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Department of Water Resources

June 15, 2004

Ms. Jan Shurte
Adjudication Bureau Supervisor
Idaho Department of Water Resources
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Re: Baicy SRBA Claim to Water Right No. 63-07431

Dear Ms. Shurte:

As I explained in our recent telephone discussion, this law firm represents John Baicy with respect to the above-referenced SRBA claim to a water right. As we discussed, I am sending this correspondence to: (1) explain details related to the claim; (2) to request that IDWR conduct research related to its currently proposed disallowal of the claim; and (3) to request a meeting for discussion of the issues related to the claim.

1. The SRBA Claim

My client filed an SRBA claim to water right no. 63-07431 on August 22, 1989. The claim was for 3.2 cfs from groundwater to irrigate the entire northeast 1/4 of Section 19, Township 1N, Range 1E. The claim also included stockwater and domestic uses of .02cfs for a total quantity claimed of 3.24 cfs. The basis for the claim is permit no. 63-07431.

2. The Permit

Lillian Terwilliger applied for a permit to appropriate 3.24 cfs from groundwater for irrigation, stockwater and domestic uses on May 11, 1971. IDWR approved the permit application on June 17, 1971. Ms. Terwilliger assigned her interest in permit no. 63-07431 to Mr. Baicy on January 31, 1972. Mr. Baicy submitted Proof of Beneficial Use of water diverted pursuant to permit no. 63-07431 on September 21, 1976, but did not indicate whether or not he had installed a measuring device pursuant to the permit's conditions. The Department responded to Mr. Baicy, informing him of the failing in his submission of Proof of Beneficial Use. Mr. Baicy resubmitted Proof of Beneficial Use on May 12, 1978. In 1986, IDWR corresponded twice with Mr. Baicy explaining the new (at that time) statutory requirement that a fee be submitted prior to the conduct of a beneficial use field examination by IDWR. Mr. Baicy responded by sending a check in the amount of \$225.00 (as established by IDWR's responsive correspondence of October 21, 1986) and correspondence explaining that he had been waiting ten years for an examination. In its response of October 21, 1986, IDWR explained to Mr. Baicy that it had not conducted his

beneficial use field exam due to a lack of funding. IDWR conducted a beneficial use field exam in June, 1992. The examiner states in her report that although the power supply for the well was in place, she did not find beneficial use of the water diverted pursuant to the permit, and recommended disallowal of the right.

In the ensuing correspondence, IDWR explained to Mr. Baicy that it was planning to cancel his permit, and Mr. Baicy explained that he had put water diverted pursuant to the permit to beneficial use for at least the period from 1975 to 1985. After correspondence back and forth, IDWR conducted a second field exam in 1995 evidenced by a file memo from Mel Schulte which states that although he found no evidence of current irrigation, he did find evidence supporting use of the water right for irrigation in the past. IDWR subsequently issued its Preliminary Order voiding the permit on July 17, 1995, finding that water had "not been applied to a beneficial use since 1985." The July 17, 1995 Order did not reach Mr. Baicy, as evidenced by the certified mail receipts returned with the letter containing the Order. Mr. Baicy wrote to IDWR on December 30, 1995, again explaining that he had used water pursuant to the permit from 1975 to 1985 and notifying the Department that he had been out of the country during the time that IDWR attempted to serve him with a copy of its Preliminary Order. Glen Saxton responded to Mr. Baicy's letter by writing a file memo stating that "[u]nless Baicy can provide evidence to show that the land associated with the voided permit was in a federal cropland set-aside program which would prevent forfeiture to the right through non-use . . . the Department should take no action to rescind its Preliminary Order."

3. Analysis

The SRBA District Court has held that the running of the forfeiture period set forth in I.C. §42-222 is tolled from the time a claim is filed in the Snake River Basin Adjudication until a partial decree in that proceeding is issued. *See Memorandum Decision and Order on Challenge, In Re SRBA, Subcase 65-05033B (Wood v. Troutt) (May 9, 2002); Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, In Re SRBA, Subcases 65-02708 et. al. (Dec. 29, 1999).* It is my understanding that IDWR has recognized and applied what has become to be known as the "Forfeiture Tolling Rule" in various circumstances, including its recommendations of water rights in the SRBA. Mr. Baicy's circumstances are no different. He filed a claim in the SRBA in 1989. At that point, the forfeiture period was tolled, preventing forfeiture of his water right.

It seems appropriate that IDWR should reexamine its proposed disallowal of Mr. Baicy's SRBA claim in light of the application of the Forfeiture Tolling Rule. Instead of making an automatic assumption that the water right is void because it has been forfeited, IDWR should examine the evidence of beneficial use of the water right during the period before the SRBA claim was filed. (Notably, IDWR has only conducted an investigation of the use of the water right as of 1992, not for any other time period). If IDWR conducts its investigation and finds (as is the fact)

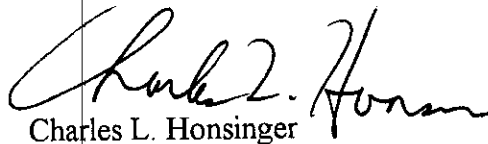
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that water was diverted and beneficially used pursuant to permit no. 63-07431 through at least 1985, then it must recommend the existence of the water right in the SRBA.

Please consider the contents of this correspondence carefully and discuss it with your staff and your attorneys. I would appreciate an opportunity to meet with you, IDWR's legal counsel, and any other appropriate personnel to discuss this issue. My client remains hopeful for a positive resolution of this matter, and would also be willing to meet personally with you and other IDWR personnel given sufficient notice.

Please contact me with any questions regarding this matter.

Sincerely,


Charles L. Honsinger

cc: John Baicy
Dave Tuthill
Susan Hamlin