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DEPARTMENT OF
WATER RESOURCES

July 23, 2007

Final filing of objections

George Brown, M.D.

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DEPARTMENT OF
WATER RESOURCES

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)

Case No. 39576)
_____)

A. Subcase

22-594, water exchange for DKJ Farms
22-265E, 22-13479

(Insert water right number)

STANDARD FORM 1
OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: George Brown, MD

Address: 1439 Cambridge Drive

Idaho Falls, Idaho 83401

Daytime Phone: 208-522-9552

Name & Address of Attorney, if any:

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: DKJ Farms and former owner Merle Jeppesen

Address: 665 Centennial Loop

Rexburg, Idaho 83440

D. I object to the following elements as recommended in the Director's Report:
(Please check the appropriate box(es)).

11. I object because:

☒ This water right should not exist.

E. REASONS SUPPORTING OBJECTIONS:

These water rights should not exist for two reasons. First, failure of the Idaho Department of Water Resources to enforce the Stream Channel Act of 1971 and of the claimant to submit Stream Channel Alteration Permits. Secondly, cutthroat trout perished in Moody Creek contrary to public interest.

July 23, 2007

OBJECTIONS

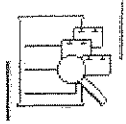
To the Snake River Basin Adjudication

I maintain that Recommended Water Rights Numbers 22-265E, 22-13479, 22-594, and a recent water exchange approved in 2007 have no legal basis to exist because of the failure of the Department of Water Resources to enforce the Stream Channel Alteration Act of 1971, the failure of DKJ Farms or Merle Jeppesen to submit the required Stream Channel Alteration Permits needed for the department to issue any water rights in Moody Creek after 1971, and the actions of IDWR to approve water rights in Moody Creek without Stream Channel Alteration Permits. The Department of Water Resources approved all of the above rights in Moody Creek after 1971.

Webster's *SEVENTH NEW COLLEGIATE DICTIONARY* defines channel several ways. First, channel is the bed where a natural stream runs. Secondly, channel is the deeper portion of a river. A stream is defined as a small river. Both definitions of channel apply to the Stream Channel Alteration Act of 1971.

Unfortunately, the Idaho Department of Water Resources has enforced the first definition of channel and ignored the second definition. As a consequence of the latter, transfers and water rights have been granted in Moody Creek that should not exist and wildlife in about an eight-mile segment of Moody Creek remain unprotected. The cutthroat trout perish each year that the creek is pumped dry.

Idaho Statutes TITLE 42 IRRIGATION AND DRAINAGE –WATER RIGHTS AND RECLAMATION CHAPTER 38 ALTERATION OF CHANNELS OF STREAMS addresses the protection of wildlife, particularly 42-3801. A copy is enclosed for your convenience.



Idaho Statutes

TITLE 42
IRRIGATION AND DRAINAGE -- WATER
RIGHTS AND RECLAMATION
CHAPTER 38

ALTERATION OF CHANNELS OF STREAMS

42-3801. LEGISLATIVE INTENT -- STREAM CHANNELS -- ALTERATION. The legislature of the state of Idaho hereby declares that the public health, safety and welfare requires that the stream channels of the state and their environments be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality. No alteration of any stream channel shall hereafter be made unless approval therefor has been given as provided in this act.

The Idaho Code is made available on the Internet by the Idaho Legislature as a public service. This Internet version of the Idaho Code may not be used for commercial purposes, nor may this database be published or repackaged for commercial sale without express written permission.

Available Reference:

The Idaho Code is the property of the state of Idaho, and is copyrighted by Idaho law, I.C. § 9-350. According to Idaho law, any person who reproduces or distributes the Idaho Code for commercial purposes in violation of the provisions of this statute shall be deemed to be an infringer of the state of Idaho's copyright.

The following is copied from the Department of Water Resources web page and represents Idaho Code 42 Chapter 38, also known as the Stream Channel Alteration Act of 1971:

Stream Channel Protection Program

The Idaho Stream Channel Protection Act requires that the stream channels of the state and their environment be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. This means IDWR must approve in advance any work being done within the beds and banks of a continuously flowing stream.

The Act requires that you first get a stream channel alteration permit from IDWR before you begin any work that will alter the stream channel.

A stream channel alteration is defined as any activity that will obstruct, diminish, destroy, alter, modify, relocate or change the natural existing shape or direction of water flow of any stream channel. This includes taking material out of the channel or placing material or structures in or across the channel where the potential exists to affect flow in the channel.

Regardless of how one reads the Stream Channel Protection Act, one can not escape that streams are included. The words "stream channel of the state and their environment" refers to the stream in the channel and the channel. Water Rights control water removal. Water removal is a form of work that will alter the stream. Water removal is an activity that will diminish, destroy, alter, modify, relocate, and change the natural existing shape of water flow of any stream channel. In particular, I call your attention to the last sentence, about "taking material out" and "flow in the channel". Water is a material and "flow in the channel" refers to a stream. Usually, nothing else flows.

The only way to protect fish in a stream is to maintain a flow sufficient to sustain life. This means water rights that appropriate irrigation water must be regulated. Current events prove the total failure of the department to enforce this aspect of the law. In fact, issuing the water rights countermands the law.

According to my reasoning, all water rights approved in streams after 1971 come under the Stream Channel Alteration Act. The Act requires the Idaho Department of Water Resources to issue no rights that threaten the fish, wildlife, recreation, or beauty of the stream. All DKJ Farm Water Rights at their present point of diversion in Moody Creek so threaten except for Right 22-4195.

I understand that the Legislature expects a change in the way the Department of Water Resources administers water law and that this concept may be foreign to some, but the law is there for IDWR to enforce and follow. Moreover, this Act must be the most far-sighted, progressive law in any of the 50 States to preserve wildlife and to promote public interest. The IDWR presently defines the "local public interest" synonymously with the interest of an irrigator. This makes a mockery of the term.

Recommended Water Right 22-4195 was issued in 1969. Since this right is terminated every drought year on June 20 and about every year is a drought year, this right has no long-lasting influence on the trout. DKJ Farms and/or Jeppesens held no other existing water right in Moody Creek at this point of diversion. The creek and trout were fully protected under the Stream Channel Alteration Act of 1971.

However, a challenge developed in 1977. The IDWR transferred Transfer Number 2034 from water right #22-265 to the present point of diversion in 1977 and Transfer 3002 in 1984. Both transfers irrigated 200 acres yearly. Recommended Water Right 22-265E is the combination of Transfers Numbers 2034 and 3002. If the Department of Water Resources had enforced the Stream Channel Alteration Act of 1971, there would be no Water Right 22-265E.

The department has documented violations of the terms of Transfers Numbers 2034 and 3002 for the last 23 years by noting the irrigation of more than 200 acres yearly, the failure to use an adequate measuring device, and the connection to a common irrigation system to their entire farm. As a consequence, the creek became dry, resulting in the destruction of cutthroat trout in about an eight-mile segment of the creek below Jeppesens' pumps. All wildlife in the region suffered. In addition to loss of the fishery, a prime spawning habitat became ruined.

Water Right # 22-265E possesses the capability to destroy fish and wildlife in Moody Creek. In a Preliminary Order on a water exchange dated June 18, 2007, Allen D. Merritt, PE, of the department, stated that Jeppesens might dewater or cause Moody Creek to cease to flow if they desired.

The irony to watch the destruction of fish in Moody Creek during the watch of the IDWR points to a horrendous, chronic failure. The department contributed to the death of the fish rather than protects them.

Recommended Water Right 22-13479 granted in 1980 and Recommended Water Right 22-594 fit the same mold. I understand Right 22-594 delivers no water to DKJ Farms' present point of diversion now. I do not know the reason behind this.

I appreciate the concept of decreed property or water rights. Enforcement of the Stream Channel Alteration Act would not harm Right 22-265 held in Moody Creek near its termination. The State of Idaho holds the property rights to Moody Creek and the cutthroat trout within. As a resident of Idaho, I object to the Idaho Department of Water Resources surrendering those rights and I am disappointed that DKJ Farms or Merle Jeppesen would ask for them in upper Moody Creek. That destruction of cutthroat trout in an eight-mile segment of Moody Creek is contrary to public interest seems obvious! After all, the State owned the property long before 1879. Moreover, the State should be outraged at the consequences and take whatever actions necessary to restore, protect and preserve the cutthroat trout in the creek. Indeed, the Idaho Fish and Game Department is charged to do just this! Moreover, the Department of Water Resources is charged to do the same.

Decreed Water Right 22-265 near the termination of Moody Creek does not allow the owner to transfer rights anywhere pleased. Idaho Code 42-3806 protects this right at its original location, but no license is given to transfer it anywhere. In 1971 the Legislature directed the Idaho Department of Water Resources that streams "be protected against alteration for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality." This essentially insured the flow in Moody Creek and the trout within of existence from DKJ's point of diversion in upper Moody Creek downstream to near the termination of the creek from 1971 onward.

In other words, the Department of Water Resources lacked authorization and justification to transfer water rights from anywhere to a point of diversion where wildlife would be harmed or to issue water rights to a point of diversion where wildlife would be destroyed.

Public Trust Doctrine allows the State to remove existing water rights proven to work against public interest. Certainly this case qualifies.

In summary, the Stream Channel Alteration Act requires the Idaho Department of Water Resources deny water rights that harm wildlife in Moody Creek starting in 1971. This means rights 22-265E, 22-13479, 22-594, and a water exchange should not exist.

A second compelling reason these rights should not exist comes from the destruction of cutthroat trout being so outrageously contrary to public interest. Moreover, wanton destruction of State property should be condemned.

F. VERIFICATION (Must be Completed)

State of Idaho)
) ss.
County of Bonneville)

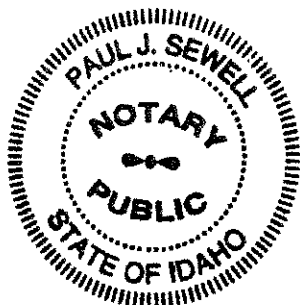
George Brown, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

That I am the party/claimant filing this objection as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant responding and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

George Brown
(Signature of person filing objection)

(Attorney signing in representative capacity)

Subscribed and sworn to before me on this 23rd day of July, 2007.



[Signature]
Notary Public for Idaho
Residing at: Idaho Falls, ID
My Commission Expires: May 2, 2011

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the court. FAX filings will not be accepted. You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on July 23, 2007, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of water right at the following address:

Name: DKJ Farms
Address: 665 Centennial Loop
Rexburg, Idaho 83440

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449

SF.1-Objection
Amended 10/16/97

George Brown, M.D.
Signature of objector