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Department of Water Resources

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DISTRICT COURT - SRBA
TWIN FALLS CO, IDAHO

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

) Subcases: 36-00039D

Case No. 39576

)
) **FINDINGS OF FACT**
) **AND CONCLUSIONS OF LAW**
)

I. PROCEDURAL BACKGROUND

Water right 39-00039D came before the court for trial on August 11, 1999. The water right is claimed by Fred and Susan Walmsley (claimants). The respondent is Cranny Brothers, Inc. (Cranny). The only element in dispute is quantity.

II. FINDINGS OF FACT

1. There were a number of objections to various elements of water right 36-00039D. At the start of the trial, both parties agreed that the only element to be tried was quantity. The claimants accepted all other elements as recommended by the Director of the Idaho Department of Water Resources.

2. Water right 39-00039D is located in the Hagerman Valley. The place of use for water right 39-00039D is the Willowbrook Subdivision (Subdivision). The claimants purchased the property 1981. The property was then rented for two years. The claimants have actually lived on the property since 1984. The claimants have been the sole irrigators on the property since 1984. The claimants use the two-acre place of use for pasture, although some of the acreage is also used to grow crops.

3. The water right was originally perfected using gravity irrigation. Since 1981, the place of use has been irrigated by a sprinkler system designed by the claimants. A small portion of the property, approximately one-tenth of an acre, has been irrigated by flood irrigation. The sprinkler system is powered by two pumps. Based on the capacity and pump specifications, the claimants estimate that the amount of water used to irrigate the land is 0.081 cfs.

4. The Director's Report for this water right originally recommended a quantity of 0.06 cfs. That quantity was based solely on a sprinkler delivery method. After the Director's Report was filed, the Director's recommendation changed. In 1998, IDWR decided that all water rights that were originally appropriated using a gravity irrigation method would be based on a quantity reflecting a gravity delivery system. This is true even if the water right is actually delivered by a sprinkler system, which uses less water. IDWR's change in policy was based on the possibility that as power costs rise, irrigators may choose to return to a gravity irrigation method to reduce costs. Based on this new policy, IDWR determined that the new recommendation for water right 36-00039D should be 0.08 cfs.

5. The methods used to calculate the quantity for a sprinkler or gravity irrigation method are not in dispute. Based on a sprinkler delivery method, IDWR calculated the quantity of water used in the Hagerman Valley to be one inch (0.02 cfs) per acre. Recognizing small acreages, less than five acres, to be less efficient than larger acreages, IDWR found the quantity of water in the Hagerman Valley to be an inch-and-a-half (0.03 cfs) per acre. For gravity irrigation, IDWR determined that the quantity should be two inches (0.04 cfs) per acre.

6. This water right is diverted from Billingsley Creek. It then runs 1,400 feet down the Buckeye Ditch. The conveyance loss for water running down the Buckeye Ditch is 0.35 cfs. The water is then diverted again into Willowbrook Creek where it runs approximately 300 feet to the claimants' place of use. No conveyance loss was calculated for Willowbrook Creek. IDWR did not include any conveyance loss because it determined that the amount of conveyance loss using a pro rata method was too small, 0.002 cfs, to include in the recommendation.

7. This water right was originally decreed under the *New International Mortgage Bank v. Idaho Power Company*, in Equity No. 1602 (S.D. Idaho, Mar. 22, 1932) (*International Mortgage Decree*). The original decreed right was assigned water right number 36-00039. The amount decreed to the land was 3.0 cfs. Having considered all the evidence produced at trial, the court finds that the prior decree has little, if any, weight as to quantity. This right was split a number of different times from the original decreed right. From the evidence produced, this court cannot discern what portion of the original decreed right should be assigned to this particular water right. If anything, the prior decree would be relevant as to the priority date. Here, none of the parties

disputed the priority date assigned by the Director's Report to water right 36-00039D. The quantity determination contained in these findings is based solely on the testimony of IDWR.

III. STANDARD OF REVIEW

The Director's Report constitutes *prima facie* evidence of the water right. Idaho Code § 42-1411(4). The objecting party has the burden of going forward with evidence to rebut the Director's Report as to all objections filed. Idaho Code § 42-1411(5). Idaho Code § 42-1411(5) is silent as to the quantum of proof necessary to overcome the presumption raised by the Director's Report. If a statute is silent as to the quantum of proof necessary to overcome a presumption, then the presumption is overcome when the "opponent introduces substantial evidence of nonexistence of fact." *Bongiovi v. Jamison*, 110 Idaho 734, 738-39, 718 P.2d 1172, 1176-77 (1986), *citing* Committee Comment to I.R.E. 301. Substantial evidence is defined "as such relevant evidence as a reasonable mind might accept to support a conclusion; it is more than a scintilla, but less than a preponderance." *Evans v. Hara's, Inc.*, 123 Idaho 473, 478, 849 P.2d 934 (1993). "When rebutted, the presumption disappears and the party with benefit of the presumption retains the burden of persuasion on the issue." *In Re SRBA Case No. 39576 (24 Hagerman Subcases)*, 130 Idaho 736, 745, 947 P.2d 409 (1997). If the presumption is overcome by the objector, then the claimant has the "ultimate burden of persuasion for each element of a water right." Idaho Code § 42-1411(5).

IV. CONCLUSIONS OF LAW

A. ON FIELD REQUIREMENTS

1. Partial Forfeiture

The original Director's Report for water right 36-00039D recommended a quantity of 0.06 cfs. This amount was based on a sprinkler irrigation system. At trial, IDWR amended its recommendation to 0.08 cfs. This amount was based on a gravity irrigation and a determination that the water right was originally appropriated using gravity irrigation system. Cranny alleges that any recommendation based on a gravity system is erroneous because the claimants have irrigated a vast

majority of the land since 1981 using a sprinkler system and, therefore, argues that any amount of water saved by switching to a sprinkler irrigation system is forfeited.

The inquiry before the court is whether a water right owner who originally appropriates a right using a gravity irrigation system partially forfeits any part of the water right when the user switches to a sprinkler irrigation system. Partial forfeiture is covered by Idaho Code § 42-222. See *In Re: SRBA Case No. 39576 (Partial Forfeiture)*, 130 Idaho 727, 947 P.2d 400 (1997). Section 42-222 is silent as to whether switching from a less to a more efficient irrigation system constitutes partial forfeiture. However, IDWR has a state-wide policy whereby if a user originally appropriated the water right using a gravity irrigation system, the water right will be based on such a system even though the water user may have switched to a sprinkler irrigations system which uses less water.¹ The court agrees with this policy.

First, the court is required to give IDWR's determination regarding forfeiture "great weight." *Id.*² Second, IDWR's policy determination has found favor with a least one other court. The Montana Supreme Court in *McDonald v. State*, 722 P.2d 598 (Mont. 1986), held as follows:

In oral argument, counsel for McDonald contended that if an appropriator who formerly used flood irrigation switched to sprinkler irrigation, the appropriator would be using less water than the original appropriation allowed for him. If, by reason of excessive utility rates or otherwise, the appropriator decided to return to flood irrigation, and to abandon the sprinkling, he would be deprived under an acre feet decree of a water right guaranteed to him by the Constitution. In our view, such an appropriator would be in no different position than the appropriator, who in wet years, though entitled to 400 miner's inches of water for 60 days, used only 200 inches for 30 days. There is no doubt that he would have the right to return in dry years to the full extent of his appropriation provided he was putting the water to a beneficial use.

Id. at 605.

The court agrees with IDWR and the reasoning outlined in *McDonald*. A water user should not be punished if the user switches from a less efficient gravity irrigation method to a more efficient

¹ IDWR does not express its policy in terms of partial forfeiture. However, the result of the policy is that when a user originally appropriates water using a gravity system and then switches to a sprinkler system, less water is used. Nevertheless, IDWR does not consider the reduction in use of water to amount to a partial forfeiture.

² An agency's determination regarding a statute is entitled to great weight if: "(1) the agency has been entrusted with the responsibility to administer the statute at issue; (2) the agency's construction of the statute is reasonable; (3) the statutory language at issue does not expressly treat the precise question at issue; and (4) any of the rationales underlying the rule of deference are present." *In Re: SRBA Case No. 39576 (Partial Forfeiture)*, 130 Idaho 727, 947 P.2d 400 (1997).

sprinkler irrigation system. See, e.g., *Hodges v. Trial Creek Irr. Co.*, 78 Idaho 10, 297 P.2d 524 (1956) (forfeiture of a water right is not favored, and all intendments are to be indulged in against a forfeiture). Given the economic realities of farming, an irrigator may have to return to a gravity irrigation method should power costs rise making sprinkler irrigation too expensive for that particular irrigator. Second, as stated in *McDonald*, switching irrigation systems is no different than an irrigator who may use less water in wet years. The irrigator who uses less water in wet years does not forfeit the unused water that would normally be used in dry years.

For these reasons, the court adopts IDWR's policy as a rule: If an irrigator appropriates a right using gravity irrigation and then switches to a sprinkler irrigation system, that user does not forfeit any part of the right and may return to a gravity irrigation system. Here, the undisputed quantity used to irrigate the place of use under a gravity irrigation system is 0.08 cfs (0.04 cfs per acre multiplied by 2 acres).

2. Pump Capacity

At trial, the claimants established that the pump capacity for their sprinkler system is 0.081 cfs. Pump capacity, without any further analysis as to crop consumption, has little relevance as to the proper on-field requirement for any particular crop. The capacity of a pump or ditch system, without more, cannot be used to establish quantity.

This rule was best outlined by the court in *McDonald v. State*.

A readings of the many cases on the law of appropriation indicates a gradual and consistent tightening of the rule measuring the rights of appropriators. The early cases measured the appropriator's right by the capacity of his ditch, but that rule has long since been repudiated in this state. . . . If the appropriator uses more than the amount so required, he gains no right thereto. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use. Insofar as the diversion exceeds the amount reasonably necessary for beneficial purposes, it is contrary to the policy of the law and is a taking without right and confers no title, no matter for how long continued.

Id. at 650-606 (citations omitted), citing *Tulare Irr. Dist. v. Lindsay Strathmore Irr. Dist.*, 45 P.2d 972 (Cal. 1935). Here, the pump capacity of the claimants' irrigations system, without more, is irrelevant.

B. CONVEYANCE LOSS

In measuring quantity, the rule is "waters appropriated will be measured for their sufficiency from the point of diversion, not at the place of use." *Glenn Dale Ranches, Inc. v. Shaub*, 94 Idaho 585, 588, 494 P.2d 1029 (1972); *see also, Hidden Springs Trout Ranch v. Hagerman Water Right Users, Inc.*, 101 Idaho, 677, 681, 619 P.2d 1130 (1980). Since the right is measured from the point of diversion, the quantity decreed must include conveyance loss. Conveyance loss is that amount of water necessary to deliver the right from the point of diversion to the place of use.

In this case, there is no dispute as to the conveyance loss necessary to deliver the water right. The only real dispute is how conveyance loss is allocated between users on any given ditch system. IDWR employs a so-called weighted pro rata method of determining conveyance loss in the Hagerman area. On any ditch, there may be a number of rights. For any water right along the ditch, that water right shares a portion of the total conveyance loss with other rights along the ditch. For example, if the total conveyance loss in a ditch was 1.00 cfs, IDWR would distribute the 1.00 cfs to all rights along the ditch based on the proportionate size of the water right.

The result of the weighted pro rata method is that the recommendation for each right along the ditch includes a conveyance loss less than the amount of water actually necessary to deliver each particular water right on the ditch. One problem with IDWR's method is that it requires that all rights along a ditch are fully used and never abandoned or forfeited. If any single right along the ditch is not in use or is abandoned or forfeited, then there will not be enough conveyance loss in the ditch system to deliver all the rights.

Furthermore, the court is concerned about the accuracy of any decree entered in the SRBA if a water right along a ditch is abandoned or forfeited. If one right is abandoned or forfeited on a ditch system, then the total conveyance loss in a ditch will not be sufficient to deliver the remaining water rights. Under these circumstances, the court would have to continuously update its decree to ensure that conveyance loss is accurately reflected and sufficient for any given ditch system. Determining and including the conveyance loss for each single right in a ditch system cures the

problem. Using this method, any rights that remain in a ditch system after one or more rights are abandoned or forfeited will always reflect the correct conveyance loss independent of other rights.³

Another problem with IDWR's method of allocating conveyance loss is the potential result in case of a call made on water. In times of scarcity, water rights are delivered "first in time, first in right." IDAHO CONST., art XV, § 3. Since the quantity of the water right is measured from the "point of diversion, not place of use," *Glenn Dale Ranches, Inc. v. Shaub*, any user making a call has a right to that amount of water necessary to deliver the right from the point of diversion to the place of use. Because IDWR did not factor in any conveyance loss for these water rights, it would be impossible for water to be delivered to its place of use. The right holders' ability to make an effective call would require that all rights up ditch be in use and valid.

For these reasons, the court finds that the full conveyance loss should be included in the quantity for any given right. In this case, there is no dispute that it takes 0.35 cfs of conveyance loss to deliver all the water rights down the Buckeye Ditch to the headgate of Willowbrook Creek.⁴ The total quantity for the water rights shall be the conveyance loss, 0.35 cfs, plus the on-field requirements of 0.08 cfs (0.04 cfs multiplied by two acres). The quantity for these rights should be reported as follows:

36-00039D Quantity: 0.43 cfs.

Of the total quantity, 0.35 cfs is for conveyance loss. The same conveyance loss is shared and used in combination with all other water rights diverted out of the Buckeye Ditch.

The amount determined by the court exceeds the amount claimed. If the claimants accept these quantities, they will be required to amend their claims. If the claims are amended, the court will allow further objection and response periods. In lieu of accepting the full amount of conveyance

³ IDWR's solution as to what occurs in case of a forfeiture makes little sense. According to IDWR, if a particular water right is forfeited, the portion of that right constituting conveyance loss remains as an independent water right. Such a solution begs a few serious questions. First, if the water right is forfeited, in whose title does the conveyance portion of the water right remain? Second, how do the remaining users in the ditch system insure use of full conveyance loss required to deliver their water right? IDWR takes the position that the remaining users must apply for a transfer to recoup the conveyance loss remaining in the system. Because transfers are only for changes in the point of diversion, place of use, period of use, or nature of use, Idaho Code § 42-222(1), there are serious legal questions of whether a transfer proceeding could accomplish the purpose intended by IDWR regarding conveyance losses.

⁴ Again, there is no evidence on the conveyance loss of Willowbrook Creek.

loss, the claimants have the option of accepting the full on-field requirements with less conveyance loss. Under this scenario, the quantities would be reported as follows:

36-00039D Quantity: 0.41 cfs.

Of the total quantity, 0.33 cfs is for conveyance loss. The same conveyance loss is shared and used in combination with all other water rights diverted out of the Buckeye Ditch.

C. QUANTITY IN EXCESS OF 0.02 CFS PER ACRE - IDAHO CODE § 42-220

The water right, as recommended, exceeds one inch per acre (0.02 cfs). The court is required to make findings if an amount exceeds one inch per acre.

[N]o license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water . . . unless it can be shown to the satisfaction of the department of water resources in granting such licenses, and to the court in making such decree, that a greater amount is necessary.

Idaho Code § 42-220.

Under Idaho Code § 42-1411(5), the Director's Report is *prima facie* evidence of the water right. The term "*prima facie*" means that there is sufficient evidence before the court "to justify a finding of the matter in question by the trier of fact." D. Craig Lewis, IDAHO TRIAL HANDBOOK, § 10.2, at 102 (1st ed). "The determination of facts by the Director is presumptively correct." *In Re SRBA Case 39576* (Enlargement), 129 Idaho 454, 462, 926 P.2d 1301 (1996); *see also, In Re SRBA Case 39576* (24 Hagerman Subcases) at 418. What this means is that the court can conclude from the Director's Report that any water recommended by the Director in excess of one inch-per-acre (0.02 cfs) is a beneficial use of water.

In addition to the Director's Report, it is clear that more than 0.02 cfs is required for these rights. The soil in the Hagerman Valley is very sandy. Because of the nature of the soil and the fact that the climate in the Hagerman Valley is generally hotter than the rest of the State, more than 0.02 cfs is necessary to irrigate the land at issue. Furthermore, the fact that this water right requires more than one inch per acre was not challenged at trial. Cranny did not contest IDWR's initial recommendation of 0.06 cfs which equates to one and one-half inch (0.03 cfs) per acre.

For these reasons, the court finds that the water rights which exceed one inch per acre (0.02 cfs) do constitute a beneficial use of water.

D. PRIOR DECREE

At trial, the claimants introduced the *International Mortgage Decree*. Cranny objected on the basis that they were not parties to the decree. Because prior decrees entered in private adjudications are not binding or conclusive as to nonparties or nonprivies, *State v. Hagerman Water Right Owners* (24 Hagerman Subcases), 130 Idaho 736, 742, 947 P.2d 409 (1997), Cranny argued that the decree should not be admitted into evidence. This argument fails for a number of reasons.

Cranny, in the litigation of other subcases, cited *Payette Lakes Protective Ass'n v. Lake Reservoir Co.*, 68 Idaho 111, 189 P.2d 1009 (1948), in support of its argument. In that case, the court held that a prior decree, except for limited circumstances, cannot be used against nonparties or nonprivies. *Id.* at 124; but see *Hill v. Merrimac Cattle Co.*, 687 P.2d 59, 68 (Mont. 1984) (prior decree may be admitted against non-parties or non-privies as "some evidence of the water right") citing *Wills v. Morris*, 50 P.2d 862 (Mont. 1935).⁵ For purposes of admitting the *International Mortgage Decree* to support a theory based on *res judicata* or collateral estoppel, this court agrees that the decree cannot be offered for those purposes.

However, *Payette Lakes* was decided before the adoption of the Idaho Rules of Evidence. In many instances, the rules changed the way evidence is considered.⁶ Therefore, this court will evaluate the *International Mortgage Decree* under those rules. As with any evidence, the first inquiry is whether the evidence offered is relevant. This inquiry was answered by the Supreme Court in 24 Hagerman Subcases. In that case, the court held that a decree entered in a private adjudication "evidences" the right to use water. Since the prior decree "evidences" a right to use water, it must

⁵ The legal principles outlined in *Wills v. Morris* are sound. In that case, the Montana Supreme Court likened a decree to a document creating title. As with all titles affecting a property right, the title is admissible even against strangers to title.

A judgment may constitute part of a chain of title to real or personal property. Though not amounting to title, it may show the character of possession of one of the parties to the suit. In either case it is admissible in evidence for or against strangers, as well as for or against the parties to the original suit. Whenever a judgment transfers a title, or is the foundation of a claim to possession, it is admissible upon the same principle as a voluntary conveyance.

Id. at 865, citing 4 JONES ON EVIDENCE (2d Ed.) p. 3375. The court went on to hold that "[a] water right, as we have noted above supra, is property, and a judgment which in some measure determines or affects one's water right is admissible as against a stranger, not to conclude him, but to evidence the right of one in whose favor it is rendered. . . ." *Id.*

⁶ For example, the prior decree 30 years or more of age qualifies as an "ancient document" under I.R.E. 803(16). Prior to adoption of the Idaho Rules of Evidence, the Committee determined that as to ancient documents, "[n]o Idaho statutes, rules or decisions have been located that are relevant to this exception." Idaho State Bar Evidence Committee at C 803 p. 26.

be relevant in a water adjudication under I.R.E. 401 as "having [a] tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

Although relevant, the decree must also be admissible. As an out-of-court declaration offered for the truth of the matter asserted, the *International Mortgage Decree* is hearsay. I.R.E. 801. The inquiry is whether any hearsay exception applies to the decree. Under I.R.E. 803(16), "ancient documents" may be admitted if the document has been in existence for 30 years or more and the document is authenticated. Ancient documents apply to numerous types of documents including certificates of title. See 7 WIGMORE, EVIDENCE § 2145. Certainly, a decree can be considered an ancient document.⁷

Ancient documents may be admitted against third parties even if they could not be admitted otherwise. For example, in *Caranta v. Pioneer Home Improvements, Inc.*, 467 P.2d 719 (N.M. 1970), a deed was offered to establish ownership in a quiet title action. The deed was offered against a third party who was neither a party nor privy to the deed. Under the facts of the case, the court held that the deed was improperly considered because the deed did not qualify as an ancient document. However, had the deed qualified as an ancient document, it would have been admissible against the third party.

Although the general rule is that recitals in a deed are mere hearsay and are inadmissible in evidence as against a third person who claims by a paramount title, there is an exception to this rule in the case of an ancient deed accompanied by possession and such deed is admissible, even as against third persons, as prima facie evidence of the facts recited in it.

Id. at 721, citing 6 THOMPSON ON REAL PROPERTY (1962 Replacement) § 3110 at 852.

The whole purpose of the ancient document exception is that with the passage of time and out of necessity, the ancient document may be the only probative evidence establishing the existence or nonexistence of any particular controversy before the court. "Statements in such ancient documents are admissible due to a rule of necessity as well as to the reliability of such evidence in comparison to any other form of available evidence." *Compton v. Davis Oil Co.*, 607 F. Supp. 1221 (1985), citing LOUISELL AND MUELLER, FEDERAL EVIDENCE, vol. 2 § 464 (1972); J. MOORE,

⁷

The decree deemed not admissible against the nonparties in *Payette Lakes* was dated 1944. The decision in *Payette Lakes* was dated 1948. At most, the prior decree was only four years old and, therefore, would not have complied with the ancient document exception had that exception existed in 1944.

MOORES FEDERAL PRACTICE, vol. 11 § 803(16) (2nd ed. 1976 and 1982 Supp.); WICKES, ANCIENT DOCUMENTS AND HEARSAY, 8 Tex.L.Rev. 451, 461-464 and n. 25 (1930). MCCORMICK, EVIDENCE, § 298 (1954), § 323 (2d ed. 1972); 5 WIGMORE, EVIDENCE § 1573a (Charbourn rev. 1974).

Here, the *International Mortgage Decree* is 68 years old and, therefore, qualifies as an ancient document. See also, I.R.E. 803(14) and 803(15). The priority dates covered by the decree date back to the early 1900s or late 1800s. The court will assume that most, if not all, of the witnesses to the use of these water rights as of the claimed priority dates are deceased. Because these parties are deceased, the *International Mortgage Decree*, as an ancient document, has evidentiary value. Any alleged defects in the decree, such as the decree being entered as a consent decree, go to the weight rather than the admissibility of the decree. See *Hill v. Merrimac Cattle Co.*, 687 P.2d at 71 ("the nature of the [ancient] document must be considered when considering the weight it can be given in proving a point in controversy").

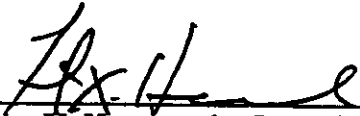
Outside the rules of evidence, the statutory scheme behind title 42, chapter 14, Idaho Code, suggests that prior decrees must be admissible. For example, Idaho Code § 42-1427 allows parties to use data as of the commencement date, 1987, to prove undefined elements of prior decrees. The decree would be admitted as foundational evidence for the claimant being able to use data from 1987 to prove the use of any undefined elements of the decreed water right. See *infra* § VI(A). If the court cannot consider prior decrees, then Idaho Code § 42-1427 would be a nullity. Furthermore, since the court is allowed to consider forfeiture or abandonment in evaluating any particular right, the court must have a baseline to determine what, if any, of the right has been forfeited or abandoned. The prior decree sets that baseline.

For these reasons, Cranny's objection to the admissibility of the decree was overruled. However, having considered all the evidence produced at trial, the court finds that the prior decree has little, if any, weight as to quantity. This right was split a number of different times from the original decreed right, 36-00039. From the evidence produced, this court cannot discern what portion of the original decreed right should be assigned to this particular water right. If anything, the prior decree would be relevant as to the priority date. Here, none of the parties disputed the priority date assigned by the Director's Report to water right 36-00039D.

V. CONCLUSION

For all these reasons, therefore, IT IS RECOMMENDED that the quantity for this water right should be 0.41 cfs.⁸

DATED August 23, 1999.


Fritz X. Haemmerle, Special Master
Snake River Basin Adjudication

⁸

If the claimants choose to amend their claim, the water right should be decreed with a quantity of 0.43 cfs.

CERTIFICATE OF MAILING

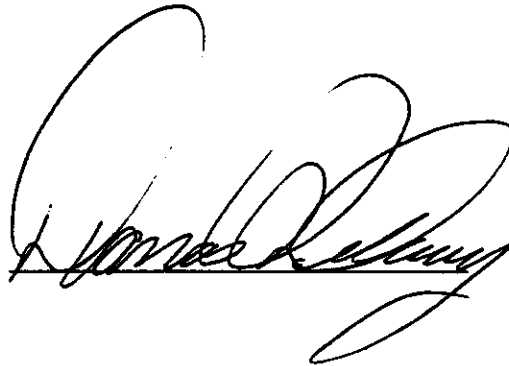
I certify that a true and copy of the FINDINGS OF FACT AND CONCLUSIONS OF LAW was mailed August 31, 1999, with sufficient first-class postage to the following:

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A handwritten signature in black ink, appearing to read "Michael C. Creamer", is written over a horizontal line.