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Department of Water Resources
Eastern Region

June 12, 2001

IDAHO DEPARTMENT
OF WATER RESOURCES
900 N. Skyline
Idaho Falls, ID 83402-1718

RE. 22-6740

Dear ladies and gentlemen:

We were recently contacted and our advice was requested by Kristine Ciesinski, Norman Bailey and Katherine Ciesinski of Victor, Idaho, with respect to a possible dispute over portions of a decreed water right on Fox Creek with Mr. D. Ray Gordon, also of Victor, Idaho. The right in question was decreed to one Michael Byrne in the Rexburg Decree (in one place in that Decree, he is referred to as Michael "Bayne"). The Decree awarded Byrne 120 inches of the waters of Fox Creek with a priority of June 1, 1890, for the irrigation of the Southwest Quarter of Section 27 and the South Half of the Southwest Quarter of Section 26 in Township 4 North, Range 45 East, some 240 total acres. This water right also became the subject of a lawsuit between Gordons and Crows in the early 1980's, which resulted in the Idaho Court confirming the provisions of the Rexburg Decree in a 1984 decision in the case of *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 1916 (1984).

At the time of the Idaho Supreme Court decision, the Southwest Quarter of Section 27 was owned by Crows and the South Half of the Southwest Quarter of Section 26 was owned by Gordons. The Court made it clear that eighty (80) inches of the right went with the Crow 160 acres and forty (40) inches with the Gordon 80 acres. By 1987, the south half of the Crow 160 had been sold and the north half of that 160 acres (actually said 80 acres plus a 20 acre parcel to the east described as the W ½ NW NE of the same Section for a total of 100 acres) was sold to Lloyd and Valerie Willden. In 1991, the Willdens entered into a contract to sell 80 of their 100 acres (described as the SW NW NE, NW SW, W ½ NE SW and SE NE SW of said Section) to D. Ray and Mary Jean Gordon. The contract recites that sixty (60) inches of the Byrne decreed right was included with this right. However, the sale was never completed and no deed to Gordons was ever recorded. In 1994, a Quitclaim Deed from Gordons back to Willdens for the same eighty (80) acres and appurtenances was recorded.

At the present time, the S $\frac{1}{2}$ SW, Section 26 is still owned by the Gordons. But the 100 acres formerly owned by Willdens is owned by four new owners. The western most twenty (20) acres (W $\frac{1}{2}$ NW SW) is owned by Katherine Ciesinski; the next twenty (20) acres to the east (E $\frac{1}{2}$ NW SW) is owned by Kristine Ciesinski and Norman Bailey; the next twenty (20) acres, continuing east, (W $\frac{1}{2}$ NE SW) is owned by Jeff Carter and Josephine Warden; and the next forty (40) acres (E $\frac{1}{2}$ NE SW and W $\frac{1}{2}$ NW SE) is owned by Bruce and Valerie Zohner.

There seems to be agreement among all affected parties that prior to Willdens' acquisition of the N $\frac{1}{2}$ SW Section 27 in 1987, all of the water rights formerly decreed for use on the entire SW $\frac{1}{4}$ of said Section had been transferred in fact and used exclusively upon the N $\frac{1}{2}$ of that quarter section. This accomplished transfer is consistent with the SRBA claims as presently filed.

Originally, the Byrne decreed right appears to have been numbered 22-192. That number appears to have been superceded by numbers 22-674 and 22-675. Our review of the records indicates that 22-675 is the Gordons' SRBA claim for forty (40) inches (.8 cfs) for the S $\frac{1}{2}$ SW Section 26 and S $\frac{1}{2}$ SE Section 27 (we assume this includes a claim of an accomplished transfer or an enlargement to the land in Section 27). 22-674 appears to cover the eighty (80) inches (1.6 cfs) awarded to the SW $\frac{1}{4}$ of Section 27, now only claimed on the N $\frac{1}{2}$ of that SW $\frac{1}{4}$ as follows:

22-674B	Jeff Carter and Josephine Warden	20 inches (.4 cfs) for 20 acres in NE SW Section 27
22-674C	Bruce and Valerie Zohner	20 inches (.4 cfs) for 20 acres in NE SW Section 27
22-674D	Katherine Ciesinski	20 inches (.4 cfs) for 20 acres in NW SW Section 27
22-674E	Kristine Ciesinski and Norman Bailey	20 inches (.4 cfs) for 20 acres in NW SW Section 27.

To our knowledge, there are no other SRBA claims pending which claim any portion of the Michael Byrne decreed right. But there has been some assertion by Mr. Ray Gordon to the effect that during the period between 1991 and 1994, when he was purchasing some eighty (80) acres of the Willden land on contract, he changed the place of use of some of the decreed water right formerly appurtenant to the Willden land. There is an ongoing dialogue regarding this assertion, but, at this time we would point out the following facts which have been disclosed by our research.

1. We have found no adjudication claim filed by Gordons to more than forty (40) inches of the Byrne right, only claim number 22-675.

2. We have been able to find no Application for Transfer of any of the eighty (80) inches claimed under 22-674 as would have been required by Idaho Code Sections 42-108 and 42-222.

3. The period during which any such change would have been made by Gordons, 1991-1994 is too late for an accomplished transfer to have taken place under the requirements of Idaho Code Section 42-1425.

4. Adverse possession could not have occurred after 1991 because of the provisions of Idaho Code Section 42-607.

5. Our view of the farming operation of Gordons in the S ½ SW Section 26 and S ½ SE Section 27, and our review of the aerial and satellite photos suggests that Gordons do not irrigate more than forty (40) acres within this 160 acre total anyway.

Our conclusion from all we have heard and seen regarding the Byrne decreed right is that eighty (80) inches is still appurtenant to the N ½ SW Section 27, and on behalf of Katherine Ciesinski, Kristine Ciesinski and Norman Bailey, we hereby call for delivery of water pursuant to said rights (22-674D and 22-674E) so long as water is available to fill or partially fill the June 1, 1890 priority.

Thank you for your kind attention to this matter.

Very truly yours,



Kent W. Foster

cc. Ronald D. Carlson, District 01 Watermaster
Clay Fullmer, Deputy Watermaster for Teton Basin
Katherine Ciesinski
Kristine Ciesinski & Norman Bailey
Ray Rigby