

**Special Meeting of the:
Honey Lake Valley Resource Conservation District**

Attachments available 11/21/19 at
www.honeylakevalleyrcd.us

Date: Monday, November 4th, 2019; 10:00am

Location: USDA Service Center, 170 Russell Avenue, Suite C Susanville, CA 96130

Present: **Board:** Jesse Claypool
 Laurie Tippin
 Wayne Langston
 William Johnson

Staff: Kayla Meyer
 Carrie Adams

Attendees: Jay Dow

MEETING MINUTES

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

Board Chair Jesse Claypool called the meeting to order at 10:00am, the pledge of allegiance was recited, and a quorum was noted. Board Vacancy noted.

II. APPROVAL OF AGENDA

Board Member Wayne Langston made a motion to approve the agenda, Board Member William Johnson seconded and the motion passed. All.

III. PUBLIC COMMENT

None.

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

A. MOTION TO OPEN PUBLIC HEARING ON JAY DOW COMPLAINT (Water Transfer) APPEAL FILED 8/15/19 (Attachments) – Adams/Meyer

Board Member William Johnson made a motion to open the public hearing, Board Member Wayne Langston seconded and the motion passed. All.

Deputy Watermaster Carrie Adams started with a summary of the complaint, the actions that preceded, and her reasoning behind the decision. Jay Dow followed with a PowerPoint presentation printout, via his counsel with Brownstein Hyatt Farber Schreck, LLP, explaining their argument (attached). There was then open discussion and questions from the Board members with responses from Adams and Dow.

B. MOTION TO CLOSE PUBLIC HEARING ON JAY DOW COMPLAINT (Water Transfer) APPEAL FILED 8/15/19 – Adams/Meyer

Board Member Johnson motioned to close the Public Hearing on Jay Dow Complaint (Water Transfer), Board Member Langston seconded and the motion passed. All.

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

The Board remained in open session and a motion was made by Board Member Tippin to reverse the Watermaster's decision and provide no damages, and seconded by Board Member Johnson. Discussion ensued and there was an attempt to modify this motion, but was unformulated. This motion was voted for by Tippin, and opposed by Langston, Johnson, and Claypool; thus, the motion did not pass.

A second motion was made by Board Member Johnson, and seconded by Langston, to uphold the Watermaster's decision, to not allow the transfer of Schedule 4 and Schedule 5, 1st and 2nd priority water rights. Board Members Langston, Johnson, and Claypool voted in support of this motion, and Board Member Tippin opposed; thus, this motion passed. The Watermaster issued Jay Dow a written decision and summary on November 7, 2019 (attached).

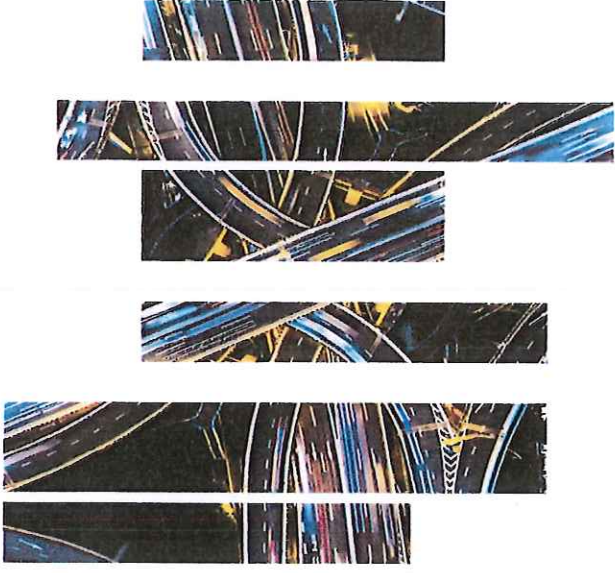
V. ADJOURNMENT

Board Chair Jesse Claypool adjourned the meeting at 11:41am. The next scheduled Honey Lake Valley RCD meeting will be **November 26, 2019 at 3:30 pm.** The location is the USDA Service Center, 170 Russell Avenue, Suite C, Susanville, CA.

Respectfully submitted,



Carrie Adams
Susan River Service Area, Deputy Watermaster
Honey Lake Valley RCD



November 4, 2019 Watermaster Board of Directors Hearing

The Dow-Bonomini Family 2013 Trust Water Rights Complaint

Re Paragraph 17 and Diversion of Schedule 4 and Schedule 5, Priority 2 Rights

Susan River Decree

- *J.J Fleming, et al. v. J. B. Bennett, et al.* – Case No. 4573
(Superior Court of Lassen County)
- A 1940 decree allocating water rights of the Susan River
- All water rights are defined by provisions of the Decree

Susan River Decree – Water Rights

- The Dow-Bonomini Family 2013 Trust (the “Trust”) owns certain water rights listed in the Decree, including Schedule 4 and Schedule 5, priority 2 rights.
 - Schedule 4 rights: rights in and to the use of the natural flows of Gold Run Creek, Lassen Creek and Piute Creek during the seasons stated in paragraph 21.
 - Addressed in paragraph 46 and schedule 4 of the Decree
 - Schedule 5 rights: those upon Susan River and Lower Willow Creek, during the seasons stated in paragraph 21.
 - Addressed in paragraphs 47 and 49 and schedule 5 of the Decree

Susan River Decree – Paragraph 17

- Paragraph 17 of the Decree provides that:
 - “Nothing herein contained shall, or shall be construed to . . . or from preventing any party hereto, who has allotments to two or more ditches, from using all or any portion of his allotments through each or any number of his ditches on all or any portion of his land, so long as the maximum quantity of water diverted shall not exceed the aggregate of all allotments to all of his ditches.”

See also Water Code § 1706

↳ Dow States Incorporated into § 17 of Decree

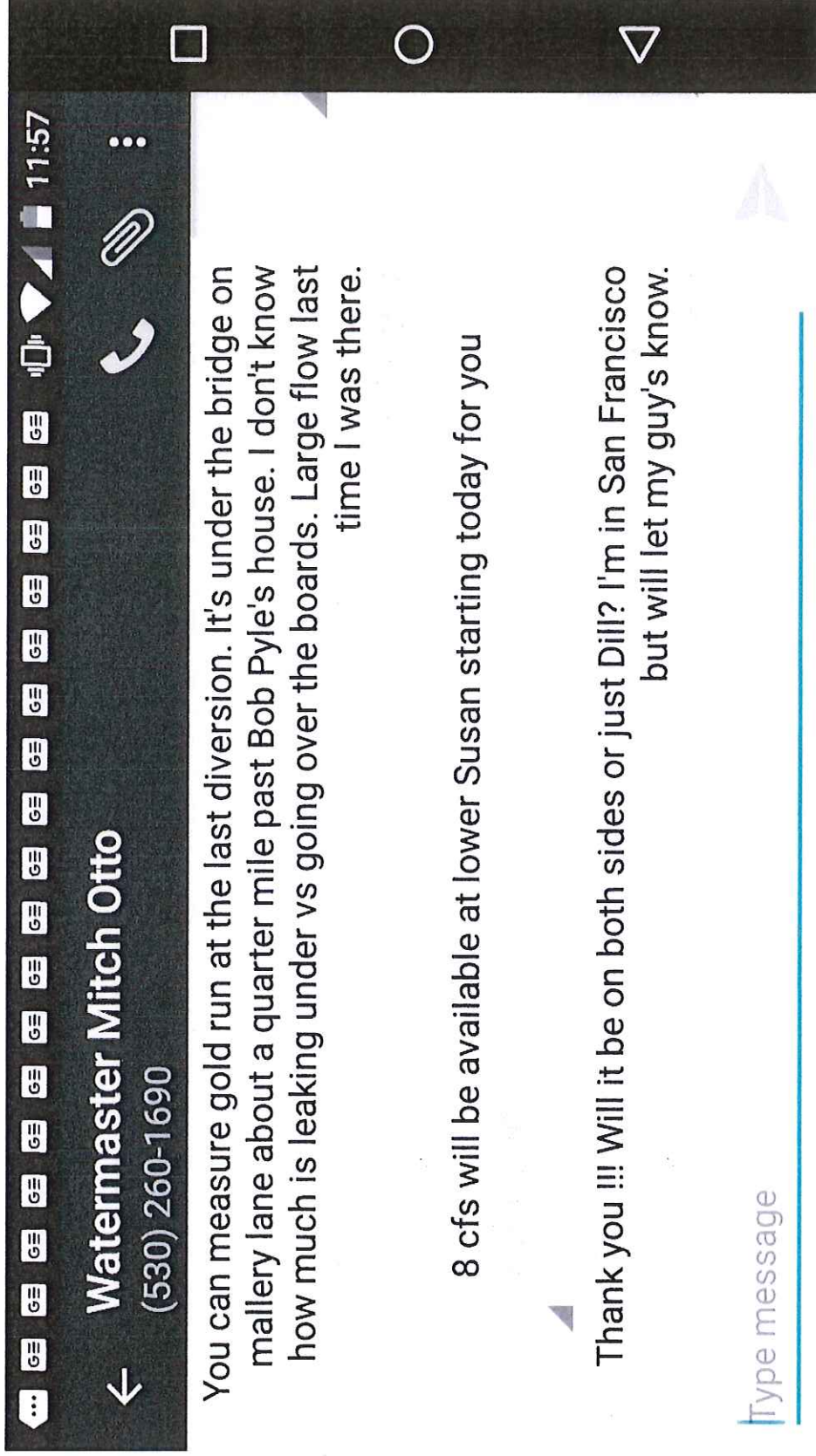
- “The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.”

Present Complaint

- During the most recent irrigation season, Jay Dow, trustee for the Trust, requested that the Watermaster administer the Decree to allow the Trust to divert its Schedule 4 and Schedule 5, priority 2 water rights at Diversions 82, 83, 89, 92, 98, 99, 100, 101, and 102 for a ranch that it owns.
- While the Watermaster has previously allowed this, in this year it did not, which is contrary to Paragraph 17 of the Decree.
 - See following slide.
- As a result, the Trust was unable to divert 10 cubic feet per second (“cfs”) for thirteen days, or 260 acre-feet (“AF”) of water, pursuant to its Schedule 4 and Schedule 5, priority 2 rights that it requested be diverted at its downstream diversion points.

May 11 '18

Previous Irrigation Seasons



Requested Action and Remedy

- The Watermaster is obligated to administer the decree in accordance with its terms.
 - The Watermaster must allow the Trust to divert water associated with one ditch through another of its ditches, so long as the maximum quantity of water diverted does not exceed the aggregate of all allotments to its ditches.
 - The Watermaster's determinations have resulted in LIC diverting water in Leavitt Lake, and McCoy Flat and Hog Flat Reservoirs that it should have been able to divert, namely, its Schedule 4 and Schedule 5, priority 2 rights pursuant to Paragraph 17 of the Susan River Decree.
- As a result of the Watermaster's administration of the Decree, in direct conflict with Paragraph 17, the Trust has incurred damages equivalent to the value of the water that it was not able to divert, and it should be made whole.

Decree, as interpreted by subsequent judicial consideration, expressly rejects or prohibits the administrative interpretation made in good faith by the Watermaster.

BACKGROUND/FACTS

After discussing the matters since June 11, 2019, on July 1, 2019 Ms. Adams informed Mr. Dow of the final decision to not allow the use of his Schedule 4 and Schedule 5, 2nd priority rights at his other properties below the confluence the Susan River and Willow Creek. In response, Mr. Dow filed a Watermaster Complaint with the District on July 26, 2019, alleging that the Watermaster administered the Susan River Decree in a manner that obstructs and interferes with his water rights, pursuant to Paragraph 17. On August 8, 2019, the Water Advisory Committee (WAC) conducted a public hearing in efforts to reach an understanding on this matter. It was found in a three to two vote to uphold the Watermaster's decision to not allow the transfer of water. On August 15, 2019, the Jay Dow and the Dow-Bonomini Family 2013 Trust submitted an Appeal of the decision of the WAC. On November 4, 2019 the Watermaster Board heard the case at hand and voted three to one to uphold the WAC decision and the Watermaster's decision.

GOVERNING LAW

A. The Initial 1940 Decree

A commitment by the District, as Watermaster, to faithfully and correctly administer the 1940 Decree as it may be interpreted and amended by the Lassen County Superior Court, or any other court or regulatory agency with jurisdiction.

B. Court Decisions Interpreting the Initial 1940 Decree

As set forth in the Court of Appeal's decision in *Dow v. Lassen Irrigation Company*, and the subsequently entered Judgment in *J.J. Fleming v. J.B. Bennett*, Lassen County Superior Court Case No. 4573; October 1, 2014, this interpretation is supported by the following:

"Significantly, the exception in paragraph 21 pertaining to the [Lassen] Irrigation Company also specifies that the [Lassen] Irrigation Company's rights to divert and store water subject to the flow requirements immediately 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. This provision is significant because essentially it gives the [Lassen] Irrigation Company's rights a different priority than they would otherwise have under the terms of the Decree. To truly understand the effect of this altered priority, it is necessary to take a closer look at the schedules in the Decree.

First, it must be noted that the exception in paragraph 21 pertaining to the Irrigation Company's rights does not mention Schedule 4. This makes sense because, as we have noted, Schedule 4 involves rights on Gold Run Creek, Lassen Creek, and Piute Creek, which are all tributary to the Susan River. Because the Irrigation Company's points of diversion are all on the Susan River itself, the Irrigation Company's diversion of water from the river can have no direct effect on those water users entitled to divert under Schedule 4, because those users take their water from the system before it ever reaches the Susan River.

Users (like Dow) entitled to water under Schedules 3, 5, and 6, or at least some of them, stand in a different position with respect to the Irrigation Company because their water rights can be affected by the Irrigation Company's exercise of

its rights. As we have seen, however, the exception in paragraph 21 pertaining to the Irrigation Company entitles the Irrigation Company to exercise its rights "irrespective of and notwithstanding the allotments granted to users in said Schedules 3 and 6 and to users of third priority class in said Schedule 5." The only users not mentioned in this clause are those in the first and second priority classes in Schedule 5. A review of Schedule 5 reveals that the first and second priority classes in that schedule encompass points of diversion ranging from Diversion 2 to Diversion 54. And an examination of the map included with the hydrographic report shows that all of those points of diversion lie along the Susan River above the confluence of the river with Willow Creek, with Diversion 54 being the last point of diversion on the river before Willow Creek."²

ANALYSIS AND DISCUSSION

A. Jay Dow's Appeal Hearing Argument

During the Board hearing, Mr. Dow, using material from his counsel Brad Herrema with Brownstein Hyatt Farver Schreck, LLP. reiterated the statements made in his Complaint, arguing that he must be allowed to use his Schedule 4 and Schedule 5, 2nd priority water rights at his other properties downstream of the Susan River and Willow Creek confluence, based on Paragraph 17 of the Decree which reads "Nothing herein contained shall, or shall be construed to...or from preventing any party hereto, who has allotments to two or more ditches, from using all or any portion of his allotments through each or any number of his ditches on all or any portion of his land, so long as the maximum quantity of water diverted shall not exceed the aggregate of all allotments to all of his ditches."³ The Trust claimed that, "The Watermaster's determinations have resulted in LIC diverting water in Leavitt Lake, and McCoy Flat and Hog Flat Reservoirs that it should have been able to divert..." and also that they have "incurred damages equivalent to the value of the water that it was not able to divert."⁴ The Trust informed the Board that on November 1, 2019 his counsel filed with the Lassen County Superior Court a "Notice of Change of Diversion Points" on advise of the Watermaster.

B. Watermaster's Position

As interpreted, the use of water rights are to be used at or near the associated irrigated acres; where in this case, the Trust is requesting to use the water rights a minimum of 13 miles downstream from where they are allocated in the Decree, and to different Schedules, as organized by the Decree. Further, on the Susan River side at Colony Dam, LIC has the right to divert anything over 20cfs, March 1 to July 1, and over 5cfs at all other times. Allowing this request to transfer water would put the gauge reading over 20 or 5cfs and LIC would be prevented by the Watermaster from diverting its full allotment as the water would be considered Mr. Dow's upstream, Schedule 4 and 5 2nd priority rights. The Watermaster assessed that if Mr. Dow does not divert his water at their Decreed Points of Diversion, this water becomes a part of the "natural flow of the Susan River,"³ which LIC is entitled to take if Colony Dam is above its specific threshold. Thus, allowing the requested transfer would be infringing upon LICs water rights. Supported by the *Dow v. Lassen Irrigation Company* Judgment in *J.J. Fleming v. J.B. Bennett*, Lassen County Superior Court Case No. 4573, October 1, 2014; when describing the exception in paragraph 21 pertaining to the Irrigation Company's rights, Schedule 4 and Schedule 5, 2nd

² Dow, 216 Cal.App.3d at 788

³ Susan River Decree, J.J. Fleming et al. v. J.R. Bennett et al. (No. 4573, April 18, 1940)

⁴ Brownstein Hyatt Farber Schreck, LLP (BHFS) Presentation Slide 8

priority rights are not mentioned as they are upstream of the Colony Dam, and thus are irrelevant to LICs right to divert. This exclusion demonstrates how it is not intended by the Decree for users to be able to utilize their water on a different river or section of river, essentially transferring the water, as this request would so do. Based on this evidence as interpreted by the Watermaster, Paragraph 17 is speaking to multiple diversions on joint ditches, and single or adjacent properties; again, not the liberty for a user to move water between Schedules. Additionally, Mr. Dow claims that “the Trust has incurred damages”; however, the water rights were available to him at their described Points of Diversions and Places of Use, set forth in the Decree; thus, no damage was done by the Watermaster’s decision. Furthermore, throughout prior discussion and the Complaint process, the Watermaster suggested the Trust go through the appropriate process of transferring the water rights through the Lassen County Superior Court, which holds continuing jurisdiction over the Case No. 4573 Judgement.

C. Board Concurrence with Watermaster’s Position

The Board was unpersuaded by the Trust’s argument that it is within the Decree, Paragraph 17 that the Watermaster must allow the use of the Schedule 4 and 5 priority 2 water rights at the other properties downstream. The Trust failed to present sufficient evidence to overrule the Watermaster’s interpretation of the Susan River Decree, the *Dow v. Lassen Irrigation Company* decision and Paragraph 17 of the Decree. From the court’s example, it is evident to the Board that the writers of the Decree did not intend for users to move their water rights between Schedules. Furthermore, the Board supports that the allowance of this movement of water would obstruct LIC’s water rights under the terms described in the Decree and *Dow v. Lassen Irrigation Company*. The Board commends both the Watermaster and the Trust for working together and is in support of the user taking the steps to change the Points of Diversion with the Superior Court. Upon the results of this process, the Honey Lake Valley Resource Conservation District as the Watermaster will abide by the decisions made by the Lassen County Superior Court.

DECISION

The Board finds that the Watermaster’s interpretation of the 1940 Decree was correctly implemented by not allowing the use of Schedule 4 and Schedule 5, 2nd priority water rights below the confluence of the Susan River and Willow Creek. Therefore, the Watermaster may continue to allow LIC to divert this water if Mr. Dow does not divert them at their upstream Decreed locations, and thus leaving them in the system. Accordingly, Mr. Dow’s appeal and remedy request is denied and rejected. This decision is final for all proposes pursuant to the Susan River Watermaster Rules and Regulations.