

Portland, Ore.

Nov. 20, 1899.

Frederick Burbidge, Esq.,

Kellogg, Idaho.

Dear Sir:-

LAST CHANCE WATER. When I met Judge McBride on the train last night, he stated that Heyburn was on the way to Boise with numerous affidavits, and would endeavor by an ex parte showing to secure an order from Judge Beatty restraining us from the use of the Reed tunnel water. Whether that flowing from the tunnel, or going around their mill, McBride did not know. In any event, I consider it important that Folsom go up and begin the work that we had already talked of; hence my telegram of last night to you. Judge McBride instructed Folsom by wire to proceed to Wardner at once and do this work.

Folsom should take affidavits from all friendly witnesses he can find, as to the amount of water flowing from the mouth of the Reed tunnel at the time Sweeny made his location. I think Sweeny made his location in May, 1890; but you will have to at once get certificates copies of all these water locations in order to have the data in hand. The witnesses should agree upon the amount of water flowing at that time, by looking at a certain sized stream. Then this should be carefully measured by Mr. Burch and others who will be able to give good and competent testimony as to the measurement. The original witnesses were probably Jack Keeley, Joe Cleaver, and as many others as you can find, who were in our employ and worked in the Reed tunnel early in 1890, or who worked around its mouth at that time.

Frank Jenkins about 1891 built a small flume that picked up all the Reed tunnel water, and dumped it down into our wheel pit, where it

could be picked up by the brake station flume. This small flume remained in place until the spring of 1895. In addition to measuring the amount of water the witnesses remember as flowing at the time Sweeny made his location, the total present flow should also be measured and recorded in the shape of affidavits. The excess flow from the Reed tunnel over and above the amount flowing from it at the time Sweeny made his location was located and appropriated in Sonnemann's time. Get certified copy of this location; and in Burch's time, the water thus located and appropriated was made use of in running the machine shop.

I think the water at the head of the brake station flume was located in 1890. It, at that time, consisted of certain springs and of the Reed tunnel water as boxed there by Jenkins, thus being entirely independent of anything claimed by the Last Chance Company. Besides the Sweeny location, the only other water locations the Last Chance people have are of two springs, called A and B, located along the banks of the creek between the head of our brake station flume and the Last Chance Mill. The Sweeny location is the only location ever made of water flowing in the creek, and is only good for the creek water at the point where it can take it from the creek. The *Brake* station flume was completed in 1891; the water then properly appropriated and used for power purposes back of Joe Steele's saloon. It was so used during the years '92, '93, and, I think, '94 by ourselves and Robert *Chap* Shane for power and electric light purposes. In '93, '94 and '95 I think it was in the hands of the Wardner Fire department for fire purposes. Also during '94, '95, '96, '97, Lem Wilson and the tenant of our house near the Last Chance Mill had the use of water in this flume! Then about '96 or '97 Alexander Monk had the Brake Station flume and water right leased for a certain length of time. Probably during the last year there has been but a small stream of water running through this flume until lately; we have again turned

in all the water belonging to this water right and flume. There were two, and perhaps three different locations made by us of the water at the head of this flume. Send ^{for} certified copies of these.

Former litigation between us and Last Chance Company over water has nothing whatever to do with any water originating in Reed tunnel, or ~~x~~ below the point in Milo Creek where Sweeny's location was made. It does not concern in any way the brake station flume and water right, nor springs A and B of the Last Chance Company. We in 1890 and 1891 endeavored to use all the water of Milo Creek at a point where it would be dumped into the creek below Sweeny's flume. We did this because the original Jim Wardner location, under which we take the water out of Milo Creek, claimed the right to take it to the town of Wardner and other places; but we did not exercise this right until after Sweeny had acquired ^{by proper location notice} an intervening right, and therefore had to put back in the ~~Milo~~ Creek at the proper height sufficient water to fill the flume as originally built by Sweeny. That is why I raised the wheel at the crusher house to a sufficient height so that the water from it could run into the Sweeny flume. Of course, this litigation is settled and accepted, and does not want to be ^{and cannot be} re-opened. What we are after now is the right to appropriate and use all water flowing from the Reed tunnel in excess of that flowing at the time Sweeny made his location. Judge Beatty is going to give this to us, but it must be properly measured and sworn to by a sufficient number of witnesses, so that the quantity of Reed tunnel water that we have to give the Last Chance Company will be a fixed and definite amount. We also claim that we have never abandoned the use of the Brake station flume, nor the different water rights at the head of it, and that besides, this ^{excess} Reed tunnel water is ours anyway; does not have to be used for useful purposes; it is our property, and we can do

with it as we please; but we are using it for a useful purpose and are running it around the Last Chance mill so as to prevent it from being contaminated by tailings. We are also running it around the Last Chance mill so as to preserve our rights to its use at the brake station flume and thus save losing a valuable water right power at that point. We have not abandoned at all the water belonging to the brake station flume, and even if we have, the Last Chance Co. have acquired no rights to it. Their locations below the Last Chance flume are only of certain specified springs. If they have appropriated in addition a certain amount of creek water, they have only done so since '95, and without making any extra location. Appropriation for four years, without any location, does not give them any rights. If it had been going on for five years, then they perhaps ^{have} ~~had~~ acquired a right by adverse possession. Therefore the reason for at once turning all our water into the brake station flume.

Yours truly,

* because they have made no legal location of it - that is, have never stuck up and recorded any notice claiming it.

Heyburn said Monk's notice no good.