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Department of Water Resources

1 Norman M. Semanko
2 ROSHOLT, ROBERTSON & TUCKER
3 P.O. Box 1906
4 Twin Falls, Idaho 83303-1906
5 Telephone: (208) 734-0700
6 Facsimile: (208) 736-0041
7 03069803.NMS

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9 Attorneys for Objectors
10 Kirby A. Jensen and Doyle Jensen
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12 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
13 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS
14

15 In Re SRBA)
16) JENSENS' RESPONSE TO
17) CLOSING ARGUMENTS
18)
19 Case No. 39576) Subcase Nos. 34-02428, 34-07096,
20) 34-07097, 34-07223, 34-12416,
21) 34-00496A, 34-00692D
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18 This is the Response of objectors Kirby A. Jensen and Doyle Jensen to the closing
19 arguments of Mitchell D. Sorensen in the above-captioned subcases.
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1. Sorensen Introduced No Evidence to Support the Decreeing of Claim Nos. 34-07096B or 34-07097B.

In his brief, the claimant, Mitchell D. Sorensen, states:

... we observe no evidence to have been generated from the examination of Mr. Fritschle and Mr. Verner by Jensens' attorney which even suggests that the elements of any of the Sorensen rights, as recommended by IDWR, are incorrect or were based on inaccurate factual foundation. Nor did we hear or see any other evidence from the

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Department of Water Resources

Norman M. Semanko
ROSHOLT, ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, Idaho 83303-1906
Telephone: (208) 734-0700
Facsimile: (208) 736-0041
03069803.NMS

Attorneys for Objectors
Kirby A. Jensen and Doyle Jensen

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	)	
	)	JENSENS' RESPONSE TO
	)	CLOSING ARGUMENTS
	)	
Case No. 39576	)	Subcase Nos. 34-02428, 34-07096,
	)	34-07097, 34-07223, 34-12416,
	)	34-00496A, 34-00692D

DESCRIPTIVE SUMMARY

This is the Response of objectors Kirby A. Jensen and Doyle Jensen to the closing arguments of Mitchell D. Sorensen in the above-captioned subcases.

RESPONSE TO CLOSING ARGUMENTS

- Sorensen Introduced No Evidence to Support the Decreeing of Claim Nos. 34-07096B or 34-07097B.

In his brief, the claimant, Mitchell D. Sorensen, states:

...we observe no evidence to have been generated from the examination of Mr. Fritschle and Mr. Verner by Jensens' attorney which even suggests that the elements of any of the Sorensen rights, as recommended by IDWR, are incorrect or were based on inaccurate factual foundation. Nor did we hear or see any other evidence from the

1 testimony of the other witnesses or exhibits provided by Jensens which demonstrates that
2 even one element of any of the recommended Sorensen rights is factually incorrect.

3 Claimant's Closing Argument, p. 10 (Feb. 26, 1998). We respectfully disagree.

4 The testimony and other evidence provided at trial clearly demonstrate that only 2.7 cfs
5 was developed by Boyd Burnett under permit nos. 34-07096 and 34-07097, within the
6 authorized development period between 1975 and 1980. All of this development was on Kirby
7 Jensen's farm, located in Section 17. The department's conclusion that additional water was
8 developed under these permits from the Sorensen well in Section 5 is factually and legally
9 incorrect. As a result, claim nos. 34-07096B and 34-07097B, which would recognize
10 development above the 2.7 cfs level, should be decreed as disallowed.
11

12 As set forth in Jensens' closing argument, the 1983 and 1987 field examinations, as well
13 as the testimony of Keith Wilson and Eric Verner, show that only 2.7 cfs was developed under
14 the two permits, and only on Kirby Jensen's Section 17 farm. Boyd Burnett further testified
15 that he developed the permits only on Kirby Jensen's property. The permit conditions required
16 that development be completed between 1975 and 1980 and Boyd Burnett provided proof of
17 beneficial use during 1980.
18

19 Sorensen states that "an additional 2.72 cfs has been diverted from Sorensen's well since
20 1978". Claimant's Closing Argument at 30. However, Sorensen did not own the two permits
21 in 1978 and the water could not have been developed by Sorensen under the two permits. In
22 fact, he did not acquire the permits until well after 1980. By this time, it was too late to
23 develop any additional water under the two permits. This, and the fact that the additional use
24 was not authorized under 34-02428, explains Sorensen's filing of Application for Permit No.
25 34-07247, which has yet to be approved by the director.
26

1 The truth is that ample evidence has been provided by the Jensens to rebut the statutory
2 presumption afforded to the director's report under I.C. Sec. 42-1411(4) and (5). In the words
3 of the Idaho Supreme Court, the "evidentiary presumption is overcome by the evidence". In
4 Re SRBA Case No. 39576, 128 Idaho 246, 256 (1995). On the other hand, no evidence has
5 been provided by the claimant Sorensen to demonstrate that claim nos. 34-07096B and 34-
6 07097B should be decreed as recommended by the director. Sorensen apparently believes that
7 the director's recommendation is sufficient.
8

9
10 In his closing argument, Sorensen states that the issue in this matter "is whether IDWR
11 has authority to control the terms and conditions of development or appropriation of a water
12 right under the statutory method or not." Claimant's Closing Argument at 33. He
13 acknowledges that IDWR may set "the initial period for completion of the works and submitting
14 proof of beneficial use under any permit". Id. The brief goes on to state, without citing any
15 legal authority, that "we think IDWR can also legally modify such conditions in any manner
16 it deems appropriate so long as no one's rights are adversely affected." Id. at 34.
17

18 In essence, Sorensen's argument is that, even though IDWR clearly required that the two
19 permits be developed between 1975 and 1980, additional development could be authorized by
20 IDWR under these same permits after 1980. We cannot read the law this way.

21 IDWR may initially grant up to five years to develop a permit. I.C. Sec. 42-204 ("The
22 department shall require that actual construction work and application of the water to beneficial
23 use shall be complete within a period of five (5) years"). That is what was done for permit nos.
24 34-07096 and 34-07097.
25

26 Additionally, IDWR may grant an extension of time, not to exceed an additional five
years, "upon request for extension received on or before the date set for completion, provided

1 good cause appears therefor." I.C. Sec. 42-204; see also, I.C. Sec. 42-218 ("The department
2 shall grant no extension unless the application therefor be filed with it prior to the date upon
3 which the proof of beneficial use was required to be made under the original terms of the
4 permit."). There exists no other mechanism by which the authorized development period can
5 be extended.
6

7 In this case, there is no evidence that a request for extension was even made, let alone
8 granted. In fact, the evidence clearly demonstrates that proof of beneficial use was due, and
9 submitted by Boyd Burnett, during 1980. There is no evidence of any kind in the record that
10 the department authorized additional development under the two permits after 1980. As a
11 result, even if Sorensen's legal theory is correct, there is no factual basis to support a finding
12 that the development period was extended in this case. If Sorensen seeks to develop additional
13 water from the Section 5 well, he must secure a new permit, presumably under his existing
14 application for permit, which has been pending with the department since 1980.
15

16 For these reasons, SRBA claim nos. 34-07096B and 34-07097B should be decreed as
17 disallowed. Claim nos. 34-07096A and 34-07097A should be decreed as recommended in
18 Exhibit 1C, but should be renumbered as 34-07096 and 34-07097 since there is no split of the
19 water rights into A and B portions.
20

21 2. Jensens have the Right to Use all Water Available Under Water Right Nos. 34-
22 07096 and 34-07097.

23 Sorensens do not agree with Jensens' interpretation of the exchange statutes, I.C. Secs.
24 42-105 and 42-240 (repealed 1986), or the exchange agreements between the parties. This is
25 not surprising.
26

1 The simple truth of the matter is that Kirby Jensen and Sorensen have exchanged the use
2 of each others water rights. This means that Sorensen is allowed to use all of Kirby Jensen's
3 surface water right, while Jensen is allowed to use all of Sorensen's ground water rights (34-
4 07096 and 34-07097). The approved exchange applications and exchange agreements do not
5 provide for splitting the ground water rights into A and B portions. Rather, they allow Kirby
6 Jensen to use all of the water available under 34-07096 and 34-07097 "in lieu" of his surface
7 water right. Exhibit 26.
8

9 Sorensen points out that "Kirby has not filed a separate claim in the SRBA" for
10 Sorensen's ground water claims. Claimant's Closing Argument at 30. Of course not. Kirby
11 Jensen has never maintained that he owns the two permits (at least since he transferred them
12 to Boyd Burnett in 1976). He maintains only that, under the approved exchange applications
13 and the exchange agreements, he is entitled to use the water available under the two permits.
14

15 Sorensen maintains that the "equal amount of water" language of I.C. Sec. 42-105 has
16 no bearing on this matter. We respectfully disagree and rely upon our previous briefing. I.C.
17 Sec. 42-105 certainly applies to both exchanges and commingling.
18

19 Despite disagreeing with our legal conclusion, Sorensen goes on to argue that he actually
20 receives less water under the exchange because canal "shrink" (i.e., conveyance losses) cause
21 the 4.52 cfs (226 inches) of surface water to be reduced to 2.9 cfs (145 inches) by the time it
22 reaches Sorensen's land. Sorensen goes so far as to state that: "In terms of receiving an equal
23 amount, Jensens don't like to consider reality". Claimant's Closing Argument at 31-32.
24

25 In response, we point the court to the terms of I.C. Sec. 42-105 which states that "due
26 allowance shall be made for loss by evaporation and seepage". In addition, the exchange
application approved by IDWR clearly provides that "[t]he exchanged water must be measured

1 at the head of the Utah Construction Canal", not at Sorensen's farm. Exhibit 26. When
2 measured at this point, it is clear that Sorensen receives more water than does Jensen under the
3 exchange. This would only be further exacerbated by providing Sorensen with use of additional
4 water under rights which have been made available to Jensen under the exchange.
5

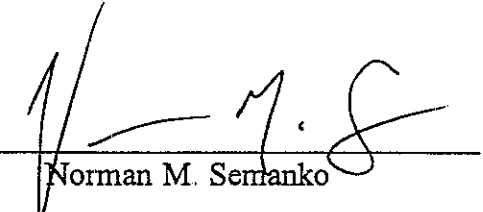
6 As a result, any additional water recognized under 34-07096B and 34-07097B should
7 first be made available to Kirby Jensen under the existing exchanges. The decrees for these
8 rights, if any, should contain a remark to this effect.
9

10 CONCLUSION

11 The objectors, Kirby A. Jensen and Doyle Jensen, respectfully request that the court
12 decree the above-captioned water rights consistent with the arguments set forth above and the
13 evidence presented at trial.

14 DATED this 6th day of March, 1998.

15 ROSHOLT, ROBERTSON & TUCKER

16
17
18 By: 

19 Norman M. Semanko
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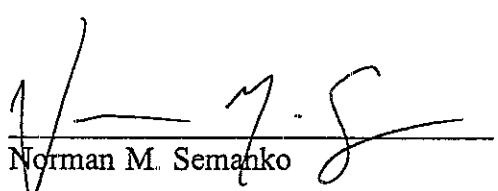
CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 1998, I served a copy of the foregoing
JENSENS' RESPONSE TO CLOSING ARGUMENTS by U.S. Mail, postage-paid in an
envelope addressed to the following:

Susan Hamlin
Deputy Attorney General
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Kent W. Foster
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
330 Shoup Avenue
Idaho Falls, ID 83405

William R. Hollifield
HOLLIFIELD & BEVAN
P.O. Box 66
Twin Falls, ID 83303


Norman M. Semanko