valley Resource Conservation District

170 Russell Ave. Suite C

Susanville, CA 96130

ph: (775) 313-1222

www.honeylakevalleyrcd.org



ATTACHMENT 5

Jay Dow <dowranch@gmail.com>

Mon, Jul 9, 2018 at 1:19 PM

To: isims@honeylakevalleyrcd.us

Cc: flyingbranch@yahoo.com, Mitch Otto <watermaster@honeylakevalleyrcd.us>

Dear Ian,

I am in receipt of your June 26, 2018 e-mail (attached) regarding the process for resolution of my June 6, 2018 complaint. I wish to clarify and reach a common understanding of the present procedural posture of the resolution process.

Your e-mail indicates that, pursuant to section 6.4 of the Susan River Watermaster Rules and Regulations, the Watermaster Advisory Committee is required to hold a public hearing within 90 days of the filing of my complaint. I am unclear how this is the case, as I read section 6.4's hearing requirement as being triggered by the filing of a notice of appeal following a written report out of the Informal Dispute Resolution meeting described in section 6.3.

Following the filing of my complaint, on June 14, 2018, you, Mike Bartley, Mitch Otto, and I held an Informal Dispute Resolution meeting as described in section 6.3. Contrary to the requirements of section 6.3, no written report regarding the outcome of the meeting was provided to me within three days of the meeting. The issuance of this report is the predicate for the potential filing of a notice of appeal, which would start the 90 day clock on a public hearing. As there has been no written report provided to me, I have not had the ability to determine whether to file a notice of appeal in response to the same. To be clear, I do not waive my rights to file such a notice of appeal after a written report is properly issued.

Thus, I request that you provide me clarification as to (1) where the Watermaster believes my complaint is in the prescribed process under Article VI of the Rules and Regulations, (2) whether the Watermaster believes my June 6, 2018 complaint constitutes a notice of appeal under section 6.3, and (3) whether and when a written report will be issued following the June 14, 2018 Informal Dispute Resolution meeting.

Also, I received an agenda for the July 12, 2018 WAC meeting. Will you please clarify where agenda item V (A) "General discussion regarding Jay Dow's recent complaint - Sims" falls within the RCD dispute procedures.

Thank You,

Jay Dow

Ian 6-26-18 email 303.jpg
380K

Susan River Decree

(Fleming v. Bennett (Super. Ct. Lassen County, 1940, No. 4573))

- 1940 decree allocating water rights of the Susan River
- All water rights are defined by provisions of the Decree
- The Decree has been interpreted through subsequent orders – including the Third Court of Appeal’s 2013 decision in *Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766 (“*Appellate Decision*”)

Susan River Decree – Water Rights

- Lassen Irrigation Company holds certain water rights:
 - Schedule 6 – diversion of 36.65 cfs at Diversions 6, 7, 41, 55, and 239; and,
 - Paragraph 50 – storage up to capacity of LIC reservoirs, McCoy Flat (Diversion 6), Hog Flat (Diversion 7), and Lake Leavitt (Diversion 239).

Susan River Decree – Water Rights

- Lassen Irrigation Company Schedule 6:
 - Subject and inferior to all rights set forth in Schedules 3, 4, and 5 (Decree, ¶ 49),
 - Except that, during period of March 1 through October 31, water may be directly diverted to beneficial use or to storage
 - between March 1 and July 1, when flow of Susan River is >20 cfs measured at confluence of Susan River and Willow Creek;
 - all other times of the irrigation season, when flow of Susan River is >5 cfs measured at confluence of Susan River and Willow Creek. (Decree, ¶ 21)

Susan River Decree – Water Rights

- Lassen Irrigation Company Paragraph 50:
 - Storage up to capacity of LIC reservoirs, McCoy Flat (Diversion 6), Hog Flat (Diversion 7), and Lake Leavitt (Diversion 239) during same season as Schedule 6 right:
 - between March 1 and July 1, when flow of Susan River is >20 cfs measured at confluence of Susan River and Willow Creek;
 - all other times of the irrigation season, when flow of Susan River is >5 cfs measured at confluence of Susan River and Willow Creek.
(Decree, ¶ 21)

Susan River Decree – Water Rights

- Dow holds certain water rights:
 - Schedule 3
 - Schedule 5 (priority 3), and
 - Schedule 6.
- Together these rights allow diversion of 26.38 cfs for direct application to beneficial use.
- All points of diversion are downstream of the confluence of the Susan River and Willow Creek and therefore below all of LIC's points of diversions.

Dow's Complaint

- “The watermaster permitted Lassen Irrigation Co. (LIC) to concurrently divert under its schedule 6 right and store under its paragraph 50 right in April and May 2018. This reduces the water that is available to my ranches pursuant to my water rights in Schedule 3, schedule 5 priority 3, and schedule 6.”
(June 6, 2018 Complaint)

Dow's Complaint - timeline

- **June 6, 2018** – complaint filed following May 7, 2018 correspondence from I. Sims re Watermaster Decree interpretation
- **June 14, 2018** – informal dispute resolution meeting, per Rules and Regulations, § 6.3
- **July 25, 2018** – Dow receives written report following June 14, 2018 meeting
- **July 31, 2018** – Dow submits, through counsel, Notice of Appeal, per Rules and Regulations, § 6.3
- **October 8, 2018** – hearing on Notice of Appeal

LIC May Exercise One Right or the Other

- 2013 *Appellate Decision* interprets the Decree as allowing LIC to either:
 - Divert (directly or to storage) pursuant to its Schedule 6 right;
 - OR,
 - Store pursuant to its Paragraph 50 right
- Paragraph 21 limits LIC's Schedule 6 right

Neither Decree nor *Appellate Decision* Provide for Concurrent Exercise

- *Appellate Decision* provides that “or” means a choice between alternatives (*Appellate Decision*, 216 Cal.App.4th at 784)
- While both 2014 BB&K Memo and August 16, 2018 Lozano Smith memo state that rights may be concurrently exercised, this is not stated in either Decree or *Appellate Decision*
- Effect of LIC’s concurrent exercise is to reduce water available to Dow’s rights (and others)

Appellate Decision Discussion Pertains to Diversion under Single Right

- “as long as the minimum flow requirements immediately above Willow Creek are satisfied and the Irrigation Company leaves enough additional water in the river to satisfy the users on the river above the confluence with Willow Creek, the Irrigation Company can directly divert up to 36.65 cfs under its schedule 6 right irrespective of other users like Dow with rights under the third priority class in schedule 5 and the first priority class in schedule 6. And this is true even if the Irrigation Company has already stored all the water it is entitled to store under paragraph 50 of the decree. That means there may be times when Dow is not receiving all of the water to which he is entitled under schedules 5 and 6 but the Irrigation Company is able to divert water into an otherwise full Lake Leavitt at the same time it is simultaneously releasing water from the reservoir for use by its shareholders. In such an instance, the water passing through the lake is water available to the Irrigation Company under its schedule 6 right, which by the terms of paragraph 21 takes priority over Dow’s rights.” (*Appellate Decision*, 216 Cal.App.4th at 789-90 (citations omitted).)

Appellate Decision Discussion Pertains to Diversion under Single Right

- *Appellate Decision* language means:
 - LIC may directly divert to beneficial use, pursuant to Schedule 6, when releasing previously stored water for beneficial use;
 - LIC may divert to storage in reservoirs, pursuant to Schedule 6, when releasing previously stored water for beneficial use;
- *Appellate Decision* language DOES NOT mean:
 - LIC may directly divert to beneficial use, pursuant to Schedule 6, while diverting to storage in reservoirs pursuant to Paragraph 50

Requested Action

- The Board should decide that it will not allow LIC to concurrently exercise its Schedule 6 and Paragraph 50 rights.
- The Board should have required LIC to release into the Susan River an amount of water equal to the quantity improperly diverted during April and May of 2018 when it was concurrently diverting under both the Schedule 6 and Paragraph 50 rights.

Honey Lake Valley RCD Items:



515 South Figueroa Street, Suite 750, Los Angeles, California 90071
Telephone: (213) 929-1066 Fax: (213) 929-1077

MEMORANDUM

PRIVILEGED & CONFIDENTIAL

DATE:	August 16, 2018	CLIENT/MATTER:	1839-01
TO:	Ian Sims		
FROM:	William P. Curley, III Jose Montoya		
RE:	Jay Dow’s Water Rights Complaint dated May 30, 2018		

This memorandum provides an analysis regarding the validity of the Water Rights Complaint submitted by Jay Dow on May 30, 2018. It also provides our recommended course of action.

BACKGROUND

Pursuant to the 1940 Susan River Decree, and as interpreted by the *Dow v. Lassen Irrigation Company* (213) 216 Cal.App.3d 766 decision (“*Dow v Lassen*”), Lassen Irrigation Company can either (1) divert under its Schedule 6 right, at up to 36.65 cfs, or (2) store up to the capacity of its reservoirs, estimated at 31,500 acre-feet, between March 1 and July 1 when the flow of the Susan River is in excess of 20 cfs immediately above Willow Creek and at all other times when the flow is in excess of 5 cfs.” (J.J. Fleming v. J.B. Bennett, Lassen County Superior Court Case No. 4573, Judgment, at 2.) These rights stem from Paragraph 21 of the 1940 Decree. Honey Lake Valley RCD (“District”) and the Lassen Irrigation Company (“LIC”) both agree that as long as water remains in the Susan River to satisfy the first and second priority classes in Schedule 5 and the 20 cfs flow requirement at Willow Creek, LIC can divert water to the extent of its Schedule 6 rights or its storage rights under the 1940 Decree.

ANALYSIS

A. APPELLATE COURT DECISION

On May 5, 2013, the appellate court in *Dow v Lassen* issued its decision rejecting each of LIC's, Jay Dow's, and the trial court's interpretation of Paragraph 21. The court concluded

that Paragraph 21 does not permit LIC to divert water up to the present capacity of the Reservoirs onto direct beneficial use. Rather, the court determined that this paragraph grants special priority to (1) LIC's direct diversion rights under Schedule 6 of up to 36.65 cubic feet per second (cfs) and (2) LIC's storage rights under Paragraph 50. As the court explained:

“provided the required flow immediately above Willow Creek is met [between March 1 and July 1 of each year, this is at least 20 cfs; at all other times, this is at least 5 cfs], the exception in paragraph 21 pertaining to the Irrigation Company allows the Irrigation Company to exercise its rights to direct diversion under schedule 6 or to storage under paragraph 50 irrespective of the allotments granted to all other users on the Susan River except for those with points of diversion above the confluence with Willow Creek. In essence, then, the Irrigation Company must leave enough water in the river (1) to satisfy the users along the river from immediately below the McCoy Flat and Hog Flat Reservoirs down to the confluence of the river with Willow Creek (i.e., those users in the first and second priority classes in schedule 5) and (2) to meet the minimum flow requirements immediately above Willow Creek. If it does so, then the Irrigation Company can divert up to 36.65 cfs for direct application to beneficial use (or for storage) under its schedule 6 right or it can store up to the capacity of its reservoirs, estimated at 31,500 acre-feet, under paragraph 50. (Dow, at p. 789 [emphasis added].)”

This decision was appealed to the California Supreme Court which declined further review, and it is our understanding that this decision is final. On May 22, LIC submitted a claim to the RCD regarding the dispute.

B. JAY DOW'S COMPLAINT

On May 7, 2018, Ian Sims, the District Manager for the District, sent a letter to Jay Dow in response to Jay Dow's efforts to readdress *Dow v. Lassen* with the District's Deputy Watermaster. Mr. Sims letter recited what the reviewing Courts have decreed, which is that the rights granted to LIC by paragraph 21 may be exercised concurrently so that LIC can "... divert water into an otherwise full Lake Leavitt at the same time it is simultaneously releasing water from the reservoir for use by its shareholders. In such an instance, the water passing through the lake is water available to the LIC under its schedule 6 right, which by the terms of paragraph 21 takes priority over Dow's rights." (Dow, at p. 790.) The letter also advised Jay Dow about the proper procedures for filing a water rights dispute within the Susan River Watermaster Service Area ("SRWSA").

In response, on June 6, 2018, Jay Dow filed a complaint with the District and alleged that the Watermaster permitted LIC to divert under its schedule 6 right and store under its paragraph 50 rights under the 1949 Decree in April and May 2018. As a result, Jay Dow further alleges that his schedule 3, schedule 5 priority 3 and schedule 6 rights were violated.

Jay Dow’s complaint is incorrectly interpreting the appellate court’s decision in *Dow v Lassen*. To support his contention, Jay Dow states that the appellate court defines “or” as “a choice between alternatives.”¹ The complaint further alleges that “LIC’s right to divert under schedule 6 is subject to the terms in paragraph 21 of the Susan River Decree #4573. Paragraph 21 “qualifies or limits rights granted elsewhere in the decree and specifies when those rights can be exercised.”² Based on the aforementioned, Jay Dow concludes that the “Watermaster is in error to allow LIC to concurrently both store under its paragraph 50 right and divert under its schedule 6 right, when minimum flows are met above the confluence with Willow Creek, for the period of March 1st through October 31st.”

In *Dow v Lassen*, the court made it clear that the language found in paragraph 21 supports the interpretation that, “as long as the minimum flows at Willow Creek are met, the Irrigation Company can either (1) divert under its Schedule 6 right, at up to 36.75 cfs, or (2) store up to the capacity of its reservoir, estimated at 31,500 acre-feet.” The court further found that LICs right to divert and store water subject to the flow requirements above Willow Creek are “irrespective of and notwithstanding the allotments granted to users in said Schedule 3 and 6 and to users of third priority class in said Schedule 5.”

The court took it one step further and provided an example to illustrate LIC’s right to divert and store water:

“For example, as long as the minimum flow requirements immediately above Willow Creek are satisfied and the Irrigation Company leaves enough additional water in the river to satisfy the users on the river above the confluence with Willow Creek, the Irrigation Company can directly divert up to 36.65 cfs under its Schedule 6 right irrespective of other users like Dow with rights under the third priority class in Schedule 5 and the first priority class in Schedule 6. And this is true even if the Irrigation Company has already stored all the water it is entitled to store under paragraph 50 of the decree. That means there may be times when Dow is not receiving all of the water to which he is entitled under Schedules 5 and 6 but the Irrigation Company is able to divert water into an otherwise full Lake Leavitt at the same time it is simultaneously releasing water from the reservoir for use by its shareholders. In such an instance, the water passing through the lake is water available to the Irrigation Company under its Schedule 6 right, which by the terms of paragraph 21 takes priority over Dow's rights.”³

In the instant case, it is alleged by Jay Dow that the Watermaster wrongfully permitted LIC to concurrently divert and store water in April and May of 2018. It is evident from the court’s example that, as long as the minimum flow requirements are being met, LIC

¹ *Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 784.

² *Id.* at 785.

³ *Id.* at 789.

has a right to both divert and store water in the months of March through October. These rights take priority over Jay Dow's water rights. Jay Dow's assertion that his water rights are being violated is misplaced and does not affect the outcome of this analysis. Thus, based on the court decision in *Dow v Lassen*, the Watermaster had sufficient legal justification for permitting LIC to divert and store water in April and May of 2018. For purposes of this analysis, we assume that Willow Creek met the minimum flow requirements at the time LIC exercised its water rights in April and May of 2018.

RECOMMENDATION

Based on the foregoing, it is our position that the District is on solid legal footing to reject Jay Dow's current complaint. However, the District is still required to follow its dispute resolution procedures outlined in Article VI of its Susan River Watermaster Rules and Regulations as amended or superseded. The Rules and Regulation requires the Dispute Resolution Committee ("DRC") to consider the Complaint within ten (10) days from the date of the Complaint. The DRC consists of the Deputy Watermaster, Water Advisory Committee ("WAC") representative, Mike Bartley, and complainant, Jay Dow. If the District has not already done so, it should schedule a hearing with Jay Dow and provide at least three (3) days prior written notice of the date, time and location of the hearing. As of now, the ten (10) days have elapsed; however, there does not appear to be any legal consequences for the District's failure to schedule a hearing within the ten (10) days. The ten (10) day deadline is likely a soft deadline.

At the conclusion of the hearing, the Dispute Resolution Committee must deliberate to come to a consensus regarding the Deputy Watermaster's decision regarding the Complaint. In the event that there is no consensus among the members of the Dispute Resolution Committee, the WAC representative will contact the RCD General Manager and request a third party legal and/or technical opinion. If the Complainant wishes to appeal the DRC's decision and expert opinion, he or she shall file a written notice of appeal with the Watermaster within three (3) days of the DRC's decision on the matter. Any Complainant that fails to appeal any decision of the Watermaster within the applicable deadlines as set forth in the Complaint Procedures shall be deemed to have waived its right to do so.

Thank you for the opportunity to be of service to you. We stand by to assist as you may desire.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Memorandum

ATTORNEY WORK PRODUCT
ATTORNEY-CLIENT PRIVILEGE

To: Honey Lake Valley Resource Conservation District
From: Best Best & Krieger LLP
Date: February 5, 2014
Re: LIC Complaint

SHORT OVERVIEW

The Honey Lake Valley Resource Conservation District (RCD) requested our opinion regarding the complaint (Complaint) filed by the Lassen Irrigation Company (LIC). The Complaint asserts that the RCD's Deputy Watermaster is incorrectly limiting LIC's diversions at diversion 41 under Paragraph 21 to the estimated current capacities of McCoy Flat, Hog Flat, and Lake Leavitt Reservoirs (Reservoirs) of 26,000 acre-feet (af) and not the estimated capacity when the Susan River Decree (Decree) was issued of 31,500 af. As discussed below, the Decree likely limits LIC's Paragraph 21 rights to the present-day capacity of the Reservoirs. It is important to remember that this right was modified in *Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766 to limit LIC to storage and not direct diversion.

ANALYSIS

I. Overview of Dispute

The Complaint is the latest in a series of disputes regarding the scope of LIC's rights under Paragraph 21 of the Decree. Previously, Jay Dow had objected to the RCD's interpretation of Paragraph 21 that permitted LIC to divert or store water up to the historic estimated capacity of the Reservoirs or 31,500 af. At that time, the RCD had expressed concerns that LIC's monitoring equipment did not permit the RCD to accurately measure LIC's diversions. The parties agreed to install additional monitoring equipment.

Mr. Dow disagreed with this interpretation and filed a lawsuit against the RCD. The parties agreed to settle this lawsuit, permitting Mr. Dow to file a motion with the court to interpret the Decree. The trial court initially agreed with the RCD's interpretation.

While the trial court case was being appealed, the Deputy Watermaster informed LIC that (1) it would be limited to storing or diverting water under Paragraph 21 to the current capacity of the Reservoirs of 26,000 af and (2) LIC would need to install additional monitoring equipment.¹ LIC responded that the reduction in diversions was improper as that issue was currently being

¹ It is unclear to us whether this equipment is part of the previously agreed improvements or something new.
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appealed and was subject to the trial court's order in the interim. The parties then exchanged some additional correspondence that all predates May 2013.²

II. Appellate Court Decision

On May 5, 2013, the appellate court issued its decision. The court rejected each LIC's, Dow's, and the trial court's interpretation of Paragraph 21. The court concluded that Paragraph 21 does not permit LIC to divert water up to the present capacity of the Reservoirs to direct beneficial use. Rather, the court determined that this paragraph grants special priority to (1) LIC's direct diversion rights under Schedule 6 of up to 36.65 cubic feet per second (cfs) and (2) LIC's storage rights under Paragraph 50. As the court explained,

provided the required flow immediately above Willow Creek is met [between March 1 and July 1 of each year, this is at least 20 cfs; at all other times, this is at least 5 cfs], the exception in paragraph 21 pertaining to the Irrigation Company allows the Irrigation Company to exercise its rights to direct diversion under schedule 6 or to storage under paragraph 50 irrespective of the allotments granted to all other users on the Susan River except for those with points of diversion above the confluence with Willow Creek. In essence, then, the Irrigation Company must leave enough water in the river (1) to satisfy the users along the river from immediately below the McCoy Flat and Hog Flat Reservoirs down to the confluence of the river with Willow Creek (i.e., those users in the first and second priority classes in schedule 5) and (2) to meet the minimum flow requirements immediately above Willow Creek. If it does so, then the Irrigation Company can divert up to 36.65 cfs for direct application to beneficial use (or for storage) under its schedule 6 right or it can store up to the capacity of its reservoirs, estimated at 31,500 acre-feet, under paragraph 50. (Dow, at p. 789 [emphasis added].)

This decision was appealed to the California Supreme Court which declined further review, and it is our understanding that this decision is final. On May 22, LIC submitted a claim to the RCD regarding the dispute.

² Last fall, we had informally discussed the Complaint with the RCD. We had recommended waiting until the appellate court provided a final ruling. We also advised that the RCD should ensure that it lodges its appointment of the Deputy Watermaster with the Court as required by the court order appointing the RCD as Watermaster. If the RCD has not done so, we again recommend that it lodge this appointment and we are happy to do so on its behalf.



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III. The Modern-day Capacity of the Reservoirs Most Likely Applies

The appellate court's interpretation of the Decree supersedes the trial court's prior order and modifies LIC's rights under the Decree. Accordingly, the RCD should ensure that it administers the Decree consistent with this interpretation. As noted above, this means that, provided the 20 cfs/5 cfs minimum flows above the confluence of Willow Creek and the Susan River are met, LIC can either (1) divert up to 36.65 cfs for direct application to beneficial use (or for storage) under its Schedule 6 right or (2) it can store up to the capacity of the Reservoirs, estimated at 31,500 af, under Paragraph 50. (See *Dow*, at p. 789.) These rights can be exercised concurrently so that LIC can "... divert water into an otherwise full Lake Leavitt at the same time it is simultaneously releasing water from the reservoir for use by its shareholders. In such an instance, the water passing through the lake is water available to the Irrigation Company under its schedule 6 right, which by the terms of paragraph 21 takes priority over Dow's rights." (*Dow*, at p. 790.)

The one remaining issue is whether the right under Paragraph 50 is fixed at the estimated capacity of the Reservoirs when the Decree was issued (31,500 af) or naturally changes as the capacity of the Reservoirs decreases.³ The appellate court did not expressly decide this issue. However, as LIC's right under Paragraphs 21 and 50 is a storage right that naturally depends on the capacity of the Reservoirs, the most likely interpretation is that "capacity" refers to the modern-day capacity of the Reservoirs. If the RCD determines that this capacity is currently 26,000 af, this would be the appropriate number to apply.

As LIC has already filed a claim under the Government Claims Act against the RCD regarding the Complaint, we would recommend that the RCD consider directing its General Manager and us to discuss potential solutions with LIC. If LIC disagrees with this interpretation, we may wish to recommend that they file a motion with the court to interpret this portion of the Decree. This would prevent the RCD from incurring attorneys' fees while permitting other water users that disagree with LIC's interpretation to oppose the motion.

CONCLUSION

We hope this memorandum has explained the issues associated with the Complaint. Please let us know if you have any questions.

BILL THOMAS
JOSH NELSON

³ As you know, the capacity of a reservoir may decline over time as sediment accumulates.



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Memorandum

ATTORNEY WORK PRODUCT
ATTORNEY-CLIENT PRIVILEGE

To: Honey Lake Valley Resource Conservation District
From: Best Best & Krieger LLP
Date: February 19, 2014
Re: Update Regarding LIC Complaint

SHORT OVERVIEW

As directed by the Board of Directors (Board) for the Honey Lake Valley Resource Conservation District (RCD), Tim Keeseey and our office met with Lassen Irrigation Company's (LIC) attorneys and Joe Egan. This meeting helped us understand LIC's concerns and position. Of immediate concern, LIC is concerned that it will be deprived of its direct diversion rights under Schedule 6 of up to 36.65 cubic feet per second (cfs) when flows are at least 20 cfs. In addition, LIC has expressed concerns regarding the impartiality of the Deputy Watermaster and ensuring it receives due process when disagreeing with the Deputy Watermaster's interpretation of the Decree.

ANALYSIS

I. LIC's Schedule 6 Right

As noted above, Tim Keeseey and our office met with Lassen Irrigation Company's (LIC) attorneys and Joe Egan regarding the Complaint. Despite our initial impression from the Complaint that the dispute largely resolved around the scope of LIC's storage right (i.e., 31,500 acre-feet (af) or 26,000 af), LIC indicated that it has two more pressing concerns. First, LIC indicated that the Deputy Watermaster has prevented LIC from diverting up to 36.65 cfs of water under its Schedule 6 right between March 1 and July 1 when the minimum flows at the confluence of Willow Creek are at least 20 cfs. LIC further indicated that it was vitally important that it be entitled to exercise this right and might seek immediate court relief if prevented from doing so.

As explained in our prior memorandum, the decision in *Dow* explained that LIC has two water rights and provided the minimum flows above the confluence of Willow Creek and the Susan River are met, LIC can either (1) divert up to 36.65 cfs for direct application to beneficial use (or for storage) under its Schedule 6 right or (2) it can store up to the capacity of the Reservoirs, estimated at 31,500 af, under Paragraph 50. (See *Dow v. Lassen Irrigation Co.* (2013) 216 Cal.App.4th 766, 789.) These rights can be exercised concurrently so that LIC can "... divert water into an otherwise full Lake Leavitt at the same time it is simultaneously releasing water from the reservoir for use by its shareholders. In such an instance, the water



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passing through the lake is water available to the Irrigation Company under its schedule 6 right, which by the terms of paragraph 21 takes priority over Dow's rights." (*Dow*, at p. 790.)

Here, based on the Court's decision, LIC is correctly interpreting its Schedule 6 right and should be entitled to divert water once the minimum flows are met. Consequently, this seems that the Deputy Watermaster is in error relative to his prior interpretation. Because storm runoff is increasing, this provision, which becomes operative March 1st, must be properly administered. The Board must insist on this to avoid liability. Accordingly, we request authorization to inform LIC that the Board recognizes this Schedule 6 right. This will assuage their immediate concerns and permit the parties additional time to resolve the remaining issues.

II. Due Process Concerns

The second important issue that LIC raised was its concern that the Deputy Watermaster is not impartial and that LIC has been deprived of due process by past Board practices. They also raised concerns about the proposed Watermaster policies that would increase the Deputy Watermaster's authority. Given that any resolution of their claim will involve resolving these issues, we believe they are relevant to the Complaint and appropriate to discuss.

It is important to remember that the RCD is the Watermaster. The Deputy Watermaster works for the Board, and is subject to its oversight. The proposed policies are inconsistent with this approach in respect to the critically relevant provisions.

"Complaints, Inquiries and Responses:

...

- Deputy Water Master's Decisions are final.
- Complaints against the decisions rendered by the Deputy Water Master can be appealed in Court.
- Complaints regarding office administration, (budgetary items, fees, public information act, etc.) (not water administration) shall be sent to the HLVRCD for review. Communication with HLVRCD may be made by telephone, email, or in writing."

We are aware of the genesis of these amendments as they do not appear in the model policy used to create the proposed policy, but they have no legal basis, are inconsistent with the official watermaster designation, and cannot be appropriately adopted. These are not administrative issues, but watermaster issues. Further, until the Deputy Watermaster is officially designated he is not fully authorized in any respect. As we previously advised the Board, it must lodge its appointment of the Deputy Watermaster with the Court.



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While we can explain our recommendations regarding Watermaster policies to the Board during its workshop, we wanted to note that these issues also affect the resolution of the Complaint.

III. Storage Right

Lastly, LIC explained its interpretation of the storage right. LIC believes that this is a less important issue that can be resolved after the above issues are addressed. In fact, LIC rarely exceeds 26,000 af under this right (approximately once every seven years).

LIC maintains that the *Dow* decision does not affect its storage right as the 31,500 af number was fixed by the Court when issuing the Decree. Moreover, the fact that the capacity of the three reservoirs may decrease over time does not affect this right. Rather, it simply imposes operational constraints on LIC. We believe progress was made on this issue and future talks would be productive once the issues above are resolved. We will also be sending a separate memo on this issue.

CONCLUSION

We hope this memorandum has provided an update regarding the issues associated with the Complaint. Please let us know if you have any questions.

BILL THOMAS
JOSH NELSON

5/21/2013

Sent via e-mail and US Mail

John Bentley, Chairman
Honey Lake Valley Resources Conservation District
2950 Riverside Drive
Susanville, CA 96130

Subject: Lassen Irrigation Water Rights up to 31,500 AF under Paragraph 21

Dear Mr. Bentley,

I have been asked by the Lassen Irrigation Company (LIC) to provide you some advice regarding LIC's water rights as they were adjudicated in 1940 and subsequently clarified by the courts. By way of introduction, I have over 40 years of experience in California water issues. For 28 years I was a staff member of the State Water Resources Control Board dealing mostly in water right issues throughout the State and served as the Assistant Division Chief of the Division of Water Rights for about half that time. I moved to Department of Water Resources (DWR) in the year 2000 and worked there for 10 years. I served as the Deputy Director of the Department of Water Resources for 7 of those years until I retired from the State about 2 years ago. My duties at DWR, among many other issues, included overseeing the Watermaster program for several years. I am now an independent consultant and provide advice on both water right and water resources issues in California as needed. I was able to conduct a rather extensive review of LIC's water rights from their 1885 and 1888 (pre-1914) fillings to divert large quantities of the water (up to 2,000 cfs) from the Susan River and its tributaries, the 1940 adjudication and the current court decisions related to these water rights.

As stated in the 1940 adjudication in Paragraph 21, "Lassen Irrigation Company shall be entitled to **divert, or store up to** the present capacity of its reservoirs, estimated at **31,500 acre-feet**, from the natural flow of Susan River between March 1 and July 1 of each year when the flow of said Susan River is in excess of 20 cfs, measured immediately above the confluence of said river with Willow Creek and at all other times when the flow of said river is in excess of 5 cfs measured at said point, **irrespective of and notwithstanding** the allotments granted to users in said **Schedules 3 and 6 and to the users of third priority class in said schedule 5...**" (Page 13, emphasis added.). Note that the term "notwithstanding" means "regardless of" or basically that these storage and direct diversion rights of LIC in paragraph 21 are superior to Schedules 3 and 6 and to the users of third priority class in said schedule 5. The term "present capacity" needs to be read as the 1940 capacity that was then estimated to be 31,500 AF. This limit of 31,500 AF sets a cap on the amount of water that LIC can divert direct to use or store in a year under the conditions set forth in paragraph 21. Such caps on the annual amount of water that can be appropriated by water users by both direct diversion and storage are very common in water right permits and licenses. As noted in a letter dated July 2007 from the Department of Water Resources (DWR), who was then serving as the Watermaster for this area, "DWR will now allow the diversion of water above 20 cfs until LIC has reached their 31,500 AF or until the flow drops below 20 cfs at Colony

5/21/2013

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Dam on the Susan River (Diversion 55).” In addition, the April 22, 2011 ruling by Superior Court Judge Donald Sokol confirms the wording of the 1940 adjudication in paragraph 21 and its limit of 31,500 AF as the amount of water that LIC can appropriate by both direct diversion and storage under that paragraph.

I understand that the Honey Lake Valley RCD is now the Watermaster for the 1940 adjudication. There appears to be some controversy over the amount of water that LIC can appropriate under the 1940 decree. The confusion seems to stem from a 1970's survey of the LIC lakes that indicates the combined storage of these lakes has decreased slightly since the 1940's likely due to siltation and appears to be estimated by some to be 26,000 AF. Siltation is common in reservoirs. Such siltation does not affect the underlying water right and in this situation does not affect the water rights of LIC. I understand that LIC has commonly appropriated water up to the 31,500 AF limit so this water has not been lost through non-use. The water that could not be stored due to siltation in the reservoirs has been appropriated by direct diversion to use under the conditions of paragraph 21.

The adjudication limited the total amount of water that can be appropriated by LIC by all means under paragraph 21 to the 1940's capacity of the reservoirs and set this limit at 31,500 AF as their best estimate of that amount. This limit is important because it provides LIC with a maximum fixed amount they can appropriate under this paragraph and it provides water users down stream assurance that this limit will not be exceeded. If the language in the adjudication was to be interpreted to be the present day capacity of these reservoirs, as suggested by the Deputy Watermaster, LIC could modify the reservoirs by either dredging or increasing the dam or spill way height over time. This would allow LIC to expand their ability to appropriate water. That is clearly not the intent of the adjudication. The purpose of the water right system is to provide some stability to water appropriation both to those appropriating the water and to those who could be affected by the appropriation.

I strongly recommend that the Honey Lake RCD continue to interpret the 1940's adjudication in the manner done by DWR over the years and specifically as stated in the 2007 letter by keeping the 31,500 AF limit on the amount able to be appropriated under paragraph 21 and not allow that quantity to be increased or decreased based upon present day surveys. This is both consistent with past practice in this basin and in other water right issues in California with which I am familiar.

On a related point, a key criteria in LIC's water rights are the 20 cfs and 5 cfs "bypass requirements" measured in the Susan River just above its junction with Willow Creek noted above in the 1940 adjudication. LIC is allowed to divert directly to use or store water if the flows at this location are above 20 cfs between March 1 and July 1 and at all other times when the flow is above 5 cfs at this location. Bypass terms like this are quite common as water right conditions. Such requirements allow diversions to take place by the water right holder provided certain downstream

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flows or flows past the diversion works are met. This allows for real time operation and the efficient appropriation of water while also satisfying downstream water rights or environmental conditions. Exactly how these flows are met, by either return flow, natural flow, sheet flow or releases from storage is not important. What matters is that diversion cannot take place unless these bypass flows are met at the prescribed location and if these bypass flows are met in the times set forth, then diversions can take place.

In LIC's case these bypass terms were first set in a court judgment in 1893 by the Lassen County Superior Court. (It can be found at Lassen County Book B of Judgments beginning on page 155). While the bypass flows in this early judgment are set in miner's inches, they equate 20 cfs and 5 cfs for this part of the state at that time. This judgment in effect establishes the definition of "surplus flows" mentioned in the LIC water right filings in the late 1880's. These bypass terms and the dates that they apply were used not only in a trial distribution in 1935 and 1936 signed off by almost all the parties to the adjudication but also in the 1940 adjudication and have been the operating criteria that have regulated both the direct diversion and storage rights of LIC in paragraph 21 for over 100 years. Thus, to be consistent with these court cases and the 1940 decree, the Watermaster should allow LIC to divert directly to use or store water if the flows in the Susan River just above the confluence with Willow Creek are above 20 cfs between March 1 and July 1 and at all other times when the flow is above 5 cfs at this location, regardless of the source of flows and limit the total diversions under paragraph 21 to 31,500 AF. LIC also has direct diversion rights under schedule 6.

Please contact me if you would like to discuss these issues in more detail.



Gerald E. Johns
Independent Water Right Consultant

cc's

Members

Les Evans

Jesse Claypool

Ramsey Wool

Willis Dow

John Richards - LIC President