



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

March 4, 2004

Representative Eulalie Teichert Langford
Idaho State House of Representatives
Capitol Building
PO Box 83720
Boise, ID 83720

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Representative Langford:

This letter is in response to your request of February 25, 2004, asking the Office of Attorney General to review a Federal court decree from the State of Wyoming in the case of *Roxana Canal Co. v. Daniels*, Equity No. 2447 (D. Wy. 1940) ("*Roxana Decree*"). In particular, you request that this Office review the provisions of the *Roxana Decree* and other related documents to address the concerns of Mr. Paul Gilroy of Wilson, Wyoming, who irrigates land in Idaho and alleges that his Idaho water rights are being injured due to diversions of water in Wyoming.

CONCLUSION

The State of Idaho and its agency the Idaho Department of Water Resources do not have jurisdiction to address Mr. Gilroy's complaint regarding alleged injury to his water rights due to diversions in the State of Wyoming. The water rights that are allegedly drying up Mr. Gilroy's source, Spring Creek, are diverted in Wyoming and thus, only the Wyoming State Engineer's Office has authority to curtail them.

ANALYSIS

Mr. Gilroy has contacted you regarding his concern that "[t]he development of a golf course and fire ponds in a new subdivision in Wyoming have dried up Spring Creek before it reaches Idaho." See Gilroy letter dated February 23, 2004. Mr. Gilroy has Spring Creek water rights that pre-date the Wyoming uses. Mr. Gilroy has claims in the Snake River Basin

Adjudication to four water rights: two licensed rights, 22-2135A with a priority date of November 15, 1950 and 22-2153A with a priority date of February 22, 1954; a decreed water right 22-12575 with a priority date of June 1, 1886; and a beneficial use water right 22-13018 with a claimed priority date of June 1, 1886. Water right no. 22-2153A has a source of Teton Creek and the other three water rights have as their source, Spring Creek, tributary to Teton Creek.

Attached hereto is Figure 1 that shows the location of Mr. Gilroy's diversions in Idaho as well as the creeks in question. As depicted on Figure 1, Spring Creek becomes tributary to Teton Creek in Idaho. The creek Mr. Gilroy refers to as Spring Creek in Idaho is known as Rapid Creek in the State of Wyoming. There is a Spring Creek in Wyoming but as demonstrated on Figure 1, that creek sinks just over the Idaho/Wyoming border. Mr. Gilroy's diversions off of Spring Creek in Idaho are approximately 2 miles from the point where Spring Creek crosses into the State of Idaho.

A decree was issued following a stipulation between the parties in the case, *Roxana Canal Co. v. Daniels*, by the United States District Court for the District of Wyoming sometime in 1940.¹ This decree is referred to as the "Roxana Decree." The plaintiffs in the action were individuals or corporations residing in the State of Idaho. The defendants were residents of the State of Wyoming. The Roxana Decree determined the water rights of the named parties. The effect of the Roxana Decree in Wyoming seems to be limited to the use of water from Teton Creek and its tributaries in the State of Wyoming.² The named parties and their successors in interest are the only persons bound by the decree.

The water rights, located in the state of Wyoming, which Mr. Gilroy alleges dry up Spring Creek were not decreed in the Roxana Decree. Nor has it been shown that the predecessors in interest to the present owners of the lands being irrigated in Wyoming were parties to the Roxana Decree. Thus, the Roxana Decree does not bind the water users in Wyoming who are allegedly drying up Spring Creek before it reaches the state of Idaho. Nor does the decree state that its provisions are intended to apply to the waters of Spring Creek which becomes tributary to Teton Creek in Idaho. The Roxana Decree does apply, however, to the

¹ *Roxana Canal Co. v. Daniels*, Equity No. 2447 (D. Wyo. 1940). The Idaho Department of Water Resources' (IDWR) files containing the Roxana Decree do not contain a specific date when the decree was entered. However, there is an untitled document with the heading "Plaintiff or Idaho Users" that summarizes the water rights for each plaintiff that was filed February 4, 1941. There is also an untitled document in IDWR's Roxana Decree file that appears to be an order that was signed by the Honorable Blake Kennedy on February 6, 1941, that incorporates, almost verbatim the stipulation language that is in IDWR's file as well as the stipulation attached to Mr. Gilroy's letter.

² As the Roxana Decree notes, the plaintiffs' water rights were previously decreed in *Rexburg Irrigation Co. v. Teton Irrigation Canal Co.*, Decree, (Fremont County, Dec, 16, 1910).

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waters of South Leigh Creek which flows across the border into Idaho before becoming tributary to Teton Creek. As Figure 1 shows, South Leigh Creek is north of Spring Creek and Mr. Gilroy's points of diversion so the agreement with regard to this creek does not affect Mr. Gilroy's points of diversion off of Spring Creek.

Mr. Gilroy alleges in his letter that the Roxana Decree was "signed by the Attorney Generals and Water Commissioners of both Idaho and Wyoming in 1940 'in Equity No. 2447' through the US District Court of Wyoming February 6, 1941." See Gilroy letter dated February 23, 2004. My research does not support this statement. A review of the decree contained in IDWR's files shows that an attorney for plaintiffs and an attorney for the defendants signed a document titled "decree" but there is no date for the signatures. There is also a document in IDWR's file titled "Stipulation" which appears to contain the exact same language as the unsigned "Stipulation" attached to Mr. Gilroy's letter. The Stipulation in IDWR's file is undated but signed by most of the Plaintiffs and several of the Defendants. This document is attached for your reference as Exhibit A. Neither the State of Idaho and any of its agencies, nor the State of Wyoming and any of its agencies, were parties to the Roxana Decree. Further, IDWR's files do not contain any documents indicating that the attorneys general for the respective states signed the stipulation to end the lawsuit.

There is another document in IDWR's files which is the same document attached to Mr. Gilroy's letter, titled "THE FOLLOWING MEMORANDUM IS TO CLARIFY CERTAIN POINTS IN THE AGREEMENT BETWEEN THE IDAHO AND WYOMING APPROPRIATORS DIVERTING WATER FROM TETON CREEK AND TRIBUTARIES." That document is signed by "F.A. Miller, Attorney for the Idaho appropriates. Signed Dec. 19, 1940." That document is also signed by "James Spofford, Commissioner of Reclamation for Idaho. Signed Dec. 19, 1940."³ This document is attached hereto as Exhibit B.

The documents, although confusing, provide some insight into Mr. Gilroy's concern. As Mr. Gilroy suggests the parties to the Roxana Decree entered into a stipulation upon which the decree is based. That stipulation discusses how water will be used between the parties of the respective states. That stipulation also specifically states that:

[t]he distribution of water among the users of wyoming [sic] of the part or portion of the waters of said streams which they shall be entitled to shall be under the direction and supervision of the State Engineer of Wyoming, or other proper Wyoming officer; the distribution among and to Idaho users of the part or portion herein to which they may be entitled of said stream flow shall be under the

³ Mr. Spofford was the Commissioner of Reclamation (IDWR's predecessor agency) in 1940.

direction and supervision of the Commissioner of Reclamation of Idaho, or other proper Idaho officer.

Furthermore, the untitled document, which appears to be an order signed by the Honorable Blake Kennedy on February 6, 1941, uses the stipulation language verbatim. This document is attached hereto as part of Exhibit A.⁴ Hence it appears that the parties to the case concurred that Wyoming had authority to regulate those diversions that occur in the state of Wyoming and that Idaho had authority to regulate those diversion that occur in the state of Idaho.

In an effort to assist Mr. Gilroy with his concerns, Tim Luke, IDWR's Manager of Water Distribution, contacted Jade Henderson, Wyoming Water Superintendent with the Wyoming State Engineer's office. Mr. Henderson confirmed that the Wyoming diversions are being made pursuant to legal water rights and that about 1.5 cfs of water was crossing the state line into Idaho during July 2003.

The State of Idaho does not have jurisdiction to force Wyoming water rights usage to be limited to the amounts stated in the stipulation referred to by Mr. Gilroy. The most viable option available to Mr. Gilroy is to seek relief in Federal District Court in Wyoming, which issued the Roxana Decree.

As far as Mr. Gilroy's specific water rights are concerned, he has three water rights 22-2135A, 22-2153A and 22-12575 that he can use to make calls on junior Idaho water rights through the watermaster for Basin 22. However, he cannot make a delivery call with water right 22-13108 until it is decreed in the SRBA. Idaho Code § 42-607. The Idaho Department of Water Resources is currently investigating water rights in Basin 22 and projects a preliminary recommendation on those water rights sometime in late 2004 or the beginning of 2005.

Very Truly Yours,



Candice M. McHugh
Deputy Attorney General, IDWR

cc: Glen Saxton, IDWR
Tim Luke, IDWR

⁴ This document seems to be a continuation of the Stipulation since the page numbers follow and paragraphs are shared between the two documents.

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STIPULATION

IT IS HEREBY STIPULATED and agreed by and between the above named plaintiffs and defendants in the above entitled suit that the following shall be the basis of a decree to be entered in the above entitled cause, and the Court is hereby authorized to enter a decree fixing the rights of the several parties, plaintiff and defendant, in accordance with the terms of this stipulation.

That for the purpose of effecting a compromise andv agreement, and to terminate the pending litigation, and to definitely establish the rights of the parties litigant, it is hereby agreed that the appropriators and water users in the State of Wyoming, who divert and use the waters of Teton Creek shall be permitted to use as much water from said stream as they can apply to a beneficial use until the total stream flow of the said Teton Creek and its tributaries in the State of Wyoming shall recede to one hundred seventy (170) cubic feet per second of time; that in the determination of said stream flow all diversions in Wyoming, including the grand Teton Canal, shall be and constitute a part of the said stream flow in determining the total of the said stream flow; that when the said stream flow of the said Teton Creek, and its tributaries in Wyoming; shall recede to said one hundred seventy (170) cubic feet per second of time, the Wyoming users, who divert water above the diversion of the Grand Teton Canal, shall thereafter be limited and permitted to divert one cubic foot per second of time for each fifty (50) acres of land (being one miner's inch per acre) for Wyoming lands of the said users in the State of Wyoming, and to continue to be so regulated until the flow of the said Teton Creek and its tributaries in Wyoming, including all the Wyoming diversions to ninety (90) cubic feet per second of time, after which time the stream flow of the said Teton Creek, and its tributaries, is to be divided between the Wyoming and Idaho areas for the benefit of their appropriators, on a fifty-fifty basis, that is,- that Wyoming shall be entitled to divert one-half of said stream flow and one-half of said stream flow shall be permitted to flow down said stream for Idaho. It being understood and agreed that ditches diverting in Wyoming and having legal appropriations of water in Wyoming and/or Idaho, to be supplied from the one-half of said stream flow awarded to Wyoming, excepting therefrom the Grand Teton Canal which, for the sake of this agreement, although having its diversion works in the State of Wyoming, is to be considered as an Idaho appropriation and if entitled under the laws of the State of Idaho to any of the stream flow of Teton Creek, shall be supplied from any portion or percentage herein agreed as to the portion or percentage to which Idaho shall be entitled for the benefit of its appropriators.

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It is agreed by the Wyoming users that what is known as the Southside Canal which canal supplies water to both states, Wyoming and Idaho, appropriators along

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the boundary line of the states, and which has been granted Wyoming permit No. 7420 for the diversion of water from Teton Creek, in Wyoming, is to be considered as a Wyoming diversion and the users in both Wyoming and Idaho supplied with water from it are to be furnished and supplied from the part or portion of the stream flow of said Teton Creek awarded Wyoming.

It is agreed that the waters of South Leigh Creek shall be distributed as follows:- the Wyoming appropriators may divert as much of the stream flow of South Leigh Creek as they can apply to beneficial use upon their lands until the natural flow of said stream, at the Idaho-Wyoming boundary line including all diversions from said stream above said boundary line, diminishes to a total of sixteen (16) cubic feet per second of time, at which time the Wyoming users shall be permitted and may divert one-half of the stream flow of said South Leigh Creek, the balance to flow down said stream for Idaho users,

The determination of the amount of the stream flow of the said streams, and the diversion of waters thereof, as between the states, as herein agreed, shall be under the supervision and direction of the Commissioner of Reclamation of the State of Idaho, and the State Engineer of the State of Wyoming.

The distribution of water among the users of Wyoming of the part or portion of the waters of said streams which they shall be entitled to shall be under the direction and supervision of the State Engineer of Wyoming, or other proper Wyoming officer; the distribution among and to Idaho users of the part or portion herein to which they may be entitled of said stream flow shall be under the direction and supervision of the Commissioner of Reclamation of Idaho, or other proper Idaho officer.

It is hereby agreed that all diversions within the State of Wyoming shall install diversion works and measuring devices, approved by the State Engineer of Wyoming, on all ditches and canals to make possible accurate measurements and proper administration and distribution of the waters of said creeks,

Dated this _____ day of _____, 1940.

PLAINTIFFS IN EQUITY NO. 2447

ROXANA CANAL COMPANY
By O. E. Peterson, Pres.

SIDDOWAY IRRIGATING & MANUFACTURING COMPANY
By S. H. Welch, Pres.

SALM IRRIGATING CANAL CO., LTD.
By Joseph Bohi, Pres.

TETON IRRIGATING & MANUFACTURING COMPANY
By J. C. Siddoway, Pres.

ISLAND WARD CANAL COMPANY, LTD.
By J. F. Sellers, Pres.

WILFORD IRRIGATION & MANUFACTURING COMPANY
By C. C. Bauer, Pres.

TETON ISLAND CANAL COMPANY
By Ephraim Ricks, Pres.

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WOODMANSEE*JOHNSON REXBURG MILL DITCH
By Martin L. Nave, Pres.

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NORTH SALM AGRICULTURAL & MILLING
CANAL COMPANY

By Milon Luke

Leroy Saurey,

CHARLES SAUEY Trustee

Katherine Baker No signature

FRANK GARNER Lyman Garner

FERN PINCOCK Fern Pincock

LaGRANDE SMITH LeGrande Smith

CANYON CREEK IRRIGATION DISTRICT

By Lee Martineau, Pres.

Nicholas Sommers Nick Sommer

WHITNEY PINCOCK Whitney Pincock

A. N. MURDOCK No signature

FRED PINCOCK Fred Pincock

LEANORE ROW No signature

DEFENDANTS IN EQUITY NO. 2447

CHARLES DANIELS No signature

D. L. WADDELL D. L. Waddell

E. E. RIGBY E. E. Rigby

WILLARD MORGAN No signature

MILTON DALLEY No signature

MILTON SHEETS No signature

KENT SHIPP No signature

RUSSELL CHRISTENSEN No signature

TED BROWN No signature

CHARLES WADDELL No signature

FREDERICK DEURTCH Frederich Deurtch

JOSEPH PEACOCK Jr. No signature

Milton L. Sheets

W. E. RIGBY Purchaser

ELEANORA WADDELL No signature

LeLAND SORENSEN LeLand Sorensen

CHARLES CHRISTENSEN Charles Christensen

T. ROSS WILSON T. Ross Wilson

CARL CARLSON Carl A. Carlson

Irvin Christensen

FRED MORGAN PURCHASER

RUDOLPH KAUFMAN Rudolph Kaufman

ELMER CHRISTENSEN No signature

WILLARD BROWN No signature

JOSIAH BROWN NO Signature

MALCOLM WADDELL No signature

L. Y. MATTHEWS L.Y. Matthews

Sidney E. Mulcock

J. E. RIGBY OWNER

LAVINIA CORN No signature

J. L. TENNANT No signature

Approved as tob form:

Attorneys for Plaintiffs:

O. E. McCUTCHEON, IDAHO FALLS, IDAHO

F. A. MILLER, ST. ANTHONY, IDAHO

Attorney for Defendants:

JAMES A. GREENWOOD, CHEYENNE, WYOMING.

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it being represented and made to appear to the Court that the following named plaintiffs, to-wit:

Katherine Baker, A. N. Murdock, and Leanora Row; are now deceased and no one has been authorized to represent them and that the defendant, Josiah Brown, has disposed of his land and water right to Willis Brown; that Fred Morgan, one of the defendants, has disposed of all of his interests to one Irvin Christensen, who has signed the last mentioned stipulation as the purchaser of the rights of the said Fred Morgan; that W.E. Rigby and J.E. Rigby, who were named as defendants, but not served, have disposed of all of their interests to Milton L. Sheets and Sidney E. Mulcock, respectively, who have signed the last stipulation as the purchasers and owners of the rights of the said W. E. Rigby and J. E. Rigby.

Now, therefore, the said first stipulation filed _____ IS HEREBY ADOPTED AS PROOF OF THE RIGHTS of said parties plaintiff and defendant, and the second stipulation filed July ____, 1940, is approved, confirmed and adopted as a part of this decree; and the Court being fully informed and advised in the premises;-

It is ordered, adjudged, and decreed, that:-

The waters of Teton Creek, a tributary of Teton River, Idaho, an interstate stream, shall be distributed to the appropriators and water users in the State of Wyoming and they shall be permitted to use all the waters from said Teton Creek as they can apply to beneficial use, until the total stream flow of said Teton Creek and its tributaries in the State of Wyoming shall recede to one hundred seventy (170) cubic feet per second of time; that in the determination of said stream flow all diversions, in Wyoming, including the Grand Teton Canal, shall be and constitute a part of the said stream flow in determining the total of the said flow; that when the said stream flow of the said Teton Creek, and its tributaries in Wyoming shall recede to one hundred seventy (170) cubic feet per second of time, the Wyoming users, who divert water above the diversion of the Grand Teton Canal, shall therefore be limited and permitted to divert one cubic foot per second of time for each fifty (50) acres of land (being one miner's inch per acre) for Wyoming lands of the users in the State of Wyoming, and to continue to be so regulated until the flow of the said Teton Creek, and its tributaries in Wyoming, including all the diversions, diminishes to ninety (90) cubic feet per second of time, at which time the stream flow of said Teton Creek, and its tributaries, is to be diverted between the Wyoming and

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Idaho areas for the benefit of their appropriators, on a fifty-fifty basis, that is,- that Wyoming shall be entitled to divert one-half of said stream flow and one-half of said stream flow shall be permitted to flow down said stream for Idaho. It being understood and agreed that all ditches diverting in Wyoming and now legal appropriations of water in Wyoming and/or Idaho, to be supplied from the one-half of said stream flow awarded to Wyoming, excepting therefrom the Grand Teton Canal, which for the sake of this decree, although having its diversion works in the State of Wyoming, is to be considered as an Idaho appropriation, and if entitled under the laws of the State of Idaho to any of the stream flow of Teton Creek, shall be supplied from any portion or percentage herein agreed as the portion or percentage to which Idaho shall be entitled for the benefit of its appropriators.

It is further decreed that what is known as the Southside Canal, which canal supplies water to both Wyoming and Idaho appropriators along the boundary line of the States, and which has been granted Wyoming permit No.7420 for the diversion of water from Teton Creek, in Wyoming, is to be considered as a Wyoming diversion and the users in both Wyoming and Idaho supplied with water from it are to be furnished and supplied from the part or portion of the stream flow of said Teton Creek awarded Wyoming.

It is ordered, adjudged, and decreed that the waters of South Leigh Creek shall be distributed as follows;- the Wyoming appropriators may divert as much of the stream flow of South Leigh Creek as they can apply to a beneficial use upon their lands until the natural flow of said stream, at the Idaho-Wyoming boundary line, including all diversions from said stream above said boundary line, diminishes to a total of sixteen (16) cubic feet per second of time, at which time the Wyoming users shall be permitted and may divert one-half of the stream flow of said South Leigh Creek, the balance of flow down said stream for Idaho users.

The determination of the amount of the stream flow of said streams, and the diversion of the waters thereof, as between the states, as herein decreed, shall be under the supervision and direction of the Commissioner of Reclamation of the State of Idaho, and the State Engineer of the State of Wyoming,

The distribution of water among the users of Wyoming of the part or portion of the waters of said streams which they shall be entitled to shall be under the direction and supervision of the State Engineer of Wyoming, or other proper Wyoming officer; the distribution among and to Idaho users of the part or portion herein to which they may be entitled of said stream flow shall be under the direction and

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supervision of the Commissioner of Reclamation of Idaho, or other proper Idaho officer.

It is decreed that all diversions within the State of Wyoming shall install diversion works and measuring devices, approved by the State Engineer of Wyoming, on all ditches and canals to make possible accurate measurements and proper administration and distribution of the waters of said creeks.

That in carrying out this decree and the distribution of the waters of said streams, the part or portion of said stream flow to which the water users and appropriators in the State of Wyoming shall be distributed in accordance with the rights of priority, as fixed and determined by the Board of Control, or Court of the State of Wyoming.

That the distribution of the water of said creeks to which the appropriators and water users of the State of Idaho shall be entitled under this decree shall be distributed to the Idaho users by the proper officer of the State of Idaho according to the rights and priorities as fixed by the Court of the State of Idaho.

That the rights fixed and decreed to the parties who have joined in the foregoing stipulations, or their predecessors in interests, either by the Board of Control of the State of Wyoming or the Court of Wyoming, and by the Courts of the State of Idaho are hereby recognized and decreed as binding upon all of the parties who have signed the foregoing stipulation as the same effects the quantity of stream flow and dates of priorities of said creeks as awarded to the Wyoming appropriators and users and the Idaho appropriators and users.

The Court retains jurisdiction of this cause for a period of one year for the purpose of making any correction to the decree or the determining of the rights of any parties who may have an interest in the waters of said streams who are not now parties to this action and desire to become parties hereto.

Each party shall pay his own costs.

Done in open court this 6 day of Feby. 1941.

(Signed) Blake Kennedy
Judge

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THE FOLLOWING MEMORANDUM IS TO CLARIFY CERTAIN POINTS IN THE AGREEMENT
BETWEEN THE IDAHO AND WYOMING APPROPRIATORS DEVERTING WATER FROM TETON CREEK
AND TRIBUTARIES.

1. That at all times when the flow of water in Teton Creek in Wyoming exceeds 90 cubic feet per second of time and is less than 170 cubic feet per second of time, the parties to this settlement who divert water in Wyoming, whether such diversion is for Wyoming or Idaho users, are to be limited to the diversion of not more than 1 cubic foot of water per second of time for each 50 acres of land (1 inch per acre as expressed by some); and at all times when the stream flow of said Creek in Wyoming is less than 90 cubic feet per second of time, the available supply is to be diverted equally between the two States; it being understood that all ditches diverting in Wyoming, from Teton Creek, and now having legal appropriations of water in Wyoming and/or Idaho, to be supplied from the one-half of said stream flow awarded to Wyoming, excepting therefrom the Grand Teton Canal, which, for the sake of this agreement, is to be considered as an Idaho appropriation and receive any water to which it may be entitled, under the laws of State of Idaho, from the Idaho portion of said stream flow; the administration of said rights shall be by each state, in accordance with their existing laws.

2. That the water supply of the town of Driggs, Idaho, now diverted and conveyed to said town from a diversion in the State of Wyoming shall be taken from the portion of the water allotted to Idaho to the extent of the right of said town, but shall be limited to such right as now established by permit or decree by the Board of Control or other proper department of the State of Wyoming and such right not to be recognized in an amount in excess of said permit or decree or in excess of the amount heretofore diverted by said town, through any diversion made from Teton Creek or tributaries in the State of Wyoming.

The undersigned agrees to the foregoing interpretation of the portion of the agreement referred to.

James A. Greenwood, Attorney for the
Wyoming appropriators, Signed _____

L.C. Bishop, Interstate Streams Commissioner
for Wyoming. Signed _____

F. A. MILLER, Attorney for the Idaho
appropriators, Signed Dec. 19, 1940

James Spofford, Commissioner of Reclamation
for Idaho. Signed Dec. 19, 1940

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EXHIBIT B

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