

311858

WATER RIGHT SETTLEMENT AGREEMENT

2006 NOV 2 PM 4 36

CASSIA COUNTY, IDAHO
LARRY A. MICKELSEN
RECORDER
FEE 36.00
DEPUTY *Y6*RECORDED AND REQUEST OF
King & Johnson
PG 801 346
Kupat 83350

311858

THIS WATER RIGHT SETTLEMENT AGREEMENT (the "Agreement") is made and entered into this 2nd day of November, 2006, by and between Kevin Smyer, Norman Smyer, Delores Smyer (hereinafter referred to as "Smyers") and Earl Warthen (hereinafter referred to as "Warthen") The foregoing are sometimes referred to herein individually as a "Party" or collectively as the "Parties".

RECITALS:

A. The Parties' water rights are presently being adjudicated in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, Case No. 39576 in the Matter of the Snake River Basin Adjudication ("SRBA").

B. The Parties have each submitted water right claims within Basin 45 in the pending SRBA. IDWR has submitted Water Right Recommendations in the Basin 45 Director's Report filed with the SRBA District Court with respect to each of said claims and certain parties have filed objections thereto.

C. The Parties claim irrigation and irrigation storage rights: Kevin Smyer's rights are those claimed in Water Right Nos. 45-10480 and 45-10481. Norman Smyer's right is that claimed in 45-12906. Earl Warthen's rights are those claimed in 45-10502, 45-13669 and 45-13991 (hereinafter collectively "Claims").

D. The elements of the claimed rights are as follows:

1. Kevin Smyer:

a. Water Right No. 45-10480 was recommended with a priority date of March 18, 1910 for 54 acres located at T. 12S R25E Sec. 16 NENE (22 acres), SWNE (16 acres) and SWNE (16 acres) Cassia County, Idaho for a total quantity of 1.05 cfs for irrigation. The sources for Water Right No. 45-10480 were recommended as Spring Creek tributary to Howell Creek and Unnamed Stream tributary to Summit Creek. The points of diversion for Water Right No. 45-10480 were recommended as T. 12S., R25E., Sec 16 SWSWNE, NESWNE, SESWNE and NWSENE. Warthen filed an objection to this claim asserting a lack of a lawful appropriation.

b. Water Right No. 45-10481 was recommended with a priority date of March 18, 1910 for 6.8 acres located within T.12S., R.25E., Sec. 16 NWNE Cassia County, Idaho for a total of .14 cfs for irrigation. The recommended source was Spring tributary to Sinks. The point of diversion was recommended as T.12S., R.25E., Sec. 16 SWNWNE. Warthen filed an objection to this claim asserting a lack of a lawful appropriation.

2. Norman and Delores Smyer

a. Water Right No. 45-12906 was recommended with a priority date of

March 18, 1910 for 4.6 located at T.12S., R.25E., Sec. 16 NWSE Cassia County, Idaho for a total of .14 cfs for irrigation. Norman Smyer has currently pending an amended notice of claim to correct the recommended priority date. The sources for 45-12906 were recommended as Spring Creek tributary to Howell Creek and Unnamed Stream, which is tributary to Summit Creek. There are two points of diversion; the diversion from Spring Creek is located at T.12S., R.25E., Sec. 16 NESESW Cassia County, Idaho the diversion from the Unnamed Stream is located at T.12S., R.25E., Sec. 16 SWNWSE Cassia County, Idaho. Warthen filed an objection to this claim asserting a lack of a lawful appropriation.

- b. After further reviewing certain judicial decrees and subsequent transfers, it was determined and agreed upon by the Idaho Department of Water Resources that a priority date of August 31, 1874 was appropriate for 45-12906. Warthen and his attorney are aware of this amendment and will not object to such amendment.

3. Earl Warthen:

- a. Water Right No. 45-10502 was originally recommended with a priority date of May 26, 1964, for 86 acres located at T.12S., R.25E., Sec. NENW (37 acres), NWNW (15), SENW(16), NESW (18) Cassia County, Idaho for a total of .40 cfs for irrigation. The source

for Water Right No. 45-10502 was recommended as Spring Creek tributary to Howell Creek. The recommended point of diversion was for T.12S., R.25E., Sec 16 SENESW. On August 3, 2006, Special Master Dolan issued a partial decree in Subcase 45-10502 and which decreed .40 cfs of Spring Creek with a priority date of May 26, 1964, for a total of 68 acres. The point of diversion remained the same but the place of use was amended to T.12S. R25E. Sec. 16 NENW (37 acres), NWNW (15), SENW (16). The Smyers filed a Motion to participate in this subcase.

- b. On March 3, 2006, Earl Warthen filed a Late Notice of Claim for Water Right No. 45-13991. Said water right is for 20 acres that was not recommended under Water Right No. 45-10502. At the time of the execution of this Settlement Agreement the SRBA Court has granted Mr. Warthen's Motion to File a Late Claim, however, the Idaho Department of Water Resources has not made a formal recommendation for the claim. Warthen claims 20 acres to the waters of Spring Creek with a point of diversion of T.12S. R.25E. Sec. 16 SENESW Cassia County, Idaho. The claimed place of use is T.12S. R.25E. Sec. 16 SWNE Cassia County, Idaho, for a diversion of .20 cfs for irrigation and irrigation storage.

- c. On March 2, 2004 Earl Warthen filed a claim for irrigation and

irrigation storage under water right number 45-13669. Mr. Warthen claimed 0.4 cfs of wastewater, tributary to Howell Creek with a priority date of August 13, 1874. The claimed point of diversion was T12S R25E S16 SENESW in Cassia County. The claim sought to irrigate and create irrigation storage for 99 acres. The source water that Mr. Warthen referred to as wastewater is the same water that the Smyer's claimed as Spring Creek water. Water Right No. 45-13669 was recommended disallowed. Mr. Warthen filed an Amended Notice of Claim on Water Right No. 45-13669 on January 3, 2005. The Idaho Department of Water Resources has not yet issued a recommendation on the Amended Claim.

E. The Parties desire to enter into this Agreement for the purpose of fully compromising and settling the Parties' pending claims and objections in Basin 45 and to describe the rights and responsibilities each Party has in Spring Creek.

F. The legal description of the properties of Kevin Smyer to which this Agreement applies and to which the water herein is appurtenant is:

TOWNSHIP 12 SOUTH, RANGE 25 EAST OF THE BOISE
MERIDIAN, CASSIA COUNTY IDAHO
Section 16: NE¼

G. The legal description of the properties of Norman and Delores Smyer to which this Agreement applies and to which the water herein is appurtenant is:

TOWNSHIP 12 SOUTH, RANGE 25 EAST OF THE BOISE
MERIDIAN, CASSIA COUNTY IDAHO

Section 16: Part of the NW¼ SE¼

Beginning at the mid-section corner of said Section 16;
Thence South 0°21'30" East 88.9 feet to a point on the
South right-of-way of Highway 77, which shall be the
True Point of Beginning:

Thence along said right-of-way South 45°51'30" East
556.2 feet to a point;
Thence South 0°51'30" East 593.1 feet to a point;
Thence South 85° 38'56" West 402.79 feet to a point;
Thence North 0°21'30" West 1010.9 feet along the
North-South mid-section line to the True Point
of Beginning.

H. The legal description of the properties of Earl Warthen, to which this
Agreement applies and to which the water is appurtenant is:

TOWNSHIP 12 SOUTH, RANGE 25 EAST OF THE BOISE
MERIDIAN, CASSIA COUNTY IDAHO

Section 16: N ½ NWNW, NENW, N ½ SENW, W ½ NESW

AGREEMENT:

NOW, THEREFORE, IT IS HEREBY MUTUALLY AGREED among the Parties
as follows:

1. Joint Use of the Available Water of Spring Creek.

The Parties shall share the waters of Spring Creek in a ratio of seventy-five percent
(75%) twenty-five percent (25%). Seventy-five percent (75%) of all available water will be
used by the Smyers' up to their combined recommended rate of diversion. Warthen shall be
entitled to twenty-five percent 25% of the waters of Spring Creek up to his recommended
Smyer/Warthen Settlement Agreement

rate of diversion. To the extent that water is available to fulfill the Agreement of the parties from January 1 to December 31 of each year, the parties shall be entitled to take water pursuant to the terms of this Agreement. The Parties to this Agreement agree that regardless of the priority dates and amounts, the parties consent that this agreement subordinates each party's rights to the agreed amount without regard to priority. The Parties explicitly agree not to challenge the rights of parties as defined by this Agreement based on the elements of the water rights as defined by the Idaho Department of Water Resources Recommendation for the Rights governed by this Agreement. This Agreement governs the rights of the Parties in all respects as concerns the waters of Spring Creek, and this Agreement shall be in effect regardless of the amount of water available.

2. Installation of Headgates and Measuring Devices.

The construction and installation of individual headgates and individual measuring devices with all other incidental costs incurred in the construction of such shall be borne by the separate Parties. The parties shall install said headgates and measuring devices by April 1, 2008.

Earl Warthen and Norman will take their diversion from Spring Creek at a common point of diversion located at T.12S., R25E., Sec. 16 NESESW. The parties will have separate measuring devices but will share a common diversion structure including a divider to separate the water. The parties shall share the installation and maintenance costs of the diversion structure 50/-50%.

Kevin Smyer shall install a headgate and measuring devise at a point where he diverts

the waters of Spring Creek specifically T.12S., R25E., Sec 16 SWSWNE.

3. Unnamed Channel.

This agreement does not cover the Unnamed Channel, which is east of the Spring Creek Channel. The waters for both Spring Creek and the Unnamed Channel originate in the ponds south of the Parties' place of use. Each of the Parties understand that they do not control the release of the water in that the land on which the ponds sit is currently owned by ALBION RANCH 2006 LLC, which was previously owned by Richard and Helen Anderson. To the extent that water could be released through either the Spring Creek Channel or Unnamed Channel, the parties to this Agreement agree that the water will be released through the Spring Creek Channel to meet the aims of this Agreement.

4. Priority Dates of Claims to Remain the Same, Yet Subordinated to Equality of Rights.

Each Party's claims have their own unique and differing quantities and priority dates based upon historical and decreed use. Notwithstanding this fact, the Parties hereby agree that the water rights of the Parties shall be diverted and delivered pursuant to the Settlement Agreement.

Neither Party has the right to make a "call" upon the other Party unless the other Party is taking more than their allotted portion of the water available from Spring Creek. Further, the Parties agree to make no further claim to water, or initiate a transfer, or take any action that may diminish the water available for diversion from the streams.

Notwithstanding the foregoing, the parties to this agreement understand and agree that

the waters of Spring Creek that they are claiming are fed entirely by run-off from the ponds known as the Anderson Ponds. The parties further understand that ownership has transferred from the Anderson family to new owners and upon reliable information, understand that the irrigation practices of the new owners will change significantly so that it is possible that no waters will be available from the Anderson Ponds. All parties agree that they have no recourse against the new owners of the Anderson property to force, coerce or, require delivery of any water from the Anderson Ponds into either Unnamed Channel or Spring Creek.

5. Disputes Arising Under Agreement.

This agreement will be delivered to the water master of Water District 45. The duly elected water master shall resolve any disputes arising pursuant to the Settlement Agreement. The water master shall review the provisions of the Agreement and administer the water accordingly.

6. Partial Decrees.

All of the Parties' water right claims shall be presented to the Court as reflected in the decree or claims referred to herein. It is intended the "Other Provisions Necessary" of the Parties' claims as finally decreed shall contain a reference to this recorded Agreement and be administered accordingly.

7. Waivers.

The failure to object to any breach of any term or condition in this Agreement shall not constitute a waiver and no failure to object shall be deemed a waiver of any prior or subsequent breach.

8. Entirety of Agreement.

This Agreement represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations, and oral agreements. No promise or inducement has been offered or made except as herein set forth, and this Agreement is executed without reliance on any statement or representation by any other Party or their agent.

9. Cooperation.

All Parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions, which may be necessary or appropriate to give full force to the basic terms and intent of this Agreement.

10. Modification.

This Agreement may be amended or modified only by a written agreement; signed by each of the Parties to this Agreement.

11. Covenant Running with the Lands of the Parties.

It is understood and agreed that this Agreement shall be a covenant running with the lands of the Parties described herein, and shall inure to the benefit of said lands. This Agreement shall be recorded in the official records of Cassia County, Idaho.

12. Signatures and Binding Effect.

IN WITNESS WHEREOF, the Parties to this Agreement, through their duly-authorized representatives, have executed this Agreement and certify that they have read, understood, and agree to the terms and conditions of this Agreement as set forth herein and

that they are the titled owner of the respective lands described herein.

This Agreement is not only binding upon the parties hereto, but upon recording is binding upon their respective successors, heirs, administrators and assigns.

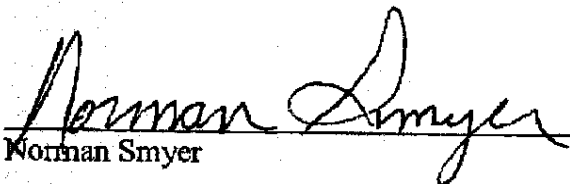
13. Attorney's Fees.

In the event either Party hereto shall be required to employ an attorney for the enforcement of this Agreement, with or without suit, the defaulting Party agrees to pay the prevailing Party's reasonable attorney's fees.

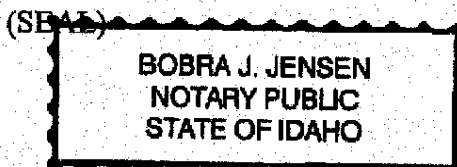
14. Binding Agreement.

Should for any reason IDWR and/or SRBA Court reject any substantive term of this Agreement, to the extent that term can be severed from the Agreement without the intent and purpose of the Agreement being destroyed, then that term shall be stricken, but all others shall remain in effect. If the term cannot be stricken without destroying the intent and purpose of this Agreement, then neither Party shall be bound by this Agreement.

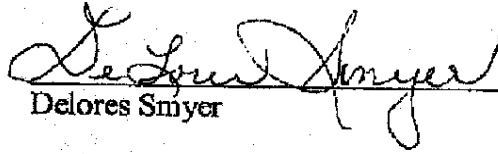
IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year first above written.


Norman Smyer

SUBSCRIBED AND SWORN to this 15th day of November, 2006

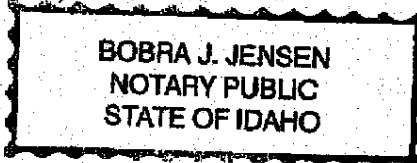


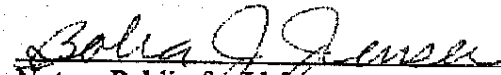

Notary Public for Idaho
Residing at: Hayburn
My Commission expires: July 24, 2012

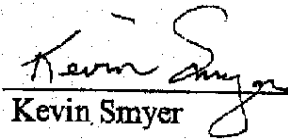

 Delores Smyer

SUBSCRIBED AND SWORN to this 1st day of November, 2006

(SEAL)

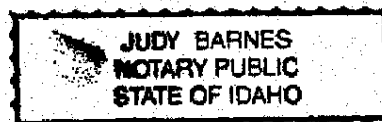


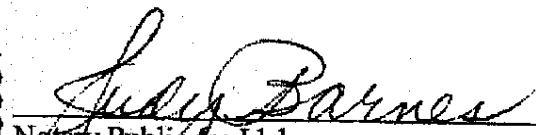

 Notary Public for Idaho
 Residing at: Hayburn
 My Commission expires: July 24, 2012


 Kevin Smyer

SUBSCRIBED AND SWORN to this 1st day of November, 2006

(SEAL)

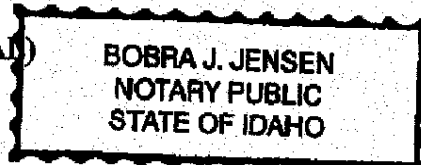


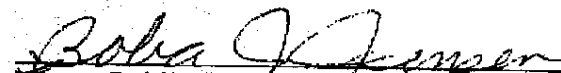

 Notary Public for Idaho
 Residing at: Rupert, Idaho
 My Commission expires: 02-12-2011


 Earl Warthen

SUBSCRIBED AND SWORN to this 2nd day of November, 2006

(SEAL)




 Notary Public for Idaho
 Residing at: Hayburn
 My Commission expires: July 24, 2012