

Idarado Mining Company
6363 Fiddlers Green Circle, Ste 800
Greenwood Village, CO 80111

November 28, 2016

Ms. Camille Price
Idarado On-Site Coordinator
Colorado Department of Natural Resources
P.O. Box 2927
Telluride, CO 81435

Mr. Russ Means
Colorado Division of Reclamation, Mining and Safety
101 3rd St
Grand Junction, CO 81501

Ms. Kathy Roso
CDPHE Water Quality Control Division
WQCD-B2
4300 Cherry Creek Drive South
Denver, CO 80246

Mr. Doug Jamison
CDPHE Haz Materials & Waste Mgmt Div
HMWMD-RP-B2
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Ms. Jean Wyatt
US Environmental Protection Agency – Region 8
1595 Wynkoop St
Mail Code: 8EPR-AR
Denver, CO 80201-1129

Dear Ladies and Gentlemen:

We are in receipt of the November 15, 2016 "Citizens Complaint" directed to you by Eric Jacobson. This letter responds to the allegations in that complaint.

Water Rights Complaint

Mr. Jacobson's chief allegation is that Idarado Mining Company's past mine reclamation activities have diverted large quantities of Red Mountain Creek Basin water through underground mine workings to the San Miguel River basin.

However, the facts do not substantiate Mr. Jacobson's claim. As confirmed by correspondence and investigations from the 1970s and 1980s, water flowing in the Treasury Tunnel since that period comes almost exclusively from old abandoned workings in the Black Bear area, infiltrating through stopes that had been mined to near surface in that location. That area is in

RECLAMATION MINING & SAFETY
DIVISION OF
GRAND JUNCTION FIELD OFFICE
NOV 29 2016

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the San Miguel, not the Uncompahgre, River basin, so any delivery of such water to the Meldrum or Mill Level Tunnels does not divert water out of the Uncompahgre River basin. Idarado has a decreed "plan for augmentation" to replace the very minor "out of priority" water depletions (typically 10 gpm or less) which gather in the lower end of the Treasury Tunnel and which Idarado occasionally pumps back through that Tunnel under current operations.

Mr. Jacobson has previously made similar claims to Bob Hurford, the Division Engineer for Water Division No. 4 within the Colorado Division of Water Resources. In Mr. Hurford's November 19, 2015 response, he concluded that Mr. Jacobson had "over-simplified the matter and supported [his] argument with case law which is not directly on point," and that Mr. Jacobson would "find little relief administratively via [the] Division of Water Resources" for his claim alleging material injury to his water right. A copy of that response (which Mr. Hurford also sent to Ms. Price at the time) is enclosed.

Water Quality Complaint

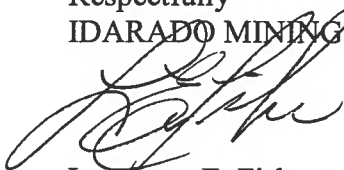
Mr. Jacobson also makes allegations and unsupported conclusions regarding water quality conditions in Red Mountain Creek and the Uncompahgre River. The Idarado mine site is governed by the 1992 Consent Decree between the State of Colorado and Idarado, and it incorporates a Remedial Action Plan ("RAP") outlining all remedial activities required at the site. Idarado has largely implemented these remedial activities, continues to work diligently to meet the performance objectives under the Consent Decree and RAP, and is in full compliance with its obligations. Indeed, Idarado has nearly a 25 year history of working cooperatively with the CDPHE and the Colorado Attorney General's Office in carrying out these obligations; and to that point, Idarado met with the agency as recently as last week to discuss ongoing efforts.

To advance his claims, Mr. Jacobsen has provided a table of results from three samples that were apparently collected on his behalf in 2012. He makes an overarching conclusion that pH in Red Mountain Creek would be much higher if more water was flowing from the Treasury Tunnel, and that this would somehow reduce alleged impacts on his operations. His own reported pH values and flow rates do not support his conclusion. The reported flow of 10 gpm from the Treasury (which is historically typical during the times of year at issue in his letter) at a pH of 6.97 would have a negligible impact at best (less than 0.01 pH units) on Red Mountain Creek which he reported to be flowing at 5.81 cfs and a pH of 2.31. Idarado also notes that the reported dissolved oxygen values of 15.75 mg/L and 22.1 mg/L are chemically impossible at the reported temperature ranges.

If you have any questions Idarado would be happy to schedule a meeting to further discuss these issues.

Respectfully

IDARADO MINING COMPANY



Lawrence E. Fiske

Director of Legacy Sites Closure and Reclamation

Larry Fiske

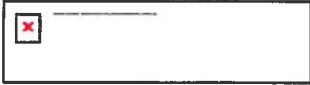
From: Price - DNR, Camille <camille.price@state.co.us>
Sent: Thursday, November 19, 2015 2:38 PM
To: Doug Jamison - CDPHE; jason king
Cc: Larry Fiske
Subject: Fwd: DWR Reply to Request for Orders
Attachments: DWR 11_19_2015 Response to Jacobson.pdf

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FYI - please see attached.

Camille Price
Project Manager
Inactive Mine Reclamation Program

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DIVISION OF
RECLAMATION MINING & SAFETY



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P.O. Box 2927, Telluride, Colorado 81435
Camille.price@state.co.us | <http://mining.state.co>

----- Forwarded message -----

From: Hurford - DNR, Bob <bob.hurford@state.co.us>
Date: Thu, Nov 19, 2015 at 1:59 PM
Subject: DWR Reply to Request for Orders
To: Eric Jacobson <ericj@ouraynet.com>
Cc: Camille Price - DNR <camille.price@state.co.us>, tisdell@gmail.com, dbatchelder@ouraycountycogov, lpadgett@ouraycountycogov, apriesz@gmail.com, dwhite@montrosecounty.net, gdavis@montrosecounty.net, rhenderson@montrosecounty.net, Steve Fletcher <sfletcher@montrose.net>, Mike Berry <mike@tricountywater.org>

Mr. Jacobson,

I am sending you this reply by email attachment so you may receive it at the same time as all the other CCd parties. Also, an original copy is in the mail today, to your mailing address only....not the other CCd parties. Because of the seriousness of your request, this office has given it the attention it deserves and necessarily had to do some extra work in order to fully address your letter to the extent I am able. Hence the delay in my response to your letter.

Please note: Your call for water at the Ouray Hydropower plant was recorded in DWR's call manager system at the time you delivered it to our office. However, the call has been de-activated due to the opening of your sluice gate at your point of diversion for the power plant. As a reminder, one of the conditions for your to place a valid call for water is you must take all the water available at your point of diversion. Bypass of flows which may have been diverted under a calling water right is not permissible.

Sincerely,

Bob W. Hurford, P.E.
Division Engineer
Water Division 4, Montrose



P [970.249.6622](tel:970.249.6622) | F [970.249.8728](tel:970.249.8728)

2730 Commercial Way, P.O. Box 456, Montrose, CO 81402

bob.hurford@state.co.us | www.water.state.co.us



COLORADO
Division of Water Resources
Department of Natural Resources

Water Division 4 - Main Office
P.O. Box 456
Montrose, CO 81402

November 19, 2015

Eric R. Jacobson
ericj@ouray.net
Ouray Hydroelectric Plant
P.O. Box 1385
Ouray, CO 81427

RE: Colorado Division of Water Resources Reply to Request for Issuance of Cease and Desist Order

Dear Mr. Jacobson:

I have reviewed your October 15, 2015 request for me to; "issue a cease and desist order ordering the discontinuance of all out of priority, un-adjudicated diversions that materially injure my senior water rights." To be specific, your desire is for me to take action requiring Idarado Mining Company to open the Treasury Tunnel so all water intercepted by the construction of the tunnel will drain to Red Mountain Creek. In addition, I reviewed the Attachments and Exhibits you provided as evidence to support your assertions. Finally, I reviewed the case law you cited in your letter and received interpretation from the Attorney General's Office in each of the five Supreme Court cases. Your request is straight forward enough and I understand why you believe you are being materially injured since you believe there is an unadjudicated diversion of water from Red Mountain Creek affecting your hydropower water right. However, my conclusion is you have over-simplified the matter and supported your argument with case law which is not directly on point. Let me explain by summarizing below:

Cresson Consolidated Gold Mining & Milling Company v. Whitten: Cresson is similar to your situation in that it involves the use of mine drainage by downstream water users and rules the water is in fact tributary to Four Mile Creek and no other stream. In this situation, I will not argue the water intercepted by the Treasury Tunnel is not non-tributary, but rather it is indeed tributary water. However, whether the mine drainage intercepted by construction of the Treasury Tunnel is water naturally tributary to the Uncompahgre River or to the San Miguel River is not clear. Therefore, I cannot make a determination at the Treasury Tunnel regarding the amount tributary to the Red Mountain Creek side of the mountain.

Zigan Sand & Gravel v. Cache La Poudre Water Users Association: This case is about gravel pits and the Supreme Court held that gravel pits may not be constructed without a well permit. I presume your reference to this case is intended to demonstrate that the Treasury Tunnel is a well and must be administered within the priority system. I remind you that Division 4 has no groundwater enforcement rules (similar to Divisions 1,2, and 3) that would allow me to make an administrative decision about tributary ground water associated with the mine tunnel. Accordingly, I cannot issue an order regarding the Treasury Tunnel pursuant to well enforcement.



Peterson v. Reed: I will presume you cite this case for the proposition that “river flow is as much affected by intercepting and diverting water, which otherwise would flow into it, as by directly withdrawing water from its channel. . . Drainage and seepage waters tributary to a natural stream cannot be independently appropriated by intercepting such waters before they are comingled with the stream.” 149 Colo. 573 (1962). In Peterson, a water user claimed a diversion from a drainage ditch that was tributary to a natural stream in the course of a supplemental general adjudication. The water user claimed that his use should not be curtailed if water rights on the downstream tributary called because the wastewater it carried was not a part of the natural stream.

The Supreme Court disagreed. Downstream tributary water users proved that the drainage ditch was and always had been tributary to the natural stream, and so the claimants’ water rights could not be senior to existing downstream diversions. Using this argument you attempt to demonstrate that the hydroelectric plant’s water rights are analogous to being entitled to the tributary wastewater described in Peterson. If that were the case, the hydroelectric plant’s water rights would be senior to Idarado’s Treasury Tunnel diversions. However, the Peterson case is distinguishable from your request because one cannot say with certainty that the Treasury Tunnel mine waters are naturally tributary, in the time and amount you assert, to the Uncompahgre River.

Ranson v. Boulder: In this case you request I consider the burden of proof criteria established in Ranson v. City of Boulder, 161 Colo. 478 (1967). That case involved a dispute between landowners who claimed diversion rights for a spring, and the downstream City of Boulder, which had senior downstream water rights to which it claimed the spring was tributary. The Supreme Court affirmed the water court’s finding that the water from the landowners’ spring was tributary. In the course of this holding, the court analyzed the burden of proof for demonstrating a water source is not tributary: “[i]n Colorado, flowing water is presumed to find its way to a stream, and the burden of proving otherwise rests upon the party claiming that such water is not tributary.” Id. at 480.

It is unclear in this case whether a court would find that Idarado carries the burden of proving that Treasury Tunnel discharges are not tributary to the Uncompahgre since the water in question originates as groundwater and is a groundwater diversion. While the groundwater discharge by the mine is certainly naturally tributary to some stream system, and even assuming that it is equally probable it is tributary to the Uncompahgre, the Ranson case is not directly on point.

Ft. Morgan Land & Canal Company v. South Platte Ditch Company: You cite Ft. Morgan Land & Canal Company, 18 Colo. 1 (1892) for the proposition that “a diversion unaccompanied by an application gives no right.” It is true that an undecreed water use cannot call out junior priorities. However, diversion does establish a priority date that a water court decree may confirm upon application. So, it is unclear to me exactly why you cite this law. While it is true Idarado does not have an adjudicated groundwater right for the Treasury Tunnel, the lack of a water right does not require the Division Engineer to order water intercepted by the construction of a mine to discharge at a specific portal.

Conclusion: You reference case law to support your enforcement request by assuming the Treasury Tunnel discharge is entirely naturally tributary to the Uncompahgre River. However, whether that water is



tributary, in the specific amounts and timing you assert, to the Uncompahgre River or the San Miguel River is undetermined. In addition, the fact the Treasury Tunnel was connected to mine tunnels on the San Miguel River side of the mountain in the 1950s and was plugged and abandoned in the 1970s (for a variety of reasons having nothing to do with water development) only further obfuscates the issue. The case law you cite does not provide clear direction for water administration in this matter. Moreover, it does not require the Division Engineer to issue an order for Colorado to direct all groundwater intercepted by the tunnel to be discharged to Red Mountain Creek.

You also err in your argument by asserting that Colorado admits the water in the Treasury Tunnel is tributary by filing case no. 02CW245. No one is arguing whether groundwater intercepted by the Treasury Tunnel is tributary. It is presumed tributary. This water court case simply decrees, among other things, a surface water right for water emanating from the Treasury Tunnel adit, namely the Treasury Tunnel Pump. The diversion record at this location reveals the average monthly flow is approximately 7.5 gallons per minute. For perspective, this is approximately a garden hose flowing half full. This water right can be administered in priority. Please be aware however, if you place a valid call for water when your hydropower right is short during winter months, I will likely make the determination that curtailment of the Treasury Tunnel Pump would be considered a futile call. Section 37-92-502(2)(a), C.R.S. states that "(e)ach division engineer shall order the total or partial discontinuance of any diversion in his division...to the extent that the water being diverted is required by persons entitled to use water under water rights having senior priorities, but no such discontinuance shall be ordered unless the diversion is causing or will cause material injury to such water rights having senior priorities." My position at this time is that curtailment of the Treasury Tunnel Pump water right will not produce a measurable increase in water supply to your senior water right given the approximately 10-mile stream distance and frozen winter conditions and the meager amount of water available under the Treasury Tunnel Pump diversion. Consequently, water diverted by the Treasury Tunnel Pump during the winter months is not causing material injury to your senior water right.

Finally, there are contents of your letter not within the scope of my jurisdiction (such as making water quality assessments, addressing reclamation and mine safety concerns, confirming your economics, etc.). You are seeking relief from material injury to your senior water right by administrative action from this office. My conclusion, based on the rationale I provided above, is that you will find little relief administratively via Division of Water Resources. Your arguments and assertions arise from a long and interesting story to be sure. Because claimed injury to vested water rights is at stake, I expect this is not the last time I will be dealing with this matter. If you have any further questions or comments, please contact me at your convenience.

Sincerely,



Bob W. Hurford, P.E.
Division Engineer



CCs: (via email)

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