

RECEIVED
SEP 16 2005
Department of Water Resources

Lola Kerner
1733 Weiser River Rd.
Weiser, ID 83672

Craig L. Saxton
St. Water Resource Agent
Adjudication Bureau
Idaho State Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Dear Mr. Saxton:

In reference to water right claim #67-4470, please find enclosed:

1. The FSA map with acres and points of diversion marked
2. Property tax notices of irrigated acres
3. A copy of the billing sent by Weiser Irrigation District attempting to assess all irrigated acres instead of only water delivered via the Galloway Canal
4. Summary of Mediation between Milton Kerner, third party defendant, and Weiser Irrigation District.

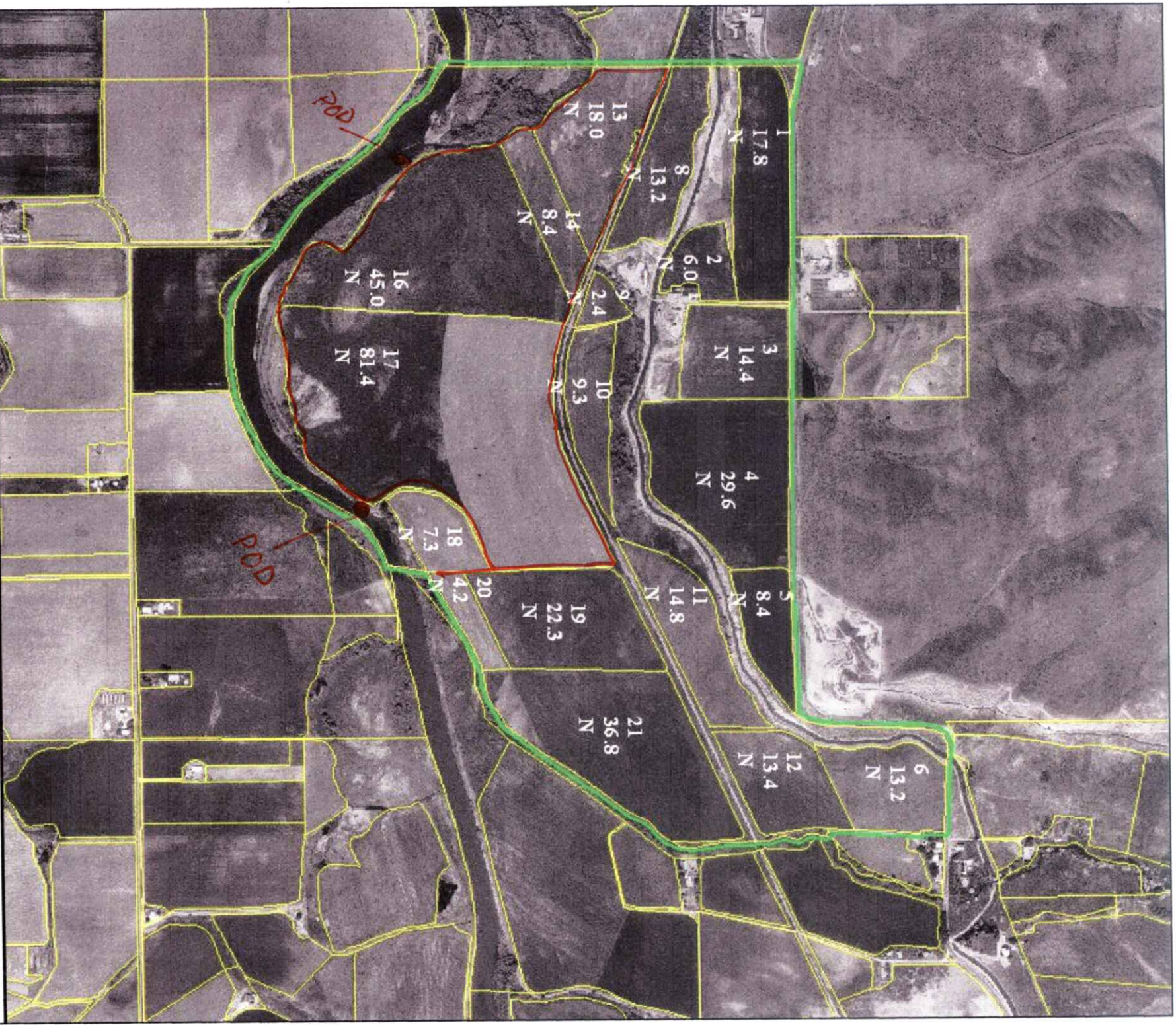
Please refer to the highlighted text of the last page of the Mediation Summary in reference to this matter. I do not have pumping records, due to the lack of electricity at the points of diversion. Portable pumps are used to deliver the water.

Also enclosed is an affidavit from my son, who now leases the ranch.

Sincerely,



Lola D. Kerner



Washington Farm 2107
Tract 2081

ACRES IRRIGATED FROM CLAIM
67-4670 OUTLINED IN RED



IN THE MATTER OF)
NOTICE OF CLAIM TO)
A WATER RIGHT NO. (S))

AFFIDAVIT

67-4670)
)
)
State of Idaho)
County of WASHINGTON)

C. BRUCE KERNER being first duly sworn,

deposes and says: MILTON KERNER BEGAN PUMPING
WATER FROM THE WEISER RIVER IN THE MID
TO LATE SIXTIES. I REMEMBER CHANGING
HAND LINES AS A SMALL BOY. THIS
GROUND HAS BEEN IN PRODUCTION SINCE
THAT TIME.

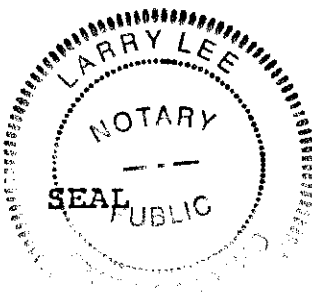
C. Bruce Kerner
(Signature)

Subscribed and sworn to before me this
day 14 of SEPTEMBER, 19 2005

[Signature]
(Notary Public)

Residing at WEISER

My Commission Expires 1-5-11



LONGIA PLISCHKE
WASHINGTON COUNTY ASSESSOR
56 E COURT
EAGER ID 83672

2005

ASSESSMENT NOTICE

& ESTIMATE OF TAX

RETURN POSTAGE GUARANTEED
OFFICE PHONE: 208-414-2000

THIS IS NOT A BILL.
DO NOT PAY.

PARCEL DESCRIPTION:

TN-13 S31T11R4
24 ACRES

For any questions, please notify the Assessor's Office immediately.

Assessor's Telephone Number: (208) 414-2000

PARCEL ADDRESS:

KERNER MILTON

1733 WEISER RIVER RD
WEISER ID 83672

Appeals of your property value must be filed in
writing, on a form provided by the County, by:

JUNE 27, 2005

Tax Code Area: 49-0000

Parcel Number: RP 11N04W31S100 A

PROPERTY TAX REDUCTION IS NOT INCLUDED.

ASSESSED VALUE OF YOUR PROPERTY

CURRENT CATEGORY AND DESCRIPTION	LOTS/ACRES	LAST YEAR'S VALUE	CURRENT YEAR'S VALUE
IRRGTD AG	18.300 AC		
DRY GRAZING	2.750 AC	11,030	12,300
WASTE	2.950 AC	70	30
SUBTOTAL:	24.000	11,100	12,330
LESS HOMEOWNERS EXEMPTION:			
NET TAXABLE PROPERTY VALUE:		11,100	12,330

These values may not include personal property values. Taxes are based on the values shown on this Notice and on the Budgets of the taxing districts.

ESTIMATED PROPERTY TAXES

TAXING DISTRICTS	LAST YEAR'S TAXES	CURRENT YEAR'S ESTIMATED TAXES	PHONE NUMBER	DATE OF PUBLIC BUDGET HEARING
COUNTY			208-414-2000	08/22/2005
SI SCH 431A			208-545-0516	05/13/2005
WEISER SCH BOND			208-549-0616	05/13/2005
ROAD BRIDGE			208-414-2092	08/22/2005
REC BRIDGE			208-414-2092	08/22/2005
WEISER FIRE			208-549-2379	08/09/2005
JOINT CONT-			208-549-0415	08/22/2005
WEISER AMBUL			208-414-2092	08/22/2005
ROAD			208-257-3538	07/25/2005
SI VAL HOSP			208-549-0370	06/15/2005
AMBULANCE TORT			208-414-2092	08/22/2005
SUBTOTAL:				
FEES:				
TOTAL PROPERTY TAXES & FEES:				

THIS IS NOT A BILL. DO NOT PAY.

See the back of this Notice for details.

ORGIA PLISCHKE
WASHINGTON COUNTY ASSESSOR
18 E COURT
WEISER ID 83672

2005

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ASSESSMENT NOTICE

& ESTIMATE OF TAX
RETURN POSTAGE GUARANTEED
OFFICE PHONE: 208-414-2000

PARCEL DESCRIPTION:

LOTS 3 & 4; SENW; SWNE;
TIN-1; TAX RR R-D-W; SIT10RS
307.27 ACRES

For any questions, please notify the Assessor's Office immediately.

Assessor's Telephone Number: (208) 414-2000

PARCEL ADDRESS:

1733 WEISER RIVER RD 83672

KERNER MILTON

1733 WEISER RIVER RD
WEISER ID 83672

Appeals of your property value must be filed in writing, on a form provided by the County, by:

JUNE 27, 2005

Tax Code Area: 49 0000

Parcel Number: 8P 10N05W012400 A

PROPERTY TAX REDUCTION IS NOT INCLUDED.

ASSESSED VALUE OF YOUR PROPERTY

CURRENT CATEGORY AND DESCRIPTION		LOTS/ACRES	LAST YEAR'S VALUE	CURRENT YEAR'S VALUE
1	IRRGTD AG	208.470 AC	212,150	226,230
5	DRY GRAZING	51.300 AC	1,400	1,500
9	RURAL HOMESITE	1.000 AC	9,600	9,600
9	WASTE	46.500 AC		
11	RURAL RES BLDG		94,090	94,090
12	RURAL IMP ON AG		13,690	13,690
SUBTOTAL:		307.270	330,930	345,110
LESS HOMEOWNERS EXEMPTION:			47,045	47,045
NET TAXABLE PROPERTY VALUE:			283,885	298,065

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ESTIMATED PROPERTY TAXES

TAXING DISTRICTS	LAST YEAR'S TAXES	CURRENT YEAR'S ESTIMATED TAXES	PHONE NUMBER	DATE OF PUBLIC BUDGET HEARING
COUNTY			208-414-2092	08/22/2005
WEI SCH 451A			208-549-0616	06/13/2005
WEISER SCH BOND			208-549-0616	06/13/2005
ROAD/BRIDGE			208-414-2092	08/22/2005
SPEC BRIDGE			208-414-2092	08/22/2005
WEISER FIRE			208-549-0379	08/09/2005
RODENT CONTR			208-549-0415	08/22/2005
WEISER AMBUL			208-414-2092	08/22/2005
FLOOD			208-257-3538	07/25/2005
WEI VAL HUSP			208-549-0370	06/15/2005
AMBULANCE TORT			208-414-2092	08/22/2005
SUBTOTAL:				
FEES:				
TOTAL PROPERTY TAXES & FEES:				

THIS IS NOT A BILL. DO NOT PAY.

See the back of this Notice for details.

GEORGIA PLISCHKE
WASHINGTON COUNTY ASSESSOR
35 E COURT
LISER ID 83672

2005

THIS IS NOT A BILL.
DO NOT PAY.

ASSESSMENT NOTICE

& ESTIMATE OF TAX
RETURN POSTAGE GUARANTEED
OFFICE PHONE: 208-414-2000

PARCEL DESCRIPTION:

LOTS 1 & 2; SENE; EXC RR
R O W; 3110R5; 117.11 ACRES

For any questions, please notify the Assessor's Office immediately.

Assessor's Telephone Number: (208) 414-2000

PARCEL ADDRESS:

KERNER MILTON

1733 WEISER RIVER RD
WEISER ID 83672

Appeals of your property value must be filed in
writing, on a form provided by the County, by:

JUNE 27, 2005

Tax Code Area: 49-0000

Parcel Number: 9P 10N05W010000 A

PROPERTY TAX REDUCTION IS NOT INCLUDED.

ASSESSED VALUE OF YOUR PROPERTY

CURRENT CATEGORY AND DESCRIPTION	LOTS/ACRES	LAST YEAR'S VALUE	CURRENT YEAR'S VALUE
1 IRRGTD AG	82.900 AC	95.410	102.510
5 DRY GRAZING	7.610 AC	210	220
7 WASTE	26.600 AC		
SUBTOTAL:	117.110	95.620	102.730
LESS HOMEOWNERS EXEMPTION:			
NET TAXABLE PROPERTY VALUE:		95.620	102.730

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ESTIMATED PROPERTY TAXES

TAXING DISTRICTS	LAST YEAR'S TAXES	CURRENT YEAR'S ESTIMATED TAXES	PHONE NUMBER	DATE OF PUBLIC BUDGET HEARING
COUNTY			208-414-2092	08/22/2005
EL SCH 431A			208-549-3615	05/13/2005
ELISER SCH BOND			208-549-0615	05/13/2005
ROAD/BRIDGE			208-414-2092	08/22/2005
REC BRIDGE			208-414-2092	08/22/2005
ELISER FIRE			208-549-2379	08/09/2005
ODENT CONTR			208-549-0415	08/22/2005
ELISER AMBUL			208-414-2092	08/22/2005
ROAD			208-257-3538	07/25/2005
EL VAL HOSP			208-549-0370	06/15/2005
AMBULANCE TORT			208-414-2092	08/22/2005
SUBTOTAL:				
FEES:				
TOTAL PROPERTY TAXES & FEES:				

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2005

ASSESSMENT NOTICE

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DO NOT PAY.

& ESTIMATE OF TAX

RETURN POSTAGE GUARANTEED
OFFICE PHONE: 208-414-2000

PARCEL DESCRIPTION:

IN 2 LXC RD R-O-W;
SECTION 4; 28 ACRES

For any questions, please notify the Assessor's Office immediately.

Assessor's Telephone Number: (208) 414 2000

PARCEL ADDRESS:

KEPNER MILTON

1733 WEISER RIVER RD
WEISER ID 83672

Appeals of your property value must be filed in
writing, on a form provided by the County, by:

JUNE 27, 2005

Tax Code Area: 49-0000

Parcel Number: 00 10N04W063040 4

PROPERTY TAX REDUCTION IS NOT INCLUDED.

ASSESSED VALUE OF YOUR PROPERTY

CURRENT CATEGORY AND DESCRIPTION	LOTS/ACRES	LAST YEAR'S VALUE	CURRENT YEAR'S VALUE
1 IRRIGD AG	28.000 AC	35,850	39,590
SUBTOTAL: LESS HOMEOWNERS EXEMPTION: NET TAXABLE PROPERTY VALUE:	28.000	35,850 35,850	39,590 39,590

These values may not include personal property values. Taxes are based on the values shown on this Notice and on the Budgets of the taxing districts.

ESTIMATED PROPERTY TAXES

TAXING DISTRICTS	LAST YEAR'S TAXES	CURRENT YEAR'S ESTIMATED TAXES	PHONE NUMBER	DATE OF PUBLIC BUDGET HEARING
COUNTY			208-414-2002	04/22/2005
WEI SCH 431A			208-549-0615	05/13/2005
WEISER SCH BOND			208-549-0615	05/13/2005
ROAD/BRIDGE			208-414-2002	08/22/2005
SPEC BRIDGE			208-414-2002	08/22/2005
WEISER FIRE			208-414-2002	08/22/2005
RODENT CONTR			208-549-2370	03/07/2005
WEISER AMBUL			208-549-0415	08/22/2005
FLOOD			208-414-2002	08/22/2005
REI VAL HOSP			208-257-3833	07/25/2005
AMBULANCE TORT			208-549-0370	06/15/2005
			208-414-2002	08/22/2005
SUBTOTAL: FEES: TOTAL PROPERTY TAXES & FEES:				

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See the back of this Notice for details.

LARY C. WALKER

Attorney at Law
232 East Main Street
Post Office Box 828
Weiser, Idaho 83672

Telephone (208) 549-0390

FAX (208) 549-0404

December 5, 1995

Mr. and Mrs. Milton Kerner

Re: Weiser Irrigation District
Our File No. 94-4572

Dear Milton and Lola:

As you may recall, I represent Weiser Irrigation District. We had a meeting with the District and yourself some time ago discussing your water rights and the rights under the contract.

We have reviewed our records, the county tax assessing records and the actual acres being irrigated, and we find at present that you are irrigating under the contract originally signed between the Irrigation District and Eva Breshears, as well as under the contract between the District and yourself.

Under the Breshears' contract, the District is carrying water for you consisting of 100 miners inches which you purchased out of a 1941 water right owned by the District, plus your storage rights from the Crane Creek Reservoir of 200 acre ft. of water. Breshears retained a home site now owned by Huston. A subsequent 6.5 acres has been conveyed to Bruce Kerner.

This original contract right was to irrigate 144.64 total acres. Part of that, however, is now owned by Huston and Bruce; we find no formal division of the 200 acre ft. of water right and the 100 miners inches that related to this property.

You have changed your operation so that approximately 9.1 acres is irrigated with Manns Creek water, leaving 90.7 irrigated acres under the Breshears' contract.

Under water that has been assessed to you and your predecessor under the name of Guy Galloway, we find no contract; however, the records show that you have 125 acre ft. of stored

Mr. and Mrs. Milton Kerner
December 5, 1995
Page 2

water in Crane Creek and some water rights under Muir vs. Allison totaling 23.1 inches associated with this water right.

Our records show that under Muir v. Allison there were only 70 miners inches that was attributable to approximately that much land which is now divided by the Weiser River.

Our records indicate that under this arrangement you have been irrigating approximately 204.4 acres, which is a large expansion over the original rights and the assessment arrangements.

The District has therefore made the decision that you will be assessed on 295.1 acres under your land and under the Breshears' contract at the regular rate, less what is paid for the Crane Creek storage water rights.

This computes to be a per acre assessment of \$ 11.90 PM/AC - Crane Creek Cost for a total assessment annually of \$ 3,462.94.

The District is also willing to allow you 15 days time to come in and meet again with the District with all of your records so that we can verify the accuracy of our figures or give you the opportunity to challenge those figures. If we hear nothing from you, we will assume that our calculations are correct and you will be assessed according to the above figures.

You may argue that your old contract is binding; however your 1941 contract is not valid because the District had no authority to sell you a water right outside of our District boundaries. Because the amount of acres irrigated has been greatly increased and it is also obvious that in the past you have not ordered any Crane Creek water out of Crane Creek until the river flow is diminished to where it is inadequate, you have utilized water that has been owned by the District over the years and paid no assessment for that water. Rather than going back and seeking some compensation for that, the District is desirous to get this resolved by requiring that a new contract be executed between you and the District covering the present circumstances and allowing for future changes and assessing you on a basis equal to all other District members.

For your information also, we are proposing a new contract along the lines and terms as per the enclosed proposed draft. We would invite you to review that proposed contract yourself. If you desire to retain legal counsel, you are invited to do that and set up a meeting time with the District to cover these issues.

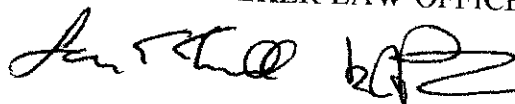
As we indicated to you and have reconfirmed by telephone conversation with the Water Department, the Water Department is undertaking to readjudicate under the Snake River Adjudication by special request all water used out of the Galloway Canal, including water used by you so this will all be reevaluated to the extent that is necessary to bring all of these rights

Mr. and Mrs. Milton Kerner
December 5, 1995
Page 3

current. We hope we have properly reflected where these rights stand today and the amount of acres being irrigated. However, we realize that mistakes can be made and we therefore invite you to bring in any documentation or evidence you may have to dispute what we understand and have proposed herein.

Sincerely,

LARY C. WALKER LAW OFFICE

A handwritten signature in black ink, appearing to read "Lary C. Walker", followed by a stylized flourish or second signature.

Lary C. Walker

LCW:mle
Enclosure

WEISER IRRIGATION DISTRICT

12/07/95 -- Page: 1

P.O. BOX 591

WEISER, ID 83672

TAX YEAR	INV#	LEGAL DESCRIPTION	TAX AMOUNT
1994	1499	IRRIGATED ACRES ON CONTRACT	\$ 11.90
1994	1499	GALLOWAY PROPERTY	
1994	1499	IRRIGATED ACRES ON CONTRACT	\$ 11.90
1994	1499	BRESHEARS PROPERTY	
Already paid for: 1994			\$ -23.80
1995	1499	IRRIGATED ACRES ON CONTRACT	\$ 3,511.69
Already paid for: 1995 CRANE CREEK CREDIT*****			\$ -48.75
			<u>TOTAL OWED: \$ 3,462.94</u>

MILTON KERNER
1733 WEISER RIVER ROAD
WEISER, ID 83672

CUST. #: 1563

MILTON KERNER

CUST. #: 1563

2nd Installment for 1995 amount \$1755.85 DUE 06/20/96

NOTE: Total ~~past due~~ amount \$ -48.75
CREDIT

WEISER IRRIGATION DISTRICT
124-128 EAST MAIN
P.O. BOX 591
WEISER, ID 83672

MILTON KERNER

CUST. #: 1563

1st Installment for 1995 amount \$1755.84 DUE 12/20/95

NOTE: Total ~~past due~~ amount \$ -48.75
CREDIT

WEISER IRRIGATION DISTRICT
124-128 EAST MAIN
P.O. BOX 591
WEISER, ID 83672

ROBERT W. TALBOY
ELLSWORTH, KALLAS & TALBOY, P.L.L.C.
Attorneys at Law
2402 W. Jefferson Street
Boise, Idaho 83702
Telephone: (208) 336-1843
Idaho State Bar No. 3603
Fax: (208) 345-8945

COPY

RANDALL C. FREDRICKS
Attorney at Law
P. O. Box 2835
Boise, Idaho 83701-2835
Telephone: 208-384-5144
Idaho State Bar No. 989
FAX: 208-433-8976

ATTORNEYS FOR PLAINTIFFS AND THIRD-PARTY DEFENDANTS KERNER

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF WASHINGTON

VAUGHN W. KELLEY, an individual;
HENRY P. GREEN and ANN C. GREEN,
husband & wife; SMITH LAND &
LIVESTOCK CO., an Idaho corporation;
LON BAKER & JACK BAKER,
dba BAKER BROTHERS, an Idaho
general partnership; and INSTITUTE
CANAL COMPANY, an Idaho Corporation

Plaintiffs,

vs.

WEISER IRRIGATION DISTRICT,

Defendant.

Civil No. CV98-00496

**PLAINTIFFS'
MEDIATION
STATEMENT**

WEISER IRRIGATION DISTRICT,

Third-Party Plaintiff,

vs.

MILTON KERNER and LOLA KERNER,
husband and wife, BRUCE KERNER and
JULIE KERNER, husband and wife,
ROBERT A. SHIRTS and RONALD W.
SHIRTS dba SHIRTS BROTHERS,

Third-Party Defendants

The following statement will be somewhat lengthy in order to give an adequate factual background, keeping in mind that this case involves seven (7) individual contracts and six (6) plaintiffs encompassing a time span of some eighty (80) years. The question involving water rights will, of course, be finally determined by the SRBA. If we can come to some solution over the "cost" of delivery of water, the ownership dispute will also be resolved.

Although the contracts have certain elements not common to each other the main element common to all of the contracts is that they are all "transportation" or "carriage" contracts by which the Weiser Irrigation District agreed to carry a certain designated amount of the private water of each contract holder for a specified contract rate. There were basically few problems involving these agreements until the year 1995 when the Weiser Irrigation District took the position that each contract holder should pay on a per acre basis the same assessment as members within the District without considering

the "actual" cost of delivery of the water to the diversion point of each contract holder and totally ignoring the plain terms of each contract.

The Weiser Irrigation District also took the position that the water being delivered to each contract holder was water owned by the District and not the individual contract holders and that the contracted rate was not valid. The District thus began charging each contract holder as if they were District members beginning in the year 1995 which charges have continued to the present time.

The contract holders filed this action for the purpose of having the court make a declaratory ruling on the validity of each contract.

This mediation was agreed to since the parties have been attempting to come to some compromise solution basically over the charges that the contract holders would be willing to pay for the transportation of their water. The basic difference at this time is that the District wants to charge on an acreage basis but is willing to reduce the normal District member assessment by some percentage. The contract holders have no real objection to paying the "actual" cost of delivery but any formula must be based on the point where each contract holder diverts their water and related directly to the maintenance and repair of the Galloway Canal. It must be kept in mind that the Plaintiffs are not District members and are not subject to the District assessments.

For example if we can come to some agreement on a reduced assessment charge that would approximate the cost of maintaining the Galloway Canal as a whole then this cost must also be prorated to the point where each contract holder diverts their water. The formula which would approximate the cost of the maintenance of the entire Galloway Canal (25 miles) would have to be divided by 25 to determine the cost to the District to maintain each mile of canal and then multiplied by the miles where each contract holder diverts their water. The Baker Brothers divert within one mile from the head of the canal; the Greens and Smith divert approximately three miles from the head of the canal; the Kelleys and Kerners divert approximately five miles from the head of the canal and the Institute Canal diverts approximately eleven miles from the head of the canal.

TIME LINE

The following is a time-line of the important dates involved for the convenience of the mediator.

Pre-1918. The Weiser Irrigation District was formed and began diverting water from the Weiser River for the irrigation of District lands. In the year 1916 Weiser Irrigation District purchased 8,400-acre feet of Crane Creek Reservoir storage water.

12/4/1918. The Weiser Irrigation District entered into a canal sharing agreement with Weiser Bench Irrigation Company (predecessor to the Institute Canal Co). The Bench Irrigation Company agreed to enlarge the canal to allow the Bench Irrigation Company to carry 2,000 miner's inches of water for their purposes and 8,000 miner's inches for Weiser Irrigation District.

6/20/1921. The Weiser Irrigation District was decreed 6,000 miner's inches (120 C.F.S.) under the Muir Decree to irrigate 8,000 acres of District lands.

4/15/1925. Due to financial difficulties the assets of the Weiser Bench Company was sold under foreclosure to L.F. Easton.

1932. The Weiser Irrigation Co. decided to move the diversion point for the Galloway Canal 1 and 3/4 miles upstream and to construct two miles of new canal across the lands now owned by the Baker Brothers and the Greens and Smiths.

10/1/1932. Contract was entered into between the Weiser Irrigation District and the predecessors to the Baker Brothers (John Baker and Eva E. Muir). The District purchased a right of way across the Baker lands and also allowed the Baker interests to carry their private water in the canal to irrigate

their lands through which the canal ran. One diversion point is approximately 1/4 mile from the head of the canal and the second diversion point approximately 1 mile from the head. The contract specified no delivery cost and no restriction on acreage or amount of water. No cost was assessed to the Baker Brothers until the year 1995. This contract has been referred to as the Muir/Baker Contract. The Bakers are presently diverting 151.6 miner's inches or approximately 1.38% of the capacity of the canal.

11/22/32. Contract was entered into between the Weiser Irrigation District and the predecessors to the Greens and Smiths (Ida M. Shoesmith and Polly A. Smith). Henry and Ann Green now own the Ida M. Shoesmith land and Smith Land & Livestock Co. owns the Polly A. Smith lands. The District purchased a right of way across their lands in order to tie into the existing Galloway Canal and agreed to carry up to 625 miner's inches (12.5 C.F.S.) of their private water and the Shoesmith/Smith parties agreed to pay 1/25th of the cost of the maintenance of the Galloway Canal from the head to their diversion point which was approximately 3 miles. The Greens are diverting approximately 181 miner's inches and the Smiths 188 miner's inches or a total of 369 miner's inches. The water is diverted at the same diversion point and is approximately 3.4% of the capacity of the canal and approximately 60% of the allowed diversion rate. At some point later in time the District, on its own volition, began using a formula to determine the delivery cost to be paid by the Shoesmith/Smith parties which formula was as follows:

- :
- (1) Add the total director salaries plus secretary salary plus water tender salaries plus mileage costs.
 - (2) Divide this number by 25 (length of the Galloway) which would equal an average cost per mile.
 - (3) Multiply this by 3 (miles from the head of the canal to the Shoesmith/Smith diversion point); and
 - (4) Multiply this by 1/25th as the agreed contractual carriage cost for their water.

1/9/36. The Institute Canal Co. was formed and the Institute Canal Co. purchased the irrigation assets of the defunct Bench Irrigation Co. from L. F. Easton.

1/10/36. Weiser Irrigation District entered into a contract with the Institute Canal Co. (actually an amendment of the 1918 contract with the Bench Irrigation Co.) whereby the flowage right through the Galloway Canal was reduced from 2,000 miner's inches to 1,000 miner's inches and if the Institute Canal Co. did not divert more than 800 miner's inches and allowed the District to utilize the excess then the ordinary cost of maintenance and upkeep of the Galloway canal from its head to the Institute diversion point was waived (except new construction or repairs due to Acts of God).

12/18/36. The Weiser Irrigation District applied for an additional 120 C.F.S. of water from the Weiser River (6000 miner's inches) to be applied to existing District lands and several thousand acres of non-district lands which included the lands now owned by the Plaintiffs. This application was approved by court decree dated May 16, 1939.

1939. The Weiser Irrigation District purchased an additional 6,700-acre feet of Crane Creek Reservoir storage water.

1940. The Weiser Irrigation District purchased an additional 2,500-acre feet of Crane Creek Reservoir secondary storage water.

1/15/1941. The Weiser Irrigation District entered into a contract with the predecessor to Vaughn Kelley (Annie Kelley) by which the District sold to Annie Kelley 50 miner's inches of Weiser River water from the 6000 miner's inches of water contained in the 1939 decree together with 100 acre feet of Crane Creek Reservoir water for the sum of \$300.00. Annie Kelley agreed to pay an annual maintenance cost of \$12.00 together with her pro rata share of the expense of any necessary improvements to the canal between the head of the canal and the Kelley diversion point. The Kelleys have been diverting approximately 50 miner's inches for irrigation of their lands which is approximately .45% of the capacity of the canal.

1/15/1941. The Weiser Irrigation District entered into a contract with the predecessor to the Kerners (Arthur Breshears) by which the District sold to the Breshears 100 miner's inches of Weiser River water from the 6000 miner's inches of water contained in the 1939 decree together with 200 acre feet of Crane Creek Reservoir water for the sum of \$600.00. The Breshears agreed to pay an annual maintenance cost of \$12.00 together with their pro rata share of the expense of any necessary improvements to the canal between the head of the canal and the Breshear diversion point. The Kerners have been diverting approximately 100 miner's inches which is approximately .9% of the capacity of the canal.

12/20/1954. The Weiser Irrigation District entered into a third contract with the Institute Canal Co. in order to clarify a prior dispute that had arisen over the manner of sharing costs of new construction for permanent improvements and repair to the canal made necessary by act of God and to further fix and determine the proportionate share of the reconstruction, maintenance and repair of that portion of the canal lying between the pumping plant of the Institute and the head gate of the canal. The basic agreement was that the obligations of the Institute Canal set out in the prior agreements (1918 and 1936) would be satisfied by the Institute participating in the cost of construction, improvement, repair and damages whether such repair be temporary or permanent by paying to the District the sum of \$150.00 per year and further if there is any damage to said portion of the canal by an Act of God

that the Institute would pay 1/9th of the cost of such repair or 11.1%. The above was only valid so long as the Institute did not divert more than 800 miner's inches from the canal. The Institute at this time is diverting approximately 800 miner's inches at a point approximately 11 miles from the head of the canal which is 7.2% of the capacity of the canal.

WEAKNESSES AND STRENGTHS OF EACH PLAINTIFF

1. THE INSTITUTE CANAL COMPANY.

The District's main contentions regarding the Institute Canal Company are: (i) that since the Institute owns no licensed or adjudicated water that all water being delivered belongs to the District; (ii) that the contractual amount of \$150.00 is invalid; and (iii) that there has been an illegal enlargement of acres being irrigated by the Institute from 800 to 957.

(a) The facts are clear that at least since the year 1920 the Institute (or its predecessor) has been diverting and applying to a beneficial use Weiser River water for the irrigation of Institute lands consisting of 800 acres. The District, for some reason, ignores the constitutional claim of the Institute.

". . . The right to divert and use the unappropriated water of any natural stream is guaranteed by the Idaho Constitution in article 15, Sec. 3. Until the law was changed in 1971, see 1971 Idaho Session Laws, ch. 177 at 843, a

person desiring to appropriate the water of a stream could do so either by actually diverting the water and applying it to a beneficial use or by pursuing the statutory method, which entailed an application to the Department of Water Resources for a permit and then fulfilling the requirements of the permit. . . Since 1971 the exclusive way to acquire a water right has been by the permit method. Nevertheless, those rights acquired by the so-called constitutional method prior to that time are still valid. (Emphasis mine.) I.C. Secs. 42-103, 42-201. Thus, an appropriator, whose right is based upon a valid, although unadjudicated, constitutional method of appropriation, retains a senior claim in relation to a person holding a later issued permit. . .".

R.T. Nahas Co. v. Hulet 114 Idaho 23, 752 P.2d 625 (App. 1988) pps. 26 to 27.

This basic law was also reiterated in the case of Fremont-Madison v. Ground Water Approp. 129 Idaho 454, 926 P.2d 1301 (1996).

The Institute Canal Co. has filed its claim with the Department of Water Resources under the Snake River Adjudication for 800 miner's inches of Weiser River water. This would place the water claim of the Institute Canal Co. as senior to the 1939 Decreed right of the Weiser Irrigation District.

Examining the claim of the Weiser Irrigation District if we add the Muir Decree of 6000 miner's inches to the later 1939 Wood decree the record would support 12,000 miner's inches decreed to the Weiser Irrigation District. The problem facing the District is that the 1939 Wood decree included over 3,000 acres of non-district lands including the Plaintiffs' lands in this litigation. According to the filing made by the District in the existing Snake River Adjudication (A67-10280) the District claims 184.310 cfs of Weiser river water or 9,215.50 miner's inches to apply to 9,215 acres of District lands. The District is presently diverting 11,000+ inches of water from the river. The facts are clear that the excess water being diverted is the water claimed by the Institute and the other Plaintiffs.

It is the position of the Institute Canal Co. that the allegation of the District that the Institute does not own its own water has no merit whatsoever.

(b) If there is any weakness whatsoever in the position of the Institute Canal Co. it is the agreed \$150.00 contractual maintenance cost although we have found no court decisions or other legal bases for finding this contractual term invalid. Idaho Code Sec. 42-906 states as follows:

"Amount and lien of rental or maintenance.--The amount to be paid by said party or parties for the delivery of said water, which amount may be fixed

:
by contract, or as may be provided by law, is a first lien upon the land for the irrigation of which said water is furnished and delivered."

From our review of the prior court decisions such contracts regarding a stipulated maintenance fee for the transportation of water through the canal system of a canal company have been upheld.

For example in the case of Nampa & Meridian Irrigation Dist. v. Briggs 27 Idaho 84, 147 Pac. 75 (1915). Nampa & Meridian sued Briggs in order to collect the Briggs pro rata share of the expenses necessarily incurred for the repair and maintenance of the ditches and canals of the entire irrigation system owned and controlled by the District. (Same position now taken by Weiser as to all Plaintiffs). The Briggs parties disputed this position and pointed out that he was the owner of his own water right and the contract provided for a specified sum of \$12.00 per annum for each cubic foot of water delivered to his lands as his share of the repair and maintenance of the relevant canal. Nampa & Meridian took the position that the owners of water rights carried through the same ditch are legally liable to contribute pro rata to the maintenance of the entire system. The court stated that: "No doubt this is true in cases wherein all parties are upon equal footing and there is not contract to the contrary." The court upheld the terms of the Briggs contract.

: Other cases which have upheld the right of parties to contract regarding a stipulated maintenance fee are: Nampa & Meridian Irr. Dist. v. Gess 17 Idaho 554, 106 Pac. 994 (1910); Knowles v. New Sweden Irr. Dist. 16 Idaho 217, 101 Pac. 81 (1909); Jackson v. Indian Creek Irr. Co. 16 Idaho 430, 101 Pac. 814 (1909); Booth v. Weiser Irr. Dist. 112 Idaho 684, 735 P.2d 995 (1987); Riverside Irr. Dist. v. Black 25 Idaho 98, 136 Pac. 611 (1918); Idaho Fruitland co. v. Great Western Bean Sugar Co. 18 Idaho 1, 107 Pac. 989 (1910); and Old River Rice Irr. Co. v. Stubbs 130 SW 1504 (Texas 1911).

The case of Jackson v. Indian Creek Irr. Co. supra is especially enlightening on this issue. The court in that case stated:

:
"This contract, it would seem, very clearly fixes and defines the respective rights of the parties. By it the company sells and conveys to the plaintiff the right to receive and use water from its reservoir and canals sufficient to irrigate certain land, and the plaintiff agrees to pay therefor an annual maintenance fee of ten cents. In case of shortage for any cause, the plaintiff agrees to receive under said contract only her pro rata share of water and consents that the company shall furnish only her pro rata share of such water. The only point urged against the validity of this contract, and the only part of such contract held to be void by the trial court is that portion which fixes the maintenance charge, and it is in the light of this provision only that this court is called upon to determine the validity of such contract. that the

parties to such contract had the capacity to contract it must be conceded, and if it was in their power to contract with reference to the maintenance charge, then so far as such contract is involved in this case, it must be held valid. The argument made against that provision in the contract which fixes the maintenance charge is based upon the provision of sec. 6, art. 15, of the constitution, which reads as follows:

'The legislature shall provide by law, the manner in which reasonable maximum rates may be established to be charged for the use of water sold, rented or distributed for any useful or beneficial purpose.'

"From this it is argued that the power to fix rates by contract is taken away and such power given solely to the legislature. Conceding, then, that the premises upon which such agreement is based are correct, still we find that the legislature of this state has by enactment authorized parties to contract with reference to the rate to be charged for furnishing water for irrigation purposes.

Sec. 3288 of the Rev. Codes, among other things, provides: (The court then states the code at this point which is now Sec. 42-906 I.C. set out above.)."

The court approved the terms of the contract and the agreed maintenance charge.

That the Institute Canal Co. and all other Plaintiffs (not being members of the Weiser Irrigation District) cannot be treated as District members as the District wants to do is illustrated in the case of Nampa & Meridian Irr. Dist. v. Briggs supra which stated:

"Had the respondent's rights under his deeds been acquired by appellant and his property been taken into the district, the contention that no preferential right could be granted in his favor and against those situated similarly to him would be sound, but his rights were not acquired by appellant, his property was not taken into the district, the water-users who are members of the appellant corporation are not situated similarly to him and the contention is not sound."

The contention that the Institute Canal Co. can now be charged on a per acre basis the same as if the Institute Canal Co. was a District member is very weak and we have found no legal basis upon which to base that allegation. The only reason that we have considered mediation is to finalize once and for all the ongoing dispute. It must be kept in mind that the present costs of delivering water to the Institute members is much higher than the cost being assessed on District members so any additional cost must be reasonable and only related to the actual cost of the delivery of water to the Institute diversion point.

(c) The final major issue is the position of the District that there has been an unlawful enlargement of acres being irrigated by the Institute Canal Co. from 800 to 957. It is the position of the Institute that there are absolutely no grounds for this allegation. The contract in question allows up to 800 miner's inches to be diverted to retain the maintenance fee of \$150.00. The Institute is pumping directly from the Galloway Canal and the pump cannot pump in excess of that amount. Further the contract makes no restriction on the amount of acres being irrigated but only the amount of water being diverted. Finally, the Institute Canal is composed of 800 acres which are being assessed on a per acre basis for the Institute costs. The additional 157 acres being complained of by the District is composed of non-District and non-Institute lands. The water, if any, from the Institute canal would be run-off or wastewater from Institute lands. The Institute has no control over these lands nor is it assessing these lands. The law is clear that any person can use run-off or wastewater from prior appropriators subject to the right of that person to reclaim such waters before it leaves their lands. The only concern that the District has is the amount of water being diverted by the Institute. How this water is delivered or utilized is the business of the Institute and not the District.

Section 42-913 Idaho Code states as follows: "Application for water. . . the consumer of water shall be the judge of the amount and the duty of the water required for the irrigation of his land; and the annual charges to be

made and to be fixed under the further provisions of this title, shall hereafter be based upon the quantity of water delivered to consumers, and shall not in any case depend upon the number of acres irrigated by means of such amount of water delivered."

2. LON BAKER AND JACK BAKER dba BAKER BROTHERS, an Idaho general partnership.

As previously indicated the Baker lands are located at the very head of the Galloway Canal and their diversion point is 1/4 mile and 1 mile from the head of the canal. It is difficult to ascertain the exact position of the District regarding the Baker Brothers but the letter from the District's attorney in 1995 stated that the "original contract has no right to any acres above the canal" and therefore the Baker Brothers were in violation of the terms of the contract.

(The contract has no such restriction). The District then began assessing the Baker Brothers for 173 acres of irrigated lands at the same rate of District members. The District allegations are basically the same as alleged against the Institute Canal: (i) Disputing the claim that the Baker Brothers own their own private water being carried in the Galloway Canal; (ii) the validity of the contract term which allows the Baker Brothers to carry their private water through the Canal for no cost. All parties until 1995 believed that the contract when read in total would not charge the Baker Brothers any cost of maintenance; and (iii) have the Baker Brothers breached the agreement?

(a) The Baker Brothers have filed their claims with Snake River Adjudication with an original claim for 2.272 cfs (113.6 miner's inches) which relates back to the 1932 contract and two later claims for .360 cfs (18 miner's inches) with priority of 1957 and .400 cfs (20 miner's inches) with priority of 1968. All claims predate the 1971 cut off date and thus are based on the constitutional claim of diversion and application to a beneficial use. Under the same basis as set out for the Institute Canal Co. there is no question but that the Baker Brothers have a right to 151.6 miner's inches of water. The claim that the Baker Brothers have no valid water claim is unfounded in fact and law.

(b) The 1932 contract provides for no cost to be assessed to the Baker Brothers. (The contract is silent on that point). It must be remembered that it was vital for the District to obtain the rights across the Baker lands in 1932 in order to move their diversion point upstream and build an additional two miles of canal of which more than one mile crossed the Baker lands. It also must be kept in mind that the diversion points of the Baker brothers are within one mile of the head of the canal thus the costs to deliver the water to the Bakers (1.4% of the capacity of the canal) would be minimal in any event. The contract when read as a whole would also indicate that there was no intent to charge the Bakers for use of the canal to irrigate those lands along which the canal ran. Weiser Irrigation District only paid the sum of \$250.00 to obtain this extensive easement and further agreed to "maintain the ditch in a suitable

and efficient manner" including the building and maintenance of two bridges across the canal on the Baker property. The District from that date until 1995 charged no fee to the Bakers for use of the canal. The evidence is clear that the contract's intent was to allow the Bakers to use the canal at no cost.

The weakness of this issue regarding the Bakers is that it is possible that the court could construe the contract against the Bakers and that a cost of delivery should be paid by the Bakers. Although we believe that the District's position on this issue is weak the Baker Brothers would be willing to compromise the issue if it will settle all issues by paying their proportional share of the cost of maintenance of the first mile of the canal. Reference is also made to the contract decisions set out under the Institute discussion.

(c) Have the Baker Brothers breached the agreement? Again, it is unclear what the District is alleging in this regard as their only contention is that irrigating above the canal is somehow a breach of the agreement. The agreement contains no such prohibition and further contains no time line in which to bring their land under irrigation. The later claims were due to the fact that the Baker Brothers were able to begin sprinkling additional acreage, which they could not do earlier. This may be what the District is alluding to. The contract is clear that "as part of the consideration for the conveyance of the right-of-way", the Baker/Muir parties were "permitted to take and carry through said canal their private irrigation water for the irrigation of their lands

through which the right-of-way runs." The Baker Brothers are in full compliance with these terms. The land being irrigated is the same land owned by their predecessors at the time of the 1932 contract.

It is our position that the position of the District on this issue is weak.

2. HENRY and ANN GREEN and SMITH LAND & LIVESTOCK CO.

The lands of the Greens and Smiths are located next to the Baker lands and were in a similar position as the Weiser Irrigation District in order to better supply irrigation water to their constituents needed to obtain rights of way across the Green and Smith lands which is the reason for the 1932 contract. The Green's predecessor Ida M. Shoesmith owned 185 acres of land in 1932 of which (at that time) 145 acres was being irrigated. Over the years additional Shoesmith lands were placed under irrigation until at this time the Greens are irrigating 181 acres of the original lands.

The Smith's predecessor owned 171 acres of land in 1932 of which 154 acres were under irrigation. Since that time additional acreage has been obtained and approximately 188 acres are now being irrigated. The contract allowed the Shoesmith/Smith parties to carry through the Galloway Canal all irrigation water that they may desire for irrigating their present lands, being about 320 acres of irrigatable lands, not to exceed 600 miner's inches. The

contract also allowed the pumping of an additional 25 miner's inches to irrigate some high ground owned by Ida Shoesmith. The contract required that the expenses of maintenance of the canal from its head to the Shoesmith/Smith diversion point would be paid 1/25th by Shoesmith/Smith and 24/25th by the Weiser Irrigation District.

The District has made the following allegations as to the Greens and the Smiths: (i) Again contesting the ownership of the water being delivered through the Galloway Canal to the Green/Smith properties; (ii) Contesting the agreed formula for payment of the costs of delivery; and (iii) That the contract has been breached.

(a) The claims of the Greens and the Smiths can be divided into two areas. Ida Shoesmith and Polly Smith followed the statutory method of applying for a permit in 1932 and on June 25, 1935 were issued a License and Certificate of Water Right for a total of 5.98 cfs (299 miner's inches) divided by 145 miner's inches to Shoesmith (Green predecessor) and 154 miner's inches to Polly Smith (Smith predecessor). Since that time additional water has been diverted and applied to a beneficial use on the original Shoesmith property in the approximate amount of 36 miner's inches and on the Smith property in the approximate amount of 34 miner's inches. These claims have all been filed with the Snake River Adjudication and all predate the year 1971.

It is our position that the District has no grounds to contest the right of the Greens and Smith to claim their own private water and that only their own private water has been carried through the Galloway Canal for irrigation of their private grounds.

(b) The contractual formula for payment of the costs of carriage of the Green and Smith private waters through the Galloway Canal is clear and unambiguous. They are to pay 1/25th of the cost of maintenance of the canal from its head to their diversion point. Since the District was having trouble calculating this cost (which is their problem not ours) the District some years ago came up with the formula referenced earlier in this discussion. Basically adding all salaries and mileage costs and then using this figure as an approximate cost of maintaining the Galloway Canal as a whole. Although it is unclear why this particular formula was set up, it does approximate 35% to 40% of the entire costs of the District which is probably a reasonable estimate of the actual costs of maintenance of the canal itself. It must be remembered that the District has other costs not directly involved with the Galloway Canal itself such as a number of miles of laterals, bridges, roads, additional costs involved with the City of Weiser, additional costs involved by pumping from the Snake River, snow surveys and other costs.

In any event, the case law and statutory law is clear that the formula agreed to by the parties in 1932 would be enforceable. Reference is made to the legal discussion under the Institute area.

The Greens and the Smiths take a strong position on this issue. As far as mediation is concerned they would be willing to agree to the calculation previously being used by the District in assessing their costs or if another formula similar can be agreed to would consider that such as a percentage of the actual District assessment in lieu of the salary/mileage method.

(c) Has there been a breach of the Shoesmith/Smith contract?

It is our position that the contract is clear that the only prohibition under the contract is the amount of water being diverted not the amount of acreage being irrigated or which could be brought under irrigation at a later date.

The irrigation of the property owned by Mr. & Mrs. Green (the original property under the Shoesmith/Smith contract) has been increased by 36 acres. The diversion rate is still below the contractual amount and the lands being irrigated are the same "present" lands referred to in the original 1932 contract. Clearly there has been no violation of the terms of the 1932 contract by the Greens.

As to the Smith lands, the additional 34 acres that although adjoining the original Smith lands are not the lands referenced in the original 1932 contract. Even though the 1932 contract allows the diversion of approximately 300 miner's inches by the Smith interests the District could argue that a violation has occurred. Any damage, though, would be minimal since the Smiths are still within the diversion rates allowed by the 1932 contract so the District is not delivering any water in excess of that allowed by contract.

Our position thus is strong on the Green issue and except for the additional 34 acres being irrigated by the Smiths would also be strong on this issue with the Smiths but this would of course be open to discussion in order to resolve it.

3. VAUGHN KELLEY AND MILTON KERNER ET AL.

The issues involving Vaughn Kelley are very similar to the Kerners since their contracts were entered into simultaneously and except for the amount of water purchased are identical in other aspects. Just prior to the execution of the Kelley and Kerner (Breshears) contract in 1941 the Weiser Irrigation District had been awarded an additional 6000 miner's inches of water (part of which was directly related to the Kelley and Kerner properties) and had purchased some 6700 acre feet of primary storage and 2500 acre feet of secondary storage in the Crane Creek Reservoir. The District had also just

completed major work on the Galloway Canal and as indicated in their minutes were in need of funds. Thus in 1941 the District sold 50 miner's inches from the 6000 miner's inches just awarded together with 100 acre feet of storage water for the sum of \$300.00 to Annie Kelley and 100 miner's inches together with 200 acre feet of storage water for the sum of \$600.00 to the Kerner predecessor. The District also agreed to carry the water just sold for an annual maintenance fee of \$12.00. As with all the other Plaintiffs the contracts were followed by the District until the year 1995 at which time the District began assessing Vaughn Kelley and the Kerners as if they were District members in total breach of the terms of the 1941 contracts.

The issues involving Vaughn Kelley and Milton Kerner are basically the same as involving the other Plaintiffs: (i) Questioning the ownership of the waters being carried through the Galloway Canal. The additional allegation that for some legal reason they couldn't sell the water to the predecessors of the Kelleys and Kerners; (ii) Validity of the agreed payment for delivery of the Kelley and Kerner water; and (iii) Allege that there has been an illegal enlargement of acres being irrigated.

(a) The District has admitted in its pleadings and other documentation that when the District was awarded the additional 6000 miner's inches of water that this included water which was to have been applied to a large number of non-district lands including the lands owned by Annie Kelley and the Breshears

and that such water was not needed for irrigation of lands within the District. It was therefore surplus water not even appurtenant or dedicated to lands within the District. As case law states such waters may be transferred, sold and delivered to non-district lands without being considered as an ultra vires act.

"Under the provisions of C.S., Secs. 4346 and 4355 (Secs. 43-304 and 43-322, I.C.), the power of the directors or other officers of an irrigation district is limited, and any act done in excess of the express or implied provisions of the statute by such directors or other officers is ultra vires. However, the foregoing provisions of the statutes do not prohibit the delivery of water to users outside of the district when the same is not needed by users within the district.

Jensen v. Boise-Kuna Irr. Dist. 75 Idaho 133,139, 269 P.2nd 755,761 (1954).

The case went on to state at page 141: "The incorporation, by reference, of powers of the district applicable to irrigation, includes the general powers set forth in Sec. 43-304 I.C. which specifically includes the power to "make and execute all necessary contracts." From these provisions it is clear that the subject matter of the contracts which the district made with the plaintiffs is not ultra vires. The contracts by their terms identify the water to

be made available to the plaintiffs as "seepage waters and waste waters". Hence, no attempt was made by the directors to obligate the district to deliver or make available to the plaintiffs any of the water or water rights owned by the district, and available, appurtenant and dedicated to lands within the district."

This basic legal issue has been followed in the case entitled In Re SRBA Case NO. 39576 Memorandum Decision and Order on Challenge dated April 27, 1999 at page 17.

Irrespective of the position of the District regarding their problem with the 1939 decree which covered both District and non District lands both the Kelleys and the Kerners have diverted and applied to a beneficial use the waters involved all of which occurred long prior to the year 1971. They also have a right under the constitution upon which to base their claim to their private waters. Vaughn Kelley has filed his claim under the SRBA, which shows it as a split right under the original 1939 decree. Kerners have also filed their claims under the SRBA part of which is under the same split right and part under a different number.

The position of both the Kelleys and the Kerners is that the Weiser Irrigation District has no basis to deny that the water being delivered to their properties are not their private waters.

(b) As to the \$12.00 set maintenance fee provided by the two contracts we would refer to the legal decisions set out under the Institute discussion. Such terms have been upheld without exception by the courts. Irrespective of that both parties are willing to negotiate on the same basis as set out under the Baker, Smith and Green discussions that the contracts could be amended to provide some agreeable formula for determining the actual cost of delivering the water to the Kelley and Kerner properties based on the maintenance cost of the Galloway canal from its head to their diversion points which are approximately 5 miles from the head of the canal.

(c) Regarding augmentation of acreage Vaughn Kelley is irrigating the exact same acreage as defined in the original 1941 contract or 51.8 acres. He is diverting approximately 50 miner's inches and is using a measuring device for this purpose designated by the Weiser Irrigation District.

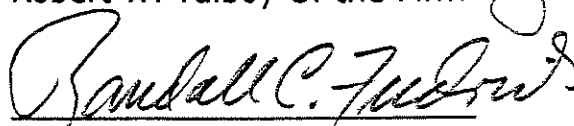
Our position regarding this issue is strong and that there has been no augmentation of acreage under the 1941 contract. In fact the contract does not restrict the acreage to be irrigated. The only restriction is the amount of water to be diverted. The Weiser Irrigation District has no interest whatsoever in the acreage involved. This is strictly up to the owner of the property. Reference is also made to Sec. 42-906 I.C.

The Kerners are irrigating approximately 120 acres from the Galloway Canal and are not diverting anymore than the 100 miner's inches allowed under the 1941 contract which is being measured by a measuring device of a type as specified by the District and installed at the District's request. The District is claiming that the Kerners are irrigating an additional 175 acres and have been assessing these acres in addition to the 120 acres. The additional acreage is being irrigated by direct pumping from the Weiser River and has absolutely no relationship to the Weiser Irrigation District or the Galloway Canal. The 120 acres being irrigated from the Canal is the same lands as described in the 1941 contract.

The Kerners are not in violation of the 1941 contract and the acreage involved is contained within the description set out in the 1941 contract. Irrespective of that the only restriction under the 1941 contract is the amount of water to be delivered not the amount of acres to be irrigated.

Respectfully submitted this 14th day of July, 1999.

ELLSWORTH, KALLAS &
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