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Department of Water Resources

Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.
P.O. Box 50130
330 Shoup Avenue, Third Floor
Idaho Falls, Idaho 83405
Telephone: (208) 523-0620
Facsimile: (208) 523-9518

Attorneys for Claimant

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

	)	CLAIMANT'S RESPONSE
	)	MEMORANDUM
In Re SRBA	)	
Case No. 39576	)	
	)	Subcase Nos. 34-02428, 34-07096,
	)	34-07097, 34-07223, 34-12416
_____	)	

DESCRIPTION SUMMARY

This Memorandum is filed on behalf of Mitchell D. Sorensen in response to the "Objector's Motion for Summary Judgment" and the "Memorandum in Opposition to Claimant's Motion for Summary Judgment and in Support of Objectors' Motion for Summary Judgment" filed herein on behalf of Kirby A. and Doyle Jensen.

MEMORANDUM

1. It appears that the parties hereto are in agreement that there is no dispute as to any material fact, and that judgment should be rendered as a matter of law.

2. As we understand the argument of the objectors, one of their major points is that the additional 2.7 CFS under permits Nos. 34-07096 and 34-07097 could not be put to beneficial use after the "authorized development period." We are attempting to understand the legal significance, if any, of that phrase. Our analysis has led us to conclude that it is not a relevant legal issue in this matter, and that objectors incorrectly seek to extend the concept beyond any application contemplated by Idaho law.

From our review of the two approved applications, we do not see the phrase "authorized development period." We find that Application for Permit no. 34-7096 was filed by J. Doyle Jensen on January 31, 1975, that notice was published on February 13 and February 20, 1975, that no protests were filed, and that the application was approved by R. Keith Higginson, director of IDWR, on March 6, 1975. Application for Permit No. 34-7097 was filed by Kirby A. Jensen on January 31, 1975. Notice was published February 13 and 20, 1975, no protests were filed, and it was approved by A. Kenneth Dunn, Administrator-Operations Division, on April 1, 1975. On each permit, there is the identical following printed statement:

"1. Approval of said application is subject to the following limitations and conditions.

b. Proof of construction of works and application of water to beneficial use shall be submitted on or before _____, 19____."

On permit no. 34-7096, the date of March 1, 1980, has been typed in the blanks, and on permit no. 34-7097, the date of April 1, 1980 has been typed in. (We have attached copies of the approved applications to this Memorandum)

Neither do we find in the applicable statutory law the phrase "authorized development period." The statute in effect in 1975 (Idaho Code §42-203) contains the following language:

"In the event that no protest is filed, then the director of the Department of Water Resources may forthwith approve the application, providing the same in all respects conforms with the requirements of this chapter, and with the regulations of the Department of Water Resources."

In the same section, the director is given statutory authority to reject an application and refuse to issue a permit or to partially approve a permit for less water than was applied for, or to grant the permit upon conditions. The referenced language of the statute in effect in 1975 appears to be identical to the applicable statutory language today (Idaho Code §42-203A).

We suggest that the condition requiring submission of proof of construction of works and application of water to beneficial use on or before a certain date was placed in each permit by IDWR under its statutory authority to do so. We further suggest that if IDWR has the legal authority to establish such a condition, it also has the legal authority, at least so long as the permit is in effect, to revoke or modify the condition in such manner as it may deem appropriate or requisite, and so long as the change does not work an injury.

Mr. Fritschle has given a clear statement of what IDWR has done with respect to permits nos. 34-07096 and 34-07097. So far as we are able to determine, all that was done by IDWR was done with proper legal authority. We would have no objection to identifying the 2.7 CFS recommended for use on the Sorensen land, with some means of distinguishing that portion of rights nos. 34-07096 and 34-07097 from the 3.42 CFS portion used on the Kirby Jensen farm.

3. We do not understand the need for right no. 34-12416 to list Kirby Jensen's well in Section 17 (Township 4 North Range 26 East) as a point of diversion. Perhaps IDWR can articulate a reason. But, as we view this right number, its function is to confirm irrigation of 385 acres of the Sorensen Era Flats land under the other water rights; it does not authorize the diversion of any additional water under any right.

4. The most striking portion of the Jensen's argument is that they seek to cause the Sorensen's to be deprived of an amount of water recommended by the director which is of great value to the Sorensen's, but in the total absence of any possible benefit to themselves, and not even an assertion that they or their water rights have been or ever will be injured by the Sorensen's continued diversion and use of the 2.7 CFS of water under permits nos. 34-07096 and 34-07097. Their insistence is devoid of rational thought. Can the argument be based on anything other than complete misunderstanding; or is there some malicious motive?

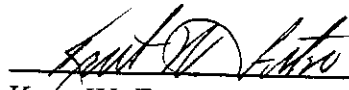
Their memorandum states "It is a factual certainty that none of the three rights referred to above have ever been used to irrigate any of Sorensen's 828 acres, let alone all of them." Consistent with the Jensens' agreement that there is no dispute of material fact, we assume this argument is not that an additional 2.7 CFS has not been diverted from a well on Mr. Sorensen's mother's land (in the NWSENE section 5, T4N, R26E), but, as we understand the argument, the Jensens claim the additional 2.7 CFS has not been diverted under rights nos. 34-07223, 34-07096 or 34-07097. Sorensens do not assert, and we do not understand IDWR to assert, that any portion of the water diverted from the Sorensen well in section 5 is diverted pursuant to right no. 34-07223. But, 2.7 CFS is the difference between the total amount of permits nos. 34-07096 and 34-07097 ($3.26 \text{ CFS} + 2.86 \text{ CFS} = 6.12 \text{ CFS}$), and 3.42 CFS, which even the Jensens admit is the amount which has been diverted from the Kirby Jensen well in section 17. So we are led to inquire "what is the problem?"

We cannot see how denial of the 2.7 CFS to Sorensens would benefit the Jensens, nor do we see how its continued diversion and use by Sorensens harms Jensens in any way. There is certainly nothing in the record or asserted by Jensens in behalf of either proposition.

Likewise, Jensens are apparently offended by the recommendation of 828 acres on Era Flats and another 117 acres on Mr. Sorensen's mother's land, for a total of 945 acres, as the permissible place of use for the various rights. And yet there is no factual allegation that these irrigated acreages are inaccurate, or that water has not been diverted in the amounts set forth in the director's recommendations, and used for the irrigation of such land.

The irritation of the Jensens seems to be that part of the water (2.7 CFS) which has been diverted for nearly two decades and used for irrigation of the Sorensen farms, is perceived by IDWR to have been diverted pursuant to permits nos. 34-07096 and 34-07097. Since the director's report has the effect of *prima facie* evidence, and the objectors have the burden of rebutting that evidence (Idaho Code §42-1411), it appears clear to us that the objectors have presented no factual evidence contrary to the *prima facie* evidence and have failed to articulate any relevant legal reason why the director's recommendation should not be accepted by the court.

Respectfully submitted this 15th day of December, 1997.


Kent W. Foster, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

DOCUMENT SERVED: CLAIMANTS RESPONSE MEMORANDUM

ATTORNEYS SERVED:

Peter Anderson
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

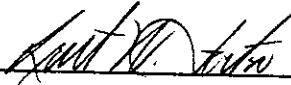
[First Class Mail]

Susan Hamlin
IDAHO DEPARTMENT OF
WATER RESOURCES
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720

[First Class Mail]

Norman Semanko
ROSHOLT, ROBERTSON & TUCKER
P.O. Box 1906
Twin Falls, Idaho 83303-1906

[First Class Mail]



Kent W. Foster, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Dated: 12/15/97

G:\WPDATA\KWF\7151 01\SUPPORT MEM:kmc

SIGNED TO: BOYDE BURNETT
04-1976 MOORE, ID 83255

Identification No. 31 7006
Application No. _____

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

To Appropriation the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

1. Name of applicant J. Doyle Jensen Phone 527 3306
post office address R.F.D. Box 43 McCool Idaho
2. Source of water supply Grover Water which is a tributary of _____
3. a. Location of point of diversion is NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Section 12 Township 4N
Range 2E B.M. Butte County; additional points of diversion if any: _____
b. If water is not consumed, it will be discharged into _____ at a point in _____ $\frac{1}{4}$ of _____ $\frac{1}{4}$ of Section _____ Township _____ Range _____ B.M. _____
4. Water will be used for the following purposes:
Amount 3.26 for Irrigation purpose from 7/1/77 to 6/1/78 (both dates inclusive)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
5. Total quantity to be appropriated:
a. 3.26 cubic feet per second and or
b. _____ acre feet per annum
6. Proposed diverting works:
a. Description of ditches flumes pumps headgates etc 1.5 H.P. Main Pump
open ditch
b. Height of storage dam _____ feet; active reservoir capacity _____ acre feet; total reservoir capacity _____ acre feet; materials used in storage dam _____
Period of year during which storage will occur _____ to _____ inclusive
c. Proposed well diameter is 16 inches; proposed depth of well is 145 feet
7. a. Time required for the completion of the works and application of the water to the proposed beneficial use is 5 years.
b. Estimated construction cost is \$ existing
8. Description of proposed uses:
a. If water is not for irrigation:
1) Give the place of use of water: _____ $\frac{1}{4}$ of _____ $\frac{1}{4}$ of Section _____ Township _____ Range _____ B.M. _____
2) Amount of power to be generated _____ hp under _____ feet of head
3) List number of each kind of livestock to be watered _____
4) Name of municipality to be served _____ or number of families to be supplied with domestic water _____
5) If water is to be used for other purposes describe: _____

MICROFILMED

[illegible]

c. Describe any other water rights used for the same purposes as described above. 163
~~167~~ 3.26 CFS. May 20, 1954
Diverted from Big Lost River

a. Who owns the property at the point of diversion Kirby H Jensen

b. Who owns the land to be irrigated or place of use J. Doyle Jensen

c. If the property is owned by a person other than the applicant, describe the arrangement enabling the applicant to make this filing. 721 actual agreement

[illegible]

1-31-1975

Received by MB Date 1-31-75 Time 4:20 PM
Preliminary check by MB Fee \$ 35.00
Received by MB Date 1-31-75 # 4669
Publication prepared by MB Date 2-7-75
Published in Arco Advertiser
Publication dates Feb 13 & 20, 1975
Publication approved MB Date 2-25-75
Priority reduced to _____ Reason _____
Protests filed by: _____
Copies of protests forwarded by _____
Hearing held by _____ Date _____
Recommended for approval denial by RDC MB

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

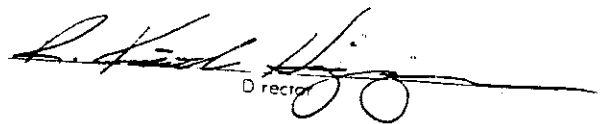
This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No 34-7096 and said application is hereby APPROVED

1. Approval of said application is subject to the following limitations and conditions

- a. SUBJECT TO ALL PRIOR WATER RIGHTS
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before March 1 19 80
- c. Other: A measuring device of a type approved by this Department shall be permanently installed and maintained as part of the diverting works.

2. Denial of said application is for the following reasons: _____

Witness my hand this 16 day of _____ March 19 75


Director

SIGNED TO
-04-1976

JOYDE BURNETT
MOORE, ID 83255

Identification No. 31111

Application No.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

To Appropriate the Public Waters of the State of Idaho
(TYPE OR PRINT IN INK)

- 1 Name of applicant Kelly R. Jensen Phone: 327-3385
post office address RED Box Moore Idaho
- 2 Source of water supply Ground Water which is a tributary of _____
- 3 a Location of point of diversion is N 1/2 of N 1/2 of Section 17 Township 4 N
Range 4 E B M B H County: additional points of diversion if any: _____
b If water is not consumed it will be discharged into _____ at a point in _____
of _____ of Section _____ Township _____ Range _____ B M _____
- 4 Water will be used for the following purposes
Amount 2.54 for irrigation purpose from 7/1/77 to 6/1/78 (both dates inclusive)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
Amount _____ for _____ purpose from _____ to _____ (both dates inclusive)
- 5 Total quantity to be appropriated
a 2.54 cubic feet per second and or
b _____ acre feet per annum
- 6 Proposed diverting works:
a Description of ditches, flumes, pumps, headgates, etc. 7.5 H.P. Motor Pump
2 ft. ditches
b Height of storage dam _____ feet active reservoir capacity _____ acre feet total reservoir
capacity _____ acre feet materials used in storage dam _____
Period of year during which storage will occur _____ Mo. Day _____ inclusive.
- 7 a Proposed well diameter is 16 inches; proposed depth of well is 165 feet
b Time required for the completion of the works and application of the water to the proposed beneficial use
is 6 years
c Estimated construction cost is \$ 1000.00
- 8 Description of proposed uses
a If water is not for irrigation
1 Give the place of use of water _____ of _____ of Section _____ Township _____
Range _____ B M _____
2 Amount of power to be generated _____ hp under _____ feet of head
3 List number of each kind of livestock to be watered _____
4 Name of municipality to be served _____ or number of families to be
supplied with domestic water _____
b If water is to be used for other purposes describe _____

[illegible]

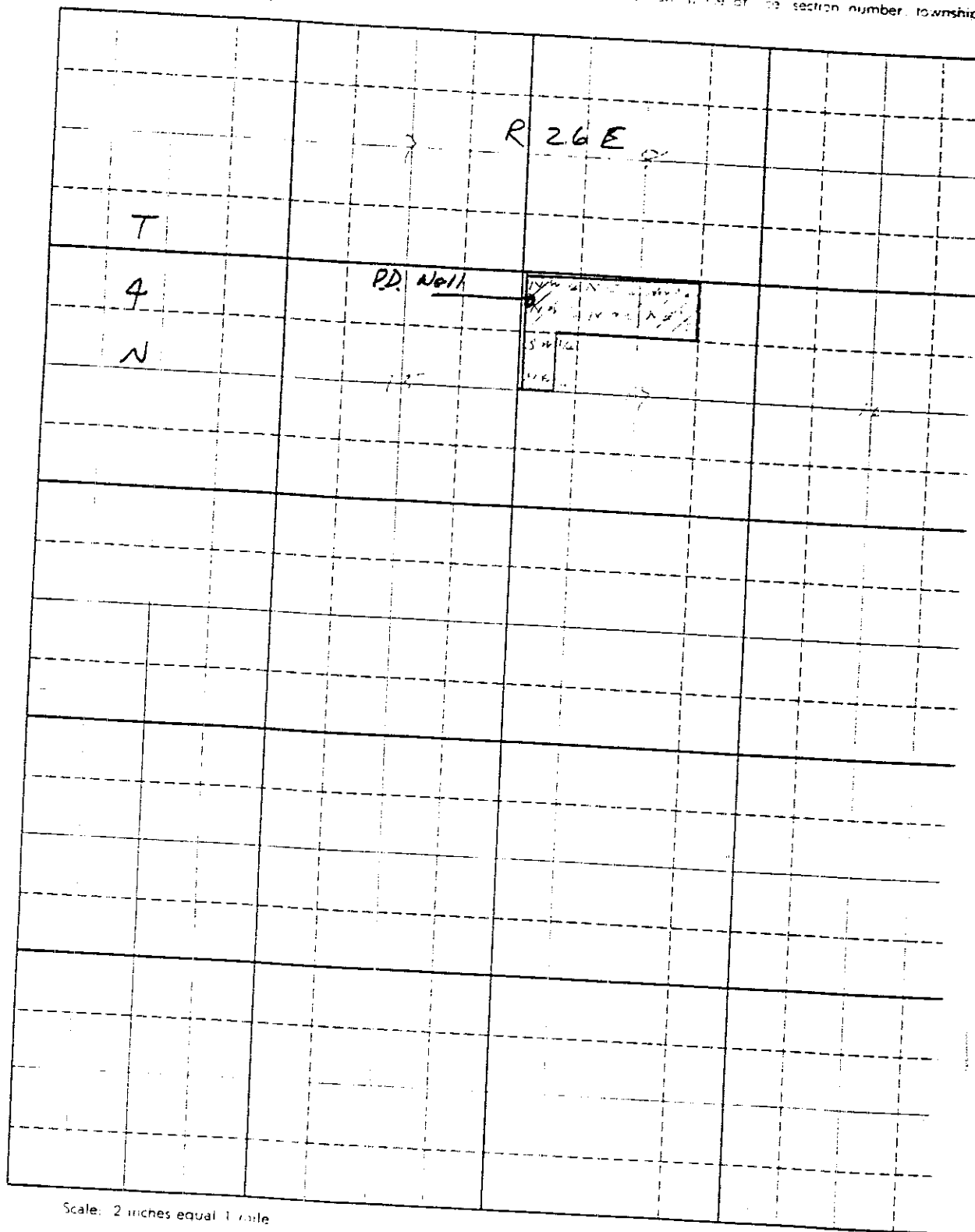
c. Describe any other water rights used for the same purposes as described above. 2.84 SFS May 20, 1984 Ray-Lant River Total number of acres to be irrigated 143

9 a Who owns the property at the point of diversion Applicant
b Who owns the land to be irrigated or place of use Applicant
c If the property is owned by a person other than the applicant to make this filing _____ applicant describe the arrangement enabling the _____

2186 C.F.S. 7772-22 1854
Dist. Fed. F-2-6222 Big Lost River -

[illegible]

1. Map of proposed project show clearly the proposed point of diversion, place of use, section number, township and range number.



Scale: 2 inches equal 1 mile

BE IT KNOWN that the undersigned hereby makes application for permit to appropriate the public waters of the State of Idaho as herein set forth

W. C. Jensen
(Applicant)

Date received by HLB Date 5-26-75 Time 2:15 PM
 File number check by HLB Date 5-26-75
 Date filed by HLB Date 5-26-75 HLB
 Publication prepared by HLB Date 5-26-75 3:26 PM
 Published in Water Resources Collection
 Publication dates 5-26-75 3/6-13/75
 Publication approved HLB Date 5-26-75
 Priority reduced to _____ Reason _____

 Protests filed by: _____

 Copies of protests forwarded by: _____
 Hearing held by _____ Date _____
 Recommended for approval denial by RPC 3DF

ACTION OF THE DIRECTOR DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of
 Idaho No. 34-7097 and said application is hereby APPROVED

1. Approval of said application is subject to the following limitations and conditions

a. SUBJECT TO ALL PRIOR WATER RIGHTS

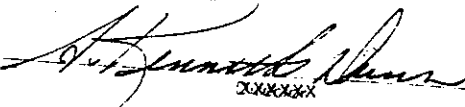
b. Proof of construction of works and application of water to beneficial use shall be submitted on or
 before April 1 1980

c. Other _____

2. Denial of said application is for the following reasons _____

Witness my hand this 1st day of

April 19 75


 XXXXXXXX

Administrator - Operations Division