



FAX COVER SHEET

FAX NUMBER: 208 287 6700

DATE: May 9, 2005

TO: Roxanne Brown

FROM: Mark C. Brown

SUBJECT: Pines Ranch

MESSAGE: Dear Roxanne

Please find attached the list of water rights for the Pines Ranch and the summary of those rights.

As you can see, I have a few things to do in the next 30 days. If you have any suggestions I would certainly appreciate them.

Thanks Roxanne

Sincerely

Mark Brown

11 pages

Mark C Brown

*Roxanne
208 287-6700
FAX*

From: "Brown, Roxanne" <Roxanne.Brown@idwr.idaho.gov>
To: <mark@markcbrown.net>
Sent: Thursday, February 24, 2005 9:50 AM
Subject: Pines Grazing water right list

73 147 A
73 147 B
73 147 C
73 150 D
73 189
73 259
73 2048
73 2126 A
73 2165
73 4004 A
73 7102
73 10036
73 10040
73 10041
73 10054
73 10069

Roxanne Brown
Sr. Water Resource Agent
Idaho Dept. of Water Resources
(208) 287-4914
roxanne.brown@idwr.idaho.gov

3/29/2005

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March 28, 2005

VIA E-MAIL WITHOUT ENCLOSURES - jclark@aviationpartners.com
ORIGINAL WITH ENCLOSURES WILL FOLLOW BY FEDERAL EXPRESS

Mr. Joe Clark
AVIATION PARTNERS
7213 Perimeter Road South
Seattle, WA 98108

Re: Joe Clark/Pines Ranch
Our File No. 1402/050035

Dear Joe:

At your request I have completed my review of the irrigation water rights for the Pines Grazing Association Ranch (the "Ranch") along the Pashimeroi River in Custer County, Idaho. This included a review of documents available from the internet database maintained by the Idaho Department of Water Resources ("IDWR"). I have prepared and enclosed an Addendum of Documents and will refer to the documents by their exhibit number. This letter sets forth my findings and conclusions. I have highlighted in *bold and italics* issues which must be brought up with the seller.

1. 73-147A, B and C. These three water rights were originally decreed¹ to Wood Live Stock Company in *Falls and O'Neil, et al v. Wells, et al*, Custer County District Court, April 1, 1910 (the "Falls Decree") (Exhibit 1) to irrigate lands within a 640 acre tract in Sections 11, 12, 13 and 14. They each have the same priority date - April 25, 1886 - which, according to Don Barnes, is the second oldest (and therefore second best) priority in the upper Pashimeroi drainage². The sources

¹ Under Idaho law, there are three primary ways to perfect a water right. First, it can be decreed by a court pursuant to a water rights adjudication. This will be the end result for all water rights in the SRBA. Second, prior to March 25, 1963 for groundwater and May 20, 1971 for surface water, a water right could be perfected by simply putting the water to a beneficial use. Third, a license from IDWR may be obtained by filing an application for permit and following the administrative procedures to ultimately obtain the water right license.

² Water law in Idaho is based on the appropriation doctrine. The appropriation doctrine has also been called "first in time is first in right", because the priority date determines who gets water when there is not enough to go around. A priority date is the date the water right was established. The priority date is important because the priority date determines who gets water when there is a shortage. If there is not enough water available to satisfy all of the water rights, then the persons with the oldest (or senior) water rights get their water rights

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and amounts of the water rights are as follows:

<u>WATER RIGHT</u>	<u>SOURCE</u>	<u>AMOUNT</u>
73-147A	Pashimeroi River	4.4 cfs ³
73-147B	Spring Creek	6.0 cfs
73-147C	Goldberg Creek	4.8 cfs
TOTAL		15.2 cfs

Claims have been filed for these water rights in *In Re: The General Adjudication of Rights to the Use of Water From the Snake River Basin Water System*, Twin Falls District Court Case No. 3956 (the "SRBA")⁴ (Exhibits 2, 3 and 4). The current owner and claimant is Pines Grazing Association, Inc. (the "Association"). The claims differ significantly from the original decrees as follows:

a. The claimed place of use is 2866.4 acres for 73-147A and C and 3345.7 acres for 73-147B. The additional 479.3 acres for the Spring Creek right is in Sections 19 and 30 near the southern boundary of the Ranch. These water rights cannot possibly irrigate all of this land!! Instead, it is likely the 3345.7 acres will be decreed as a permissible place of use within which these rights will collectively be limited to irrigating a maximum of 760 acres. This is based on the typical "duty of water" in Idaho of one inch per acre (15.2 cfs = 760 inches). However, since the original decreed place of use was a maximum of 640 acres, the SRBA decrees may impose this lower limit

satisfied first and so on in order until there is no water left. It is the persons with the new (or junior) water rights who do not get water when there is not enough to satisfy all the water rights.

³ The amount of an irrigation water right is typically given in "cfs" which is cubic feet per second. There are 50 miners inches in each cfs and 9 gallons per minute (g.p.m.) in each miners inch. A "miners inch" is typically referred to as an "inch" and that nomenclature will be used throughout this letter.

⁴ In June, 1987, the Idaho Department of Water Resources filed a petition to commence an adjudication of all water rights in the Snake River Basin and its tributaries. A special division of the District Court for the Fifth Judicial District of the State of Idaho was established with Judge Daniel Hurlbutt the presiding judge. In November, 1987, Judge Hurlbutt issued an order in the SRBA commencing the proceedings. The SRBA encompasses all or part of 38 counties in Idaho. It was mandated by statute passed in 1985 as a result of the settlement of the "Swan Falls Litigation", a dispute between Idaho Power Company and farmers proposing to drill into the Snake River aquifer to divert water for irrigation with water rights junior to Idaho Power's hydro power water rights to flows of the Snake River. All persons claiming water rights within the area covered by the SRBA were required to file claims over a two (2) year period. This requirement covered previously decreed and licensed water rights as well as those based on historical, beneficial use. A great deal of information about the SRBA may be found on the SRBA and IDWR websites - <http://www.srba.state.id.us/> and <http://www.idwr.idaho.gov/water/srba/mainpage/>, respectively. I will be happy to go into greater detail with you at anytime concerning the current status and anticipated procedures in the SRBA for the Ranch's water rights.

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for the maximum area to be irrigated by these rights.

b. Each of the claims lists numerous points of diversion from their respective sources. The original decrees do not identify specific points of diversion. Therefore, when these claims are investigated and evaluated by IDWR in the SRBA, the provisions of Idaho Code Section 42-1427⁵ will be followed to determine the points of diversion for the decrees to be issued for the water rights. This will require proof that the points of diversion were being used prior to November, 1987, the commencement of the SRBA. *Therefore, the Association must provide us with affidavits, photographs or other viable evidence to support these claimed points of diversion. If any of the points of diversion were established AFTER November, 1987, then they will be excluded from the SRBA decree and, if still used, must be approved through a water right transfer filed with IDWR.*

There is one last issue with these water rights. Ila and Leon Zeigler have filed a claim (73-147D) in the SRBA for small portions of each of these rights totaling 0.95 cfs (Exhibit 5). Don Barnes told me they do not use water from the creeks to irrigate; instead, they irrigate with ground water only. The IDWR file for this claim includes a Notice of Change in Water Right Ownership based upon a deed for certain lands from the Zeiglers to the Association, and a letter from IDWR to the Association stating that the land described in the deed was not part of the place of use for the claim. The correspondence was in April - May, 1995. The Association apparently never followed up to get the proper deed from the Zeiglers and I have asked Mark Brown to find out what happened. *This is a conflicting claim to a portion of the best water right for the Ranch and should be resolved by the Association!!*

⁵ 42-1427. DESCRIPTIONS OF WATER RIGHTS -- REPORTING AND DECREETING ELEMENTS OF A DECREE OR LICENSED WATER RIGHT.

(1) Legislative findings:

(a) The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and courts have made this original description of a water right more specific by the addition of other elements. Because of the increasing demand for water, it is important that the elements of a water right be standardized to allow for fair and efficient administration of the limited water supply. One (1) purpose of chapter 14, title 42, Idaho Code, is to establish, through an adjudication a uniform description for surface water rights, ground water rights and water rights which include storage.

(b) Because of the passage of time it is not possible to establish with any degree of certainty the undefined elements of a decreed or licensed water right as they existed on the date the right was established, because water delivery has occurred based upon the historic water use patterns and custom, and because attempts to define elements of a water right based upon unknown conditions in existence on the date of the establishment of the water right could result in significant impacts upon the claimant, the local economy and tax base, the legislature finds that it is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right.

(2) If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication (emphasis added).

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2. 73-10040. This is the second most senior water right for the Ranch with a May 1, 1897 priority date. It is the number assigned to the claim filed in the SRBA as a combination of water rights 73-148 (3.2 cfs) and 73-149 (8.0 cfs) (Exhibit 6). These two rights were originally decreed in the Falls Decree to Wood Live Stock Company to irrigate unspecified acreage within 160 acre and 640 acre tracts, respectively, diverting water from unspecified points on the Pashimeroi River. The combination SRBA claim lists the Association as the current claimant and is for the total of 11.2 cfs (560 inches) to irrigate a 2866.4 acre place of use. As with the water rights described in paragraph 1, above, it is likely the 2866.4 acres (or perhaps the 3345.7 acres) will be decreed as the permissible place of use within which 73-10040 will be limited to irrigating 560 acres. The claim describes four different points of diversion whereas in the original decrees the points of diversion were not specified. *Therefore, we need to have the Association provide us with affidavits, photographs or other viable evidence to support these claimed points of diversion. If any of the points of diversion were established AFTER November, 1987, then they will be excluded from the SRBA decree and, if still used, must be approved through a water right transfer filed with IDWR.*

3. 73-150A. This is the third most senior water right for the Ranch with a July 1, 1897 priority date (the priority date is claimed incorrectly as July 1, 1887 and this will be corrected by Roxanne during her claim investigation). The water right was originally decreed to Wood Live Stock Company in the Falls Decree for 8.487 cfs with one point of diversion on the Pashimeroi River to irrigate an unspecified acreage within a 920 acre parcel, 400 acres of which are within the Ranch. The SRBA claim with the Association as the current claimant is for 4 cfs of the original decreed water right (Don Barnes owns the rest) to irrigate the 3345.7 acre place of use (Exhibit 7). Just like the water rights described in paragraphs 1 and 2, above, this water right cannot possibly irrigate all of the claimed place of use!! Instead, it is likely the 3345.7 acres will be decreed as a permissible place of use within which this right (4 cfs = 200 inches) will be limited to irrigating a maximum of 200 acres. The claim describes five different points of diversion whereas in the original decree the points of diversion were not specified. *Therefore, we need to have the Association provide us with affidavits, photographs or other viable evidence to support these claimed points of diversion. If any of the points of diversion were established AFTER November, 1987, then they will be excluded from the SRBA decree and, if still used, must be approved through a water right transfer filed with IDWR.*

4. 73-189. This is the next most senior water right with a May 19, 1909 priority date. It was originally decreed in the Falls Decree to Martha Beach to divert 6.4 cfs (320 inches) from the Pashimeroi River. The point of diversion and irrigated acreage within a 320 acre place of use were not specified. The SRBA claim with the Association as the current claimant lists the same four points of diversion as 73-10040 and claims the same 2866.4 acre place of use (Exhibit 8). My same comments apply: it is likely the 2866.4 acres (or perhaps the 3345.7 acres) will be decreed as the permissible place of use within which 73-189 will be limited to irrigating 320 acres. The claim describes four different points of diversion whereas in the original decree the points of diversion were not specified. *Therefore, we need to have the Association provide us with affidavits,*

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photographs or other viable evidence to support these claimed points of diversion. If any of the points of diversion were established AFTER November, 1987, then they will be excluded from the SRBA decree and, if still used, must be approved through a water right transfer filed with IDWR.

5. 73-2048. The next most senior water right is based on a license (Exhibit 9) issued to Willard Bowen on October 16, 1979 to divert 3.2 cfs (160 inches) from Goldberg Creek with a September 3, 1909 priority date to irrigate 160 acres in the W1/2 of Section 18, T.13N., R.23E., B.M., all of which is outside the Ranch boundaries. The point of diversion from Goldberg Creek is also outside the Ranch boundary. The SRBA claim (Exhibit 10), with the Association as the current claimant, lists the point of diversion in the SW1/4SW1/4 of Section 19 and the place of use as the N1/2S1/2 of Section 24. This raises two significant issues:

a. *The Association must provide some "chain of title" to this water because the owners of the Ranch were not the owners of the licensed place of use. In other words, there must be a conveyance of the water right to the Association prior to the commencement of the SRBA in November, 1987.*

b. Since the point of diversion and place of use of the water right were never properly transferred by the required administrative procedure, the claim must be based on Idaho Code Section 42-1425 known as the "accomplished transfer statute."⁶ If the point of diversion or

⁶ 42-1425. ACCOMPLISHED TRANSFERS. (1) Legislative findings regarding accomplished transfers and the public interest. (a) The legislature finds and declares that prior to the commencement of the Snake River basin adjudication, many persons entitled to the use of water or owning land to which water has been made appurtenant either by decree of the court or under provisions of the constitution and statutes of this state changed the place of use, point of diversion, nature or purpose of use, or period of use of their water rights without compliance with the transfer provisions of sections 42-108 and 42-222, Idaho Code. (b) The legislature finds that many of these changes occurred with the knowledge of other water users and that the water has been distributed to the right as changed. The legislature further finds and declares that the continuation of the historic water use patterns resulting from these changes is in the local public interest provided no other existing water right was injured at the time of the change. Denial of a claim based solely upon a failure to comply with sections 42-108 and 42-222, Idaho Code, where no injury or enlargement exists, would cause significant undue financial impact to a claimant and the local economy. Approval of the accomplished transfer through the procedure set forth in this section avoids the harsh economic impacts that would result from a denial of the claim. (c) The legislature further finds and declares that examination of these changes by the director through the procedures of section 42-222, Idaho Code, would be impractical and unduly burdensome. The more limited examination of these changes provided for in this section, constitutes a reasonable procedure for an expeditious review by the director while ensuring that the changes do not injure other existing water rights or constitute an enlargement of use of the original right. (2) Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication, may be claimed in a general adjudication even though the person has not complied with sections 42-108 and 42-222, Idaho Code, provided no other water rights existing on the date of the change were injured and the change did not result in an enlargement of the original right. Except for the consent requirements of section 42-

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place of use of a water right as of November, 1987 differs from the decree or license for that right, and the change had not been approved by IDWR pursuant to the requirements of Idaho Code Section 42-222, the statute allows the water right owner to claim the right in the SRBA as changed as long as the owner can prove (if necessary in the face of an objection to the claim) that no other water rights existing on the date of the change were injured and the change did not enlarge the original right. The constitutionality of this statute has been upheld by the Idaho Supreme Court. *Therefore, the Association must provide us with proof that the water right was being diverted at the claimed point of diversion and used to irrigate the claimed place of use before November, 1987.*

6. 73-10041. The next most senior water right is represented by this SRBA claim (Exhibit 11) which, like 73-10040, is a combination of two decreed water rights. 73-18 (2.4 cfs and a 160 acre place of use) and 73-19 (4.8 cfs for a 320 acre place of use) were both decreed in *Maessler et al v. Smith et al*, Custer County District Court, April 29, 1920 (Exhibit 12) to J. J. Bauman and Celia Bauman, respectively, to divert water from Big Creek with a November 24, 1909 priority date. The combination SRBA claim lists the Association as the current claimant and is for the total of 7.2 cfs (360 inches) to irrigate a 2866.4 acre place of use. Water is diverted from Big Creek into the California Ditch which injects the water into Goldberg Creek. It is then re-diverted from Goldberg Creek and/or the Pashimeroi River at the points of diversion listed in the claims for 73-147A, B and C. Roxanne prepared and provided me with a copy of a map showing the location of this diversion (Exhibit 13) As with the water rights described in paragraph 1, above, it is likely the 2866.4 acres (or perhaps the 3345.7 acres) will be decreed as the permissible place of use within which 73-10041 will be limited to irrigating 360 acres.

7. 73-10069. The Association filed this claim in the SRBA for the diversion of 2.88 cfs from Big Creek with a November 24, 1909 priority date to irrigate 32 acres in Section 6 along Big Creek. The location of the place of use is shown on the map attached to the SRBA Claim (Exhibit 14). Roxanne states there is no evidence of irrigation of these lands and will recommend the claim be disallowed on that basis. *The Association should provide us with adequate proof of the use of water from Big Creek to irrigate these lands (as well as its ownership of the place of use), the priority date, point of diversion and amount diverted from Big Creek.*

108, Idaho Code, all requirements of sections 42-108 and 42-222, Idaho Code, are hereby waived in accordance with the following procedures: (a) If an objection is filed to a claim for accomplished change of place of use, point of diversion, nature or purpose of use or period of use, the district court shall remand the water right to the director for further hearing to determine whether the change injured a water right existing on the date of the change or constituted an enlargement of the original right. After a hearing, the director shall submit a supplemental report to the district court setting forth his findings and conclusions. If the claimant or any person who filed an objection to the accomplished transfer is aggrieved by the director's determination, they may seek review before the district court. If the change is disallowed, the claimant shall be entitled to resume use of the original water right, provided such resumption of use will not cause injury or can be mitigated to prevent injury to existing water rights. The unapproved change shall not be deemed a forfeiture or abandonment of the original water right. (b) This section is not applicable to any claim based upon an enlargement of use.

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8. 73-2126A. The Association filed this claim in the SRBA for the diversion of 40 cfs (2000 inches) from Big Creek with an August 1, 1920 priority date to irrigate 2000 acres. The claim states it is based on historic beneficial use from the priority date of a lapsed permit issued to Wood Live Stock Company. A copy of the Adjudication Claim Report for this Claim is included (**Exhibit 15**) as I could not locate a copy of the actual Claim. Roxanne intends to recommend this claim be disallowed as it is covered by 73-10041. However, 73-10041 is for only 7.2 cfs with a better priority date (November 24, 1909). *Since this claim is based upon beneficial use, the Association must provide us with adequate proof to support the priority date and amount of water diverted. Roxanne requested this information in a July 26, 2004 letter (Exhibit 16) but has not received a response.*

9. 73-259. The Association filed this claim in the SRBA for the diversion of 1.6 cfs (80 inches) from Spring Creek with a May 1, 1950 priority date to irrigate 2866.4 acres (**Exhibit 17**). A Stipulation among numerous water right users in the Pashimeroi River valley was signed in 1981 in *Pines Grazing Association, Inc. et al v. Gilbert*, Custer County District Court Case No. 2244. Pursuant to a subsequent Stipulation signed by attorneys for the parties in 1989, the District Judge entered on June 26, 1989 an Order and a Decree which forms the basis for this SRBA claim. (Copies of the two Stipulations are found as **Exhibit 18**). With this priority date the water right is good only in very high water.

10. 73-10054. The Association filed this claim (**Exhibit 19**) in the SRBA for the storage of 40 acre-feet of water from the Pashimeroi River, springs, Spring Creek, Goldberg Creek and Big Creek with an October 2, 1962 priority date for irrigation, and then diversion of 160 acre-feet per year from storage to irrigate 647.5 acres. Water is stored in the reservoir on the Ranch purportedly built by Felipe Yribar in 1962. The claim is based on historical beneficial use from the date of construction. The following are issues raised by the claim:

a. *Since this claim is based upon beneficial use, the Association must provide us with adequate proof to support the priority date and amount of water stored and diverted from storage.*

b. The references to the NW1/4 in Section 11 for the place of use should be corrected to the NE1/4. This can be done by Roxanne in the claim recommendation process.

c. *The Association must provide adequate proof of how water was diverted from all of the listed sources to the reservoir prior to November, 1987. If there were diversions out of a source through a ditch to the reservoir, then the claim must be amended to include a "diversion to storage" component and proof of the point of diversion, date the diversion was first used and amount diverted provided.*

d. *Don Barnes told me the reservoir is NOT used for irrigation. If the irrigation use stopped before November, 1987, the SRBA claim should be amended to wildlife or*

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fish habitat use (Don says Roxanne is OK with these uses). If the irrigation use stopped AFTER November, 1987, and it no longer makes sense to use the reservoir to store water for irrigation, then once the SRBA decree is issued a water right transfer application should be filed with IDWR to change the nature of use from irrigation to wildlife and fish habitat.

e. *The 20 ft. high dam requires inspection and certification for safety by IDWR. As we discussed, the worst case result is that the dam cannot be made safe and therefore must be removed.*

11. 73-2165. The Association filed this claim (**Exhibit 20**) in the SRBA for the diversion of 2.05 cfs (102.5 inches) of ground water from a well with a September 23, 1966 priority date to irrigate 294 acres. The place of use is also irrigated by several of the surface water rights described above, so 73-2165 is known as a "supplemental ground water right". This means the SRBA decree will likely include a requirement that This ground water right not be used unless and until there is insufficient surface water to irrigate the 294 acre place of use. The SRBA claim is based on a License issued to the Association October 22, 1981 (**Exhibit 21**). The point of diversion (location of the well) and place of use are slightly different in the claim from those specified in the License. However, Roxanne has already reviewed this claim and prepared her recommendation, which is the same as the claim except for small differences in the location of the 294 acre place of use (**Exhibit 22**). The Field Report from 1977 shows how the water was originally diverted from the well to an irrigation ditch and then flood irrigated over the place of use (**Exhibit 23**). Don Barnes told me this right now only irrigates 211 acres under a 10 tower pivot. *The Association should provide us with the date this pivot was installed. The portion of the water right used to irrigate the 83 acres no longer irrigated, e.g. pivot corners, should either be transferred to other parts of the Ranch or put into the Water Supply Bank.*

12. 73-10036. This SRBA claim (**Exhibit 24**), listing the Association as the current claimant, is based upon an enlargement of 73-2165. It was thus filed under Idaho Code Section 42-1426⁷, titled "Enlargements -- Waiver of Mandatory Permit Requirements". This statute declares

⁷ 42-1426. ENLARGEMENTS -- WAIVER OF MANDATORY PERMIT REQUIREMENTS. (1) Legislative findings regarding enlargements: (a) The legislature finds that prior to the commencement of the Snake River basin adjudication and subsequent to the mandatory permit system provided in sections 42-201 and 42-229, Idaho Code, persons entitled to the use of water or owning any land to which water has been made appurtenant by decree, license or constitutional appropriation have, through water conservation and other means, enlarged the use of said water without increasing the rate of diversion and without complying with the mandatory permit system adopted by the legislature. Enlargements have been done with the knowledge of other water users, and water has been distributed based upon the right as enlarged. Junior water users made appropriations based upon a water system that reflected these enlarged uses. Thus, the legislature further finds and declares that it is in the public interest to waive the mandatory permit requirements for these enlargements in use prior to the commencement of a general adjudication, so long as such enlargements in use did not increase the rate of diversion of the original water right or exceed the rate of diversion for irrigation provided in section 42-202, Idaho Code, after the enlargement of use, and the enlargement of use did not reduce the quantity of water available to other water rights existing on the date of the

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it to be "in the public interest" to waive the mandatory permit requirements for an enlargement of an existing, valid water right (decreed, licensed or beneficial use) AFTER the effective date of such requirements (1963 for ground water and 1971 for surface water) if there was no increase in the original rate of diversion, the diversion rate does not exceed one inch per acre for irrigation and the enlargement did not reduce the quantity of water available to other water rights existing on the date of the enlargement. It provides a new water right with a priority date as of the date of enlargement may be claimed and decreed if the enlargement did not injure existing water rights. The claim lists a September 24, 1966 priority date, the same 2.05 cfs (102.5 inches) diversion rate from the same well as 73-2165, and an additional 335.2 acres irrigated. It is also "supplemental" to surface water rights used to irrigate the same land so the SRBA decree will likely include the same provision that it may not be used unless and until there is insufficient surface water to irrigate the 335.2 acres. This brings the total land irrigated by this well to 529.2 acres, which seems very unlikely for only 102.5 inches diverted!! *Nonetheless, for us to successfully establish this claim, the Association must provide us with proof that the additional 335.2 acres came under irrigation from the well on or before September 24, 1966.*

13. 73-7102. This water right was perfected by a License issued to the Association April 14, 1997 for the diversion of 1.65 cfs (82.5 inches) of ground water from a well to irrigate 240 acres with a September 17, 1992 priority date (Exhibit 25). A copy of the Well Driller's Report is also

enlargement in use. (b) The legislature further finds that it is in the public interest to waive certain statutory provisions for the appropriation of water that has been diverted and applied to beneficial use to insure the economic and agricultural base in the state of Idaho as it existed on the date of the commencement of the Snake River basin adjudication and to maintain historic water use patterns existing on that date. (2) The mandatory permit requirements of sections 42-201 and/or 42-229, Idaho Code, are waived, and a new water right may be decreed for the enlarged use of the original water right based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before November 19, 1987; provided however, that the rate of diversion of the original water right and the separate water right for the enlarged use, combined, shall not exceed the rate of diversion authorized for the original water right; and further provided, that the enlargement in use did not injure water rights existing on the date of the enlargement of use. An enlargement may be decreed if conditions directly related to the injury can be imposed on the original water right and the new water right that mitigate any injury to a water right existing on the date of enactment of this act. If injury to a water right later in time cannot be mitigated, then the new right for the enlarged use shall be advanced to a date one (1) day later than the priority date for the junior water right injured by the enlargement. It is further provided that any such enlargement of use allowed in a general adjudication shall not constitute an abandonment or forfeiture of the original water right to the extent of current use. (3) The director shall publish a notice of enlargement of water right for all water rights recommended under this section. The notice shall contain a summary of the notice of claim and shall be published in the same manner as notices for applications to appropriate water in section 42-203A, Idaho Code. Any person who has filed an application for a water right prior to the enactment of this act or who has been issued a permit for a water right prior to enactment of this act but who has not filed a claim in an adjudication shall have thirty (30) days from the date of last publication of the notice of enlargement of a water right under this section to file a petition with the department of water resources to assert any claimed injury from the enlargement. No appeal of the determination of the department shall be allowed. If the applicant or permittee is dissatisfied with the determination of the department on any claim of injury, the sole remedy is to intervene in the general adjudication and assert their claim of injury in an objection to the water right.

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included (Exhibit 26). The Association has not filed a claim in the SRBA for this water right and it is not required to do so. The Beneficial Use Field Report prepared by IDWR (based on a 1995 field exam) describes an 8 tower pivot with an end gun and one portable 4 inch lateral handline to irrigate the west end of the place of use (Exhibit 27). *The Association should confirm that this irrigation system remains in place or, if not, what is presently irrigated by this water right and when the change occurred.*

I understand from Roxanne and Don that many of the changes in the irrigation system took place AFTER November, 1987. Therefore, to continue irrigating with those system changes water right transfer applications will have to be filed with and approved by IDWR. Roxanne will likely identify those changes during her claim investigation and the applications can then be made.

Don stated that a maximum of 2000 acres would be irrigated in the future. The 1886 water rights will irrigate 760 acres, the 1897 rights add another 760 acres, and then you are into the 1909 rights which are probably not that reliable. The licensed ground water right (73-7102) will also add another 240 acres (if the 82.5 inches under this right can irrigate that much land!) Roxanne stated there are no forfeiture issues due to non-use of the water rights prior to the dates the SRBA claims were filed. The major issues are providing adequate proof for those claims based upon beneficial use and of the numerous points of diversion to the extent they are still in use.

Please call with any questions you may have after reviewing this report. Thank you again for the opportunity to work with you on this project.

Sincerely yours,

SPECK & AANESTAD
A Professional Corporation



James P. Speck

JPS/j

(enclosures)

cc: Mark Brown (w/ enclosures)

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