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

In Re SRBA	)	Subcase Nos. 45-10481, 45-10481,
	)	45-10502 and 45-12906
Case No. 39576	)	
	)	BRIEF IN ANSWER TO WARTHEN'S
	)	MOTION FOR SUMMARY JUDGMENT
	)	ON ALL CLAIMS AND WITHDRAWING
	)	OBJECTION TO SUBCASE NO. 45-10502

COME NOW Kevin Smyer, Norman Smyer and Dolores Smyer (hereinafter referred to as the Smyers), the claimants/participants in Water Right Nos. 45-10481, 45-10481 and 45-12906, by and through their attorney of record Michael P. Tribe, and file this *Brief in Answer to Warthen's Motion for Summary Judgment on All Claims*. As there are genuine issues of material fact, Earl Warthen is not entitled to an order for summary judgment as a matter of law under Idaho Rule of Civil Procedure 56(c).

Earl Warthen has filed a Motion for Summary Judgment on the Smyers' three beneficial use water claims (45-10481, 45-10481, 45-12906) based on his assertion that there has

ANSWER TO WARTHEN'S MOTION
 FOR SUMMARY JUDGMENT

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3 been no lawful appropriation of the rights by the Smyers. Warthen's claim is based on a 1991
4 Memorandum Decision and Subsequent Order adopting the Memorandum Decision in Water
5 Right No. 45-0292. However, that Order is not binding in the Smyers' current subcases, and the
6 Department of Water Resources recommendations for the Smyers' rights should stand.

7 8 I INTRODUCTION

9 On March 15, 1990, Kevin Smyer filed with the Idaho Department of Water
10 Resources (Department) an Application for Transfer to establish a point of diversion for Water
11 Right No. 45-0292. Earl Warthen protested the application and a hearing on the objection and
12 transfer application was held on November 13, 1990. Gary Spackman of the Department
13 conducted the hearing and heard evidence from both parties. Water Right No. 45-0292 was
14 originally decreed for 0.24 cfs of Howell Creek water in the case of *Wood v. Stokes*. The court
15 originally decreed the water to B.F. Mahoney for the purposes of irrigating land located in the
16 NE¼ of an unidentified section of Cassia County in T12S, R25E., Boise Meridian. The decree
17 did not locate the point of diversion for Water Right No. 45-0292, and the purpose of Smyer's
18 application for transfer was to locate a point of diversion.

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20 In January of 1991, Spackman held that Water Right No. 45-0292 had been
21 forfeited. The Order made no mention of the waters of Spring Creek, the Unnamed Stream or
22 any spring located on Kevin Smyers' property. (Those three sources comprise Kevin Smyer's
23 sources of water for Water Right Nos. 45-10480 and 45-10481.) The Order also made no
24 findings regarding possible beneficial use rights on the property; the Order focused solely on the
25 waters of Howell Creek. Therefore, the Smyers maintain that any use of the 1991 Order is

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3 irrelevant and should not be a factor in the current adjudication of the Smyers' water rights.
4 There also exists evidence of diversion and application of water to a beneficial use for the
5 Smyers' three water rights as well as evidence that those rights have not been abandoned or
6 forfeited.

7 8 II. LEGAL STANDARDS

9 Summary judgment is appropriate "if the pleadings, depositions, and admissions
10 on file, together with the affidavits, if any, show that there is no genuine issue of material fact
11 and the moving party is entitled to a judgment as a matter of law" I.R.C.P. 56(c). All disputed
12 facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences
13 that can be drawn from the record are to be drawn in favor of the non-moving party. *Sprinkler*
14 *Irrigation Co. v. John Deere Ins.*, 139 Idaho 691, 695-96 (2004).

15 16 III. LEGAL ARGUMENT

17 A. THE DEPARTMENT HAS NOT DETERMINED THAT ALL 18 THREE OF THE SMYERS' RIGHTS ARE DERIVATIVE OF WATER RIGHT 45-0292

19 Warthen alleges at page two (2) of his *Memorandum in Support of Motion for*
20 *Summary Judgment* that the Smyers' water rights are derivative of decreed Water Right No.
21 45-0292 from the *Stokes v. Wood* decree. Water Right No. 45-10480 is not wholly dependant on
22 Water Right No. 45-0292 for its existence. The Department of Water Resources, through its
23 field agent Kelly Christensen, determined that "It is likely that the diversion system (for
24 45-10480) was historically part of the original diversion system for Water Right No. 45-0292"
25 (Tribe Aff Exhibit A. at page 5). If Christensen were exclusively relying on Water Right No.
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3 45-0292 for his recommendation of Kevin Smyer's rights, then he would have not recommended
4 the right. What Christensen did say was that the "water for water right no. 45-10480 would have
5 been incidental to the original decreed right, and naturally captured by the Howell Creek system."
6 (Tribe Aff. Exhibit A at p.5) Incidental means subordinate or secondary; it does not mean
7 dependant on. Incidental also means "in addition to the regular amount or main amount."
8 *Random House Webster's College Dictionary* 659 (1997). Christensen did not rely on Water
9 Right No. 45-0292 to determine Water Right No. 45-1040. Instead, Christensen determined that
10 there existed a beneficial use right in Spring Creek, the Unnamed Stream, and springs located
11 wholly on Kevin Smyer's property (45-10481), which was in addition to the water decreed for
12 Water Right No. 45-0292.
13

14 The fact that Christensen stated that Water Right No. 45-10480 would have been
15 incidental to Water Right No. 45-0292 is not dispositive of whether the Smyers have now
16 lawfully appropriated their recommended rights on Spring Creek and the Unnamed Stream. It
17 simply removes the rights of the Smyers to divert the waters of Howell Creek.
18

19 In addition, the source for Water Right No. 45-10481 was never forfeited.
20 Christensen did find that the "spring water would have commingled with Howell Creek water
21 when water right no. 45-292 was being used in 1881 or later." *Id.* at 9. But that is not a final
22 determination of whether the spring was ever diverted and beneficially used. There is evidence
23 of diversion works which makes the appropriation and use by Kevin Smyer lawful. *Id.* at 8
24 Warthen cannot claim that he is injured if Water Right No. 45-10481 is maintained because, as
25 discussed in *Kevin Smyer's Motion for Summary Judgment for Water Right No. 45-10481* and as
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3 reported by Kelly Christensen, the spring is tributary to sinks and never leaves Kevin Smyer's
4 property, making it impossible to injure Warthen's current decreed rights.
5 Water Right No. 45-12906 cannot be part of the discussion that it is being unlawfully
6 appropriated based on the forfeiture of 45-0292, because its points of diversion do not come from
7 the NE¼ of Section 16, which was at issue in the forfeiture hearing of Water Right No. 45-0292,
8 but is instead based use in the SE¼ of Section 16. See discussion of Water Right No. 45-12906
9 below.
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12 **B. THE DEPARTMENT DID NOT DECLARE A COMPLETE**
13 **FORFEITURE OF WATER TO THE NE ¼ OF SECTION 16 IN THE JANUARY 1991**
14 **ORDER NOR DOES THE ORDER HAVE PRECLUSIVE EFFECT OVER KEVIN**
15 **SMYER'S CLAIMS BECAUSE DIFFERENT ISSUES WERE DETERMINED**

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17 **1. The Determination That There Was No Record of Delivery Is Merely**
18 **Dicta**

19 The 1991 *Order Issuing Proposed Memorandum Decision*, which was adopted by
20 the Department of Water Resources on March 1, 1991, cannot preclude the adjudication of the
21 Smyers' current water rights. (Tribe Affidavit Ex. B and C.) The 1991 Order denied Kevin
22 Smyer's Application to Transfer water right no 45-0292 by establishing a point of diversion in
23 Howell Creek. (Tribe Affidavit Ex. B.) The Order further found "that water right no. 45-0292 is
24 forfeited." The hearing that preceded the Order was held to hear testimony on Kevin Smyer's
25 Application to Transfer and Warthen's Objection wherein he claimed Water Right No. 45-0292
26 had been forfeited.

27 After testimony from both the Smyers and Warthen the Hearing Officer

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3 determined that he:

4 [C]annot conclude that water right no. 45-00292 was delivered at anytime
5 before or after 1925. What I can conclude is that there is no record of
6 delivery of water irrigating the NE1/4 of Section 16, T12S, R25E, B.M
after 1932.

7 *Id* The Smyers do not claim that the Order from the 45-0292 is invalid. The Smyers do
8 contend, however, that the Order and Memorandum decision, its accompanying exhibits, and the
9 findings of the Hearing Officer only apply to the forfeited right water from Howell Creek

10 The fact that the Hearing Officer concluded "that there is no record of delivery of
11 water irrigating the NE1/4 of Section 16" is merely dicta to the final decision regarding Water
12 Right No. 45-0292. The Hearing Officer never went to or personally reviewed the ground like
13 the Department's field agent Kelly Christensen did, and the Smyers did not attempt to
14 demonstrate use of water of the NE1/4 of Section 16 by Spring Creek, the Unnamed Stream, or the
15 adjacent springs.
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17 There can be no preclusive effects on the current adjudication of the Smyers'
18 rights because the parties did not present evidence of a beneficial use water right for Spring
19 Creek, the Unnamed Stream or the spring wholly located on Kevin Smyers' property at the
20 45-0292 forfeiture hearing. There was no testimony regarding the spring (45-10481) and there
21 would never be a record of use in the official water records because the owner or lessees of the
22 land would have simply used it when they could.
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24 Furthermore, at page 4 of the 1991 Order, the Hearing Officer found that, "[n]o
25 evidence was submitted to show that the water right has been diverted from Howell Creek in
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3 recent history, or that the NE1/4 of Section 16, T12S, R25E, has been irrigated from Howell
4 Creek since 1932." (Tribe Affidavit Ex. A.) That is the true holding from the 1991 Order – that
5 there is no evidence to show that the 45-0292 had been diverted from Howell Creek. That is a
6 more accurate representation of what preclusive effects the Order should have, not that all other
7 rights in the section were forfeited. The determination that there is no record of delivery of water
8 irrigating the NE1/4 of Section 16 should not have a preclusive effect for the following reasons.

9
10 **2. Res Judicata/Claim Preclusion**

11 Warthen maintains that because 45-0292 made a determination of one of Kevin
12 Smyer's rights in Section 16, that decision should be binding on the current subcases when
13 deciding delivery of water in Section 16. However, res judicata only applies when an issue has
14 been definitively settled by a judicial decision.

15 Res judicata is comprised of claim preclusion (true res judicata) and issue
16 preclusion (collateral estoppel). Under principles of claim preclusion, a
17 valid final judgment rendered on the merits by a court of competent
18 jurisdiction is an absolute bar to a subsequent action between the same
parties upon the same claim.

19 (Emphasis added) *Western Indus. and Environmental Services, Inc. v. Kaldveer Associates,*
20 *Inc.*, 126 Idaho 541, 544, 887 P.2d 1048, 1051 (1994). Claim preclusion is not before the Court,
21 which would foreclose any litigation because of the determination that one party should have
22 advanced in an earlier decision. Kevin Smyer could not have raised any issues to his claim to
23 Spring Creek, the Unnamed Stream or his spring in an earlier hearing for a Howell Creek right.
24 However, collateral estoppel or issue preclusion would be applicable if all the criteria for its
25 application were present, which they are not.

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3 There are five factors that must be considered in determining whether collateral
4 estoppel or issue preclusion will act as a bar to further litigation of a matter:

5 1) the party against whom the earlier decision was asserted had a full and
6 fair opportunity to litigate the issue decided in the earlier case; 2) the issue
7 decided in the prior litigation was identical to the issue presented in the
8 present action; 3) the issue sought to be precluded was actually decided in
9 the prior litigation; 4) there was a final judgment on the merits in the prior
10 litigation; and 5) the party against whom the issue is asserted was a party
11 or in privity with a party to the prior litigation.

12 *Western Indus.*, 126 Idaho at 544, 887 at 1051.

13 Each of those factors are not present in Water Right Nos. 45-10480, 45-10481, or
14 45-12906. Again, the issue determined in 45-0292 was whether Kevin Smyer's right to divert
15 Howell Creek water had been forfeited. The Department determined that it had.

16 First, Kevin Smyer did have a full and fair opportunity to litigate the issue decided
17 in 45-0292. Second, the issue decided in that litigation was not identical to the issue presented in
18 this action, which is whether Kevin Smyer has lawfully appropriated the water recommended for
19 Water Right No. 45-10480. Water Right No. 45-10480 utilizes Spring Creek water and water
20 from the Unnamed Stream. 45-10481 employs a spring wholly on Kevin Smyer's property,
21 which does not leave his property or return to a stream bed. Therefore, any decision or findings
22 in 45-0292 should not be introduced in the proceedings that involve 45-10480 or 45-10481.
23 Third, the issue Warthen is seeking to raise from the Order was not actually decided in the prior
24 litigation, i.e., whether Kevin Smyer's Spring Creek, Unnamed Stream and his spring
25 recommended rights have been unlawfully appropriated. Fourth, there was a final judgment on
26 the merits in the prior litigation. Fifth, the party against whom the issue is asserted was a party to

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3 the prior litigation Kevin Smyer was the party against whom the issue is being sought to be
4 precluded. But just so the Court is clear, Norman Smyer's recommended Water Right No. 45-
5 12906 is in Norman and Dolores Smyers' names, and they were not named parties to 45-0292,
6 nor were there successors in interest. Therefore criteria number five (5) is clearly not present, and
7 any findings from 45-0292 should have no effect on the adjudication of Water Right No. 45-
8 12906. In addition, 45-12906 also uses Spring Creek Water and water from the Unnamed Stream
9 in a different quarter of Section 16 than 45-0292 was decreed for.
10

11 Therefore, the findings of the Department in 45-0292 should not be permitted to
12 be presented in these proceedings for any res judicata or preclusive effect. Even if the 1991
13 Order is admitted, there is still evidence of beneficial use in the recommended places of use for
14 Water Right Nos. 45-10480, 45-10481 and 45-12906 by the Smyers or their predecessors in
15 interest. There also exist certain defenses to forfeiture by the Smyers for their beneficial use
16 right.
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19 **C. THERE IS EVIDENCE OF APPLICATION OF WATER FOR**
20 **KEVIN SMYER'S RECOMMENDED WATER RIGHTS NO. 45-10480 AND 45-10481**
21 **AND THEREFORE THOSE RIGHTS HAVE NOT BEEN FORFEITED**

22
23 **1. Water Right No. 45-10480**

24 There is evidence that the waters of Spring Creek and the Unnamed Stream have
25 been diverted and put to a beneficial use on the land currently owned by Kevin Smyer (Norman
26 Smyer Affidavit at par. 6.) From 1943 through at least 1948 the Smyers leased the NE¼ of
27 Section 16, T12S, R25E, from D. C. Harris for pasture for milk cows. *Id.* The NE¼ of Section
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3 16 is the land currently owned by Kevin Smyer on which Water Right No 45-10480 and
4 45-10481 have been recommended as the place of use. *Id* Norman Smyer personally witnessed
5 water being diverted from what has been identified as Spring Creek and Unnamed Stream in the
6 Sw¼ of Section 16 in the mid-1940's. (Norman Smyer Affidavit at par. 8) Ditches for irrigation
7 diverted the water from the above-mentioned sources, and water was diverted by Norman's
8 father (Norman Smyer Affidavit at par. 9.)
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10 Bennie Smyer, who grew up in the Albion Valley and is familiar with Kevin
11 Smyer's property, also witnessed water being diverted and put to a beneficial use on the NE¼ of
12 Section 16 (Bennie Smyer Affidavit) Bennie Smyer has witnessed water running onto Kevin
13 Smyer's place of use from property formerly owned by the Andersons to the South and currently
14 owned by Norman Smyer. Prior to Kevin's ownership of the land, Bennie Smyer personally
15 witnessed Kate Bridger and Albert W. Clark irrigate the property through diversion ditches,
16 when water was available, since the early 1940's. (Bennie Smyer Affidavit at par. 8 & 9).
17

18 In addition to the Smyers, Loren Goodman has also witnessed water being put to a
19 beneficial use on the NE¼ of Section 16. (Tribe Affidavit Exhibit D) Mr. Goodman helped his
20 aunt, Kate Bridger, who was the owner of the NE¼ of Section 16 prior to the Smyers purchase of
21 the land. Mr Goodman helped his aunt with general ranch work from the mid-1970's through
22 the early 1980's. *Id*. Some of this work included irrigating the property using existing ditches
23 *Id*. One channel carrying water that they utilized was Spring Creek Channel, which enters Kevin
24 Smyer's property at the southwest corner *Id*. Also, the draw to the east (the Unnamed Stream)
25 would produce small quantities of water onto the property *Id*.
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3 Kevin Smyer filed a notice of claim to a beneficial use surface water right for
4 irrigation in the SRBA on May 9, 1989, and the period for forfeiture has therefore been tolled.
5 The combined affidavits of Norman Smyer, Bennie Smyer and Loren Goodman create a disputed
6 issue of material fact regarding whether Kevin Smyer's Water Right No. 45-10480 has been
7 forfeited.

8
9 **2. Water Right No. 45-10481**

10 As it is a spring which raises into a pond, wholly located on the property of Kevin
11 Smyer, there would not be any record of delivery of 45-10481. Warthen maintains that because
12 the Department found that the spring water would have commingled with Howell Creek water
13 when Water Right No. 45-0292 was being used, it was inexplicable that the Department could
14 hold in its Supplemental Report that the Department was not able to find that Water Right No
15 45-10481 had been abandoned. Even if the spring, which has been recommended as 45-10481,
16 had commingled the right, it still is not forfeited for lack of delivery record nor based upon the
17 1991 Order. There was simply no finding that the spring was part of the Hearing Officer's
18 determination in 45-0292. For a more full discussion of the spring and Water Right No
19 45-10481, please see *Smyers' Motion for Summary Judgment on Water Right No. 45-10481*

20
21 **D. SUFFICIENT EVIDENCE EXISTS THAT A VALID WATER**
22 **RIGHT HAS BEEN DEVELOPED ON NORMAN SMYER'S PROPERTY FOR WATER**
23 **RIGHT NO. 45-12906**

24 On August 17, 1999, Norman and Delores Smyer filed a notice of claim to a
25 beneficial use surface water right for irrigation in the SRBA. Contrary to Warthen's contention
26 at page 11 of his *Memorandum in Support for Summary Judgment*, there have been attempts and

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3 success in diverting and using the water recommended in 45-12906 since 1979. In fact, Richard
4 and Helen Anderson as well as Oliver and Janice Anderson have recently and continuously used
5 the place of use described in Water Right No. 45-12906 for pasture. (Affidavit of Helen
6 Anderson.) The Andersons continued such use until after Norman Smyer purchased the property
7 in 1994. *Id.* Said parcel is irrigated by a diversion from Spring Creek and from water that runs
8 down a channel east of Spring Creek. *Id.* Helen Anderson and her now deceased husband,
9 Richard Anderson, personally irrigated the place of use currently owned by Norman Smyer since
10 approximately 1954, when they purchased the land from Albert Clark. *Id.* Since that time, Helen
11 and Richard Anderson, together with Oliver and Janice Anderson, have diverted water from
12 Spring Creek and the channel (Unnamed Stream) that runs to the east of Spring Creek and
13 pastured their cattle in the wetlands created by their diversions. *Id.*

14
15 Norman Smyer's 7.5 acres, which was split from the original Anderson
16 Farmstead, is not fenced in and has been used for pasture by Helen and Richard Anderson and
17 Oliver and Janice Anderson. (Affidavit of Norman Smyer at par. 15.) The Andersons have
18 always paid the water bill for water on their lands which included Norman's 7.5 acres (Affidavit
19 of Norman Smyer at par. 16 & 20.) Of Norman Smyer's 7.5 acres, 4.6 acres are irrigated from
20 two sources. First, when water from a small reservoir on the Unnamed Stream overflows, it runs
21 down the streambed and irrigates a portion of his 4.6 acres (Affidavit of Norman Smyer at par.
22 17.) The second point of diversion is from Spring Creek, which is diverted through a ditch
23 running to Norman Smyer's property and irrigates the remaining 4.6 acres (Affidavit of Norman
24 Smyer at par. 18.) The Andersons have always used Norman's 7.5 acres to irrigate the property
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3 to pasture their livestock. (Affidavit of Norman Smyer at par. 19.) The Andersons continued to
4 pasture their livestock when Norman's predecessor owners, the Solosabals and Kilmartins,
5 owned the 7.5 acre parcel. *Id.*

6 Based on the Affidavit of Helen Anderson and Norman Smyer, there is clearly an
7 issue of genuine fact as to whether Water Right No. 45-12906 has been lawfully appropriated or
8 forfeited
9

10 **E. WARTHEN HAS NOT ESTABLISHED THAT WATER WAS**
11 **AVAILABLE FOR WATER RIGHTS NO. 45-12906 OR THAT WATER WAS NEEDED**

12 At page seventeen (17) of his *Memorandum in Support of Motion for Summary*
13 *Judgment*, Warthen asks the Court to either declare Water Right No. 45-12906 "forfeited for
14 non-use, or remand the matter to the Department to make a proper determination regarding
15 forfeiture." As demonstrated above, water has been put to beneficial use on Norman Smyer's
16 property.

17 Evidence of non-use alone is not sufficient to prove forfeiture. In order for a
18 water right to be forfeited, water must be available to satisfy the water right during the alleged
19 period of non-use. Thus, low water years and/or the relative priorities on a given source must be
20 taken into account. In Re SRBA, Case No. 39576, Subcase No. 65-05663B (Wood v. Troutt)
21 (Idaho Fifth Judicial Dist., May 2002), at 32-33; (Roger S. Burdick presiding) Idaho Code
22 42-223(6) provides that "no portion of any water right shall be lost or forfeited for nonuse if the
23 nonuse results from circumstances over which the water right owner has no control." Warthen
24 has provided no evidence that water has been available during his claimed period of non-use
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3 Additionally, water must also be needed during the period of non-use In the case
4 of irrigating a pasture, unusually high precipitation within a growing season may alleviate the
5 need to irrigate. Given the fluctuations in the precipitation and the fluctuating supply of water
6 from year to year, the availability and necessity of water during any of the periods in question are
7 relevant to establishing forfeiture by clear and convincing evidence. *Id.* Again, no such evidence
8 has been presented
9

10 IV. CONCLUSION

11 Therefore, based on the above, Warthen's *Motion for Summary Judgment* on
12 Smyers' claims for Water Right Nos 45-10480, 45-10481 and 45-12906 should not be granted,
13 as there are genuine issues of material fact on each of the claims.
14

15 DATED this 28th day of February, 2006.

16 LING, ROBINSON & WALKER

17 By: Michael P. Tribe
18 Michael P. Tribe
19 Attorneys for Claimants/Participants
20 Kevin Smyer, Norman and Dolores Smyer
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CERTIFICATE OF MAILING

I hereby certify that on the 28th day of February, 2006, I served the original and true and correct copies, respectively, of the foregoing ANSWER TO WARTHEN'S MOTION FOR SUMMARY JUDGMENT upon:

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Snake River Basin Adjudication
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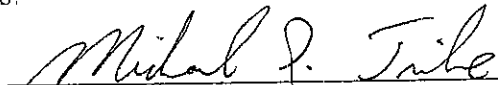
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by depositing said document in the United States mail, postage prepaid, in envelopes addressed to said persons/entities at the foregoing addresses.


Michael P. Tribe

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