

William Bart Conlin
New York New York South Mission
8569 60th Dr.
Elmhurst, NY 11373-5547
Telephone: (208) 221-4959

RECEIVED
JAN 14 2008
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

)
) Subcase No. 27-04020
)

) **AFFIDAVIT OF WM. BART CONLIN**
) **IN SUPPORT OF MOTION FOR**
) **SUMMARY JUDGMENT**
)

STATE OF NEW YORK

COUNTY OF QUEENS

)
) ss.
)

William Bart Conlin, being first duly sworn upon oath, deposes and states as follows:

1. I am over 18 years of age and have first-hand knowledge of the facts set forth herein, to which I am fully competent to testify.
2. I am the president of Wm. Bart Conlin, Inc., which is the owner of the water right in subcase no. 27-04020 listed above.
3. I am temporarily residing in New York as a missionary for The Church of Jesus Christ of Latter-day Saints. My missionary service is complete in December 2008, and thereafter I will return to my residence at 250 E. Third N., Soda Springs, Idaho 83276.
4. As a young boy in the fall of 1955, I helped my father install a pipeline from a small spring (known as Gardner Spring) located in the NE ¼ of the NW ¼ of

Section 23, Twp 07S Rge 42 E B.M. to the NE ¼ of Section 22, Twp 07S Rge 42 E B.M. A copy of this map and a map of the spring are attached as Exhibit A.

5. The pipeline we installed is approximately ½ mile long. The pipeline produced a gravity flow water system that irrigated 10 acres of farmland and provided domestic water for a small cabin in addition to providing stock water for livestock we had on the farm.
6. The elevation of the spring is higher than the elevation of the 10 acres and cabin where the water was used; the natural geography provided a very effective gravity flow water system.
7. I remember asking my father why we didn't use the water out of the Blackfoot River which was immediately adjacent to the 10 acres. He told me that the water in the river belonged to the Fort Hall Indian Tribes and that we could not use it. He also told me that we could use the water from Gardner Spring because after the water comes to the ground surface, it then flows for approximately ¼ of a mile and then sinks back into the ground and never reaches or enters the Blackfoot River.
8. Furthermore, the water not only never reaches or enters the Blackfoot River, it never leaves the property nor does it ever enter into any other stream, creek, or body of water.
9. Every year since 1955 either my father or I have used this water.
10. We installed a spring box to keep the water clean and a valve to enable us to turn the gravity flow system on every spring and off every fall.

11. The valve to the pipeline is usually opened in April or May (depending on the snow pack) and shut off in late October of each year.
12. Most years the irrigation use of this water began in late June or early July and usually ended by the middle of August each year. This is because of the high altitude of the farmland property. The late snow pack and the spring rains usually provided enough moisture for crops to grow on the 10 acres until around the beginning of July. By the mid to end of August, we are finished irrigating.
13. The domestic water and stock water were and are used from April through October of each year.
14. The spring, though small, usually produced enough water to irrigate the 10 acres and to provide for our domestic and stock water needs. On extremely dry years when the snow pack was small, there was an occasional year when there wasn't enough water to irrigate the 10 acres. There was, however, always enough water to meet our domestic and stock water needs.
15. This water has been used yearly in this manner every year since 1955 by our family. We feel we have used the water prudently over the last 50-plus years and have not deprived any other person or entity of any water that was available to them. If we were not using this water it would not increase the water available for use by anyone else.
16. My father never filed a claim for the use of the water because the spring was on our property and because it sunk back into the ground and never entered the Blackfoot River. A few years later, I was advised to file a claim on the water even though it never entered the Blackfoot River. At the time I felt it was

unnecessary but did file the claim with the help of Ruell Moss, who was an employee with the USDA Soil Conservation Service.

17. In the past few years, Cindy Bird of the Idaho Department of Water Resources (IDWR) has helped me as I have tried to protect my water right.
18. Cindy Bird has made on-site inspections of the spring and has a log that can verify that water from the spring sinks into the ground and never reaches the Blackfoot River.
19. I do not believe I should be a party to this litigation because my water does not reach, enter, or impact the Blackfoot River at any time, nor does it enter any other creek, stream, or body of water. My use, or non-use, of this spring does not increase or decrease the water available to any other person or entity.
20. Cindy Bird from the IDWR has also made an on-site inspection of my water system and has tested the water pressure (albeit in a low-water year) for purposes of calculating my volume of water use. She has recently informed me over the telephone that according to her calculation, I use 39 acre feet per year for irrigation purposes.
21. She gathered this information as part of her responsibilities as a specialist for the IDWR. I also provided her with copies of maps showing the location of the property and the spring, as well as documents that show that the pipeline was constructed in 1955.
22. In connection with this litigation, the IDWR proposed a notice of water right claim that did not include my irrigation use of this water. Unfortunately, I did not understand the implication of their failure to specifically designate my irrigation

use; therefore I objected on July 27, 2006. A copy of this documentation is attached as Exhibit B.

23. On February 21, 2007, I received a letter from Spence Ward, Deputy Tribal Water Engineer, proposing a settlement of my water right claim, which I was favorably disposed to accept, except that it did not include the irrigation of 10 acres of farmland. I contacted Spence Ward, who made an approximate calculation of the volume the Tribes would accept. This calculation was 31 acre feet per year for irrigation purposes; stock water use was calculated at 2.63 acre feet per year, and domestic use is calculated at 0.02 cubic feet per second. I am quite confident that the proposed domestic and stock water volumes are in line with what I have historically used and are sufficient for my needs. I also believe that it is likely that if necessary, the Tribes and I could reach an agreement on the irrigation volume, as 31 and 39 acre feet per year are fairly close. A copy of the correspondence between myself and Spence Ward is attached as Exhibit C.
24. On May 4, 2007, I received a letter from the Department of Water Resources objecting to my proposed settlement with the Tribes because of a lack of information regarding "actual diverted volumes." A copy of this letter is attached as Exhibit D.
25. It is my understanding that Cindy Bird from the IDWR went to my farm in the summer of 2007 to take pressure tests so she could determine the amount of water I have used over the years. (See my December 18, 2007 letter to Jeanette Wolfley). As I previously mentioned, Cindy recently informed me that she estimates my irrigation water volume use as 39 acre feet per year

26. Although 2007 was a low water year and the measurements Cindy took may not perfectly estimate my historic use, the tests are probably relatively accurate for the purposes of resolving my claim. It is impractical and inconvenient to wait to resolve this matter until a year with heavy snow fall so that a volume measurement can be taken the following summer in a high water year.
27. Furthermore, it does not seem that the tribes should have the right to control my water volume use since my water never enters or reaches the Blackfoot River or any other body of water, creek, or stream. If they have that right, the tribes and I should be permitted to reach an agreement on irrigation volume and settle the claim regarding my water right outside of any further litigation.

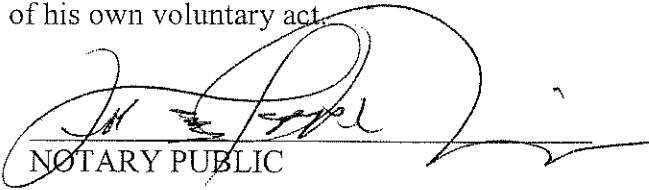
Further this affiant sayeth naught.

DATED this 11th day of January, 2008.



William Bart Conlin, President
Wm. Bart Conlin, Inc.

On the 11 day of Jan, 2008, personally appeared before me, William Bart Conlin, whose identity has been proven on the basis of satisfactory evidence, being first duly sworn, acknowledges that he executed the foregoing instrument, for the purposes stated therein, of his own voluntary act.



NOTARY PUBLIC

FRANZ POPPE
Notary Public - State of New York
NO. 01PO4693438
Qualified in Queens County
My Commission Expires 12/31/11

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on the 11 day of January, 2008, to the following:

1. Original to: Clerk of the District Court US Mail
Snake River Basin Adjudication
253 Third Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707

2. One copy to the party who filed the objection at the following address:
Shoshone-Bannock Tribes US Mail
Jeanette Wolfley
202 N. Arthur
Pocatello, ID 83204

3. Copies to: IDWR Document Depository US Mail
P. O. Box 83720
Boise, ID 83720-0098

United States Department of Justice US Mail
Environment & Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

David Barber, Deputy Attorney General US Mail
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

State of Idaho, IDWR US Mail
Cindy Bird
P. O. Box 935
Soda Springs, ID 83276

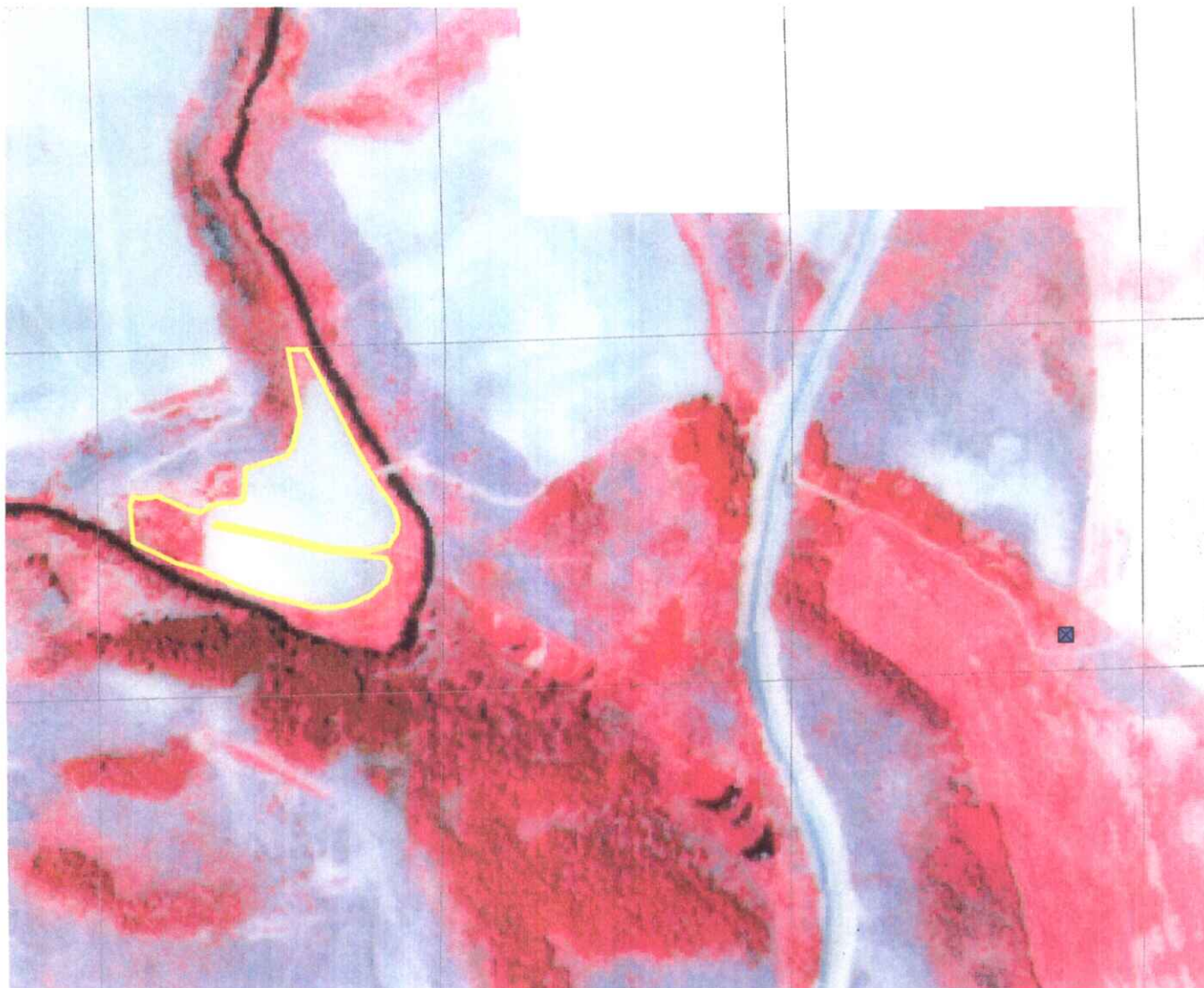
Adjudication Bureau US Mail
Idaho Dept of Water Resources
900 N. Skyline, Ste A
Idaho Falls, ID 83401-3653



Wm. Bart Conlin

EXHIBIT A

27-4020

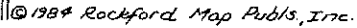


-  27-4020.shp
-  Quarter-Quarter Lines
-  Recommendation POD

1987 NAPP Photography
Created by: Cbird
12-20-2006

0.2 0 0.2 0.4 Miles

A horizontal scale bar with four segments of equal length, corresponding to the 0.2, 0, 0.2, and 0.4 mile markings.



SODA SPRINGS, IDAHO

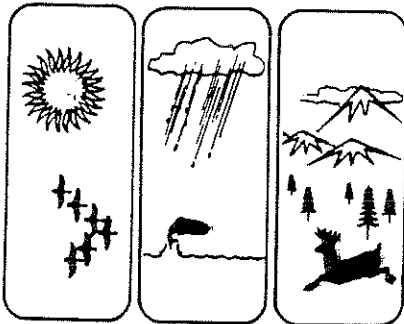


EXHIBIT B

2006 SEP -7 PM 3: 44
DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

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	)	ORDER GRANTING MOTION TO
	)	FILE LATE OBJECTION AND
Case No. 39576	)	SETTING DEADLINE
	)	
	)	SUBCASE NO.: 27-04020
	)	

I. PROCEDURAL BACKGROUND

An *Objection* was filed on July 27, 2006 by William Bart Conlin, Inc. The SRBA District court treated the *Objection* as a *Motion to File Late Objection*. The *Motion* seeks to amend the notice of claim for this water right by increasing the acreage. A hearing was held on the *Motion* on September 6, 2006.

II. STANDARD OF REVIEW

The SRBA Administrative Orders do not provide a standard to be applied for filing late objections. However, the court's administrative rules set forth that *Motions to File a Late Notice of Claim* are to be reviewed under the criteria of I.R.C.P. 55(c) and 60(b). *SRBA Administrative Order 1 (AO1) § 4 (d)(2)(d)*.

According to case law and the Rules of Civil Procedure, a court applies the criteria of I.R.C.P. 55(c) when determining whether to allow the filing of a late answer. *Motions for Late Objection* have been reviewed in the SRBA under the same criteria of Rule 55(c). The proponent of a *Motion for Late Objection*, like a party seeking to file an untimely answer, must show both "good cause" for untimeliness and the existence of a "meritorious position." I.R.C.P. 55(c).

The SRBA has recently affirmed the legal standard of what must be shown to satisfy "good cause" and "meritorious position." The legal standard for "good cause" for untimeliness of an

objection is determined under the standard for setting aside the entry of a default under I.R.C.P. 55(c). The "good cause" standard under Rule 55(c) is more lenient than the standard under Rule 60(b). The I.R.C.P. 55(c) standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent; and
- 3) whether a meritorious position has been presented.

Order on Motion to Set Aside Partial Decrees and File Late Objections (A.L. Cattle) (Jan. 31, 2001).

In support of the *Motion*, Mr. Conlin explained that he did not originally realize that the irrigation component of his claim had not been recommended. When he learned at the Initial Hearing that his irrigation use was not recommended, he immediately sought the filing of a late objection. The lateness of the objection was therefore, not willful. In addition, Mr. Conlin explained that he has irrigated the 10 acres in question since about 1955. Therefore a meritorious position on the irrigation claim has been alleged. No parties to the SRBA opposed the *Motion*, and there is no showing prejudice would result from allowing the late objection.

III. FINDINGS

Mr. Conlin failed to file a timely *Objection* to the *Director's Report* because he did not understand the different uses of this water right. There was no opposition to the *Motion*. Therefore, the *Motion to File Late Objection* is **granted**. The *Objection* will be filed with the court dated September 6, 2006.

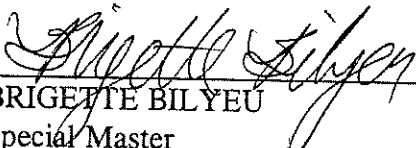
IT IS ORDERED that the following deadline shall govern further proceedings:

October 27, 2006

5:00 pm

Deadline to file Response to Objection

DATED September 7, 2006.


BRIGETTE BILYEU
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER GRANTING MOTION TO FILE LATE OBJECTION AND SETTING DEADLINE was mailed on September 07, 2006, with sufficient first-class postage to the following:

SHOSHONE-BANNOCK TRIBES

Represented by:
JEANETTE WOLFLEY
SPECIAL COUNSEL
SHOSHONE-BANNOCK TRIBE
202 N ARTHUR
POCATELLO, ID 83202
Phone: 208-232-1922

STATE OF IDAHO

Represented by:
NATURAL RESOURCES DIV CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
PO BOX 44449
BOISE, ID 83711-4449

WILLIAM BART CONLIN INC

PO BOX 753
SODA SPRINGS, ID 83276
Phone: 208-547-4258

DIRECTOR OF IDWR

PO BOX 83720
BOISE, ID 83720-0098


Deputy Clerk

EXHIBIT C



Shoshone-Bannock Tribes

TRIBAL WATER RESOURCES DEPARTMENT

P.O. Box 306
Fort Hall, Idaho 83203

Phone: 208-239-4583
Fax: 208-239-4592

February 21, 2007

William Bart Conlin Inc.
New York New York S Mission
85-69 60TH Drive
Elmhurst, NY 11373-5547

Dear Water Claimant:

As you know the Shoshone-Bannock Tribes have objected to water rights claims where a volumetric limit was not placed on your water right as recommended in the State of Idaho's Director's report. The Snake River Basin Adjudication Court has scheduled all water right objections for trial in November 2007. Your water right is one of those right(s).

The Tribes would like to settle your stockwater claim(s) and propose to settle stockwater claim(s) using the following formula:

$$\text{number of stock} \times \frac{\text{## gallons/day}}{\text{head}} \times \text{period use (days)} \times \frac{1 \text{ acre-ft}}{\text{# gallons}} \Rightarrow \text{volume (AFY)}$$

We have settled numerous claims using this formula. If you are willing to consider settling, we need the following information from you: 1) type of stock (e.g. cattle, cow-calf pairs, sheep, horses, elk); 2) number of stock; and 3) actual period of use. We will generally use the period of use as listed on the recommended water right, however the State of Idaho will require the actual period of use to come up with a more realistic number. For example, if your water right has a period of use for 365 days a year and your cattle only use this water right 6 months of the year then a period of use of 6 months would be used to calculate the volume.

If you wish to settle Tribal objections to your stockwater claims please fill out the attached form and place it in the enclosed self-addressed stamped envelope. We will calculate your water claim using this formula, and then contact you. Should you have additional questions or need further clarification of this letter, please feel free to call me at (208) 239-4581. Thank you for your consideration of our proposal.

Sincerely,

Spence Ward
Deputy Tribal Water Engineer

March 16, 2007

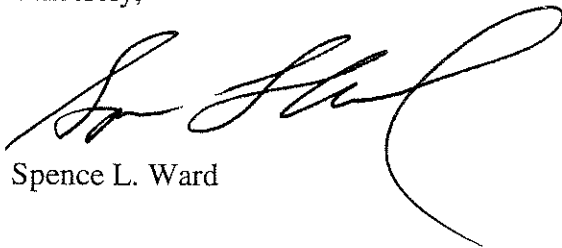
Dear Mr. Conlin,

The stock water volume was reached from the information you provided on the stock water calculation sheet. The 214 days would be from May 1 through the end of November as you indicated.

The irrigation of 10 acres has not been added to the water right as of today. The paralegal, Gail Martin and I checked the IDWR site and no amendment had been made by IDWR. I was reading through your file and remember talking with you and Cindy Bird about the 10 acres you irrigate. The irrigation volume calculated on the bottom of the water right enclosed is what the Tribes would suggest if and when the 10 acres of irrigable land was added to your water right.

Let me know if these volumes are acceptable to you. Good luck on your mission, and hope all is well.

Sincerely,

A handwritten signature in black ink, appearing to read 'Spence L. Ward', with a large, sweeping flourish extending from the end of the signature.

Spence L. Ward

11/09/2005

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 27-4020

NAME AND ADDRESS: WILLIAM BART CONLIN INC
BOX 753
SODA SPRINGS ID 83276

SOURCE: GARDINER SPRING

TRIBUTARY: SINKS

QUANTITY: 0.020 CFS

The quantity of water under this right shall not exceed 13,000 gallons per day.

PRIORITY DATE: 05/01/1956

POINT OF
DIVERSION: T07S R42E S23 NENW Within CARIBOU County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
STOCKWATER	01/01 12/31	0.020 CFS
DOMESTIC	05/01 11/01	0.020 CFS

2.63 AFY

PLACE OF USE: STOCKWATER Within CARIBOU County

T07S R42E S22 NENE

DOMESTIC Within CARIBOU County

T07S R42E S22 NENE

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

The quantity of water decreed for this water right is not a determination of historical beneficial use.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

Stockwater use is for 50 cattle

$$\text{STOCKWATER: } \left(200 \text{ COW/CALE} \right) \left(\frac{20 \text{ GAL/DAY}}{\text{COW/CALE}} \right) \left(214 \text{ DAYS} \right) \left(\frac{1 \text{ AC-FT}}{325,850 \text{ GAL}} \right) = \underline{\underline{2.63 \text{ AFY}}}$$

$$\text{IRRIGATION: } \left(3.1 \frac{\text{AC-FT}}{\text{AC}} \right) \left(10 \text{ AC} \right) = \underline{\underline{31 \text{ AFY}}}$$

EXHIBIT D



State of Idaho

DEPARTMENT OF WATER RESOURCES

15 W Center Street, Soda Springs, Idaho 83276-1575

Phone: (208) 547-3993 FAX: (208) 547-3939 www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Director

May 4, 2007

Bart Conlin
8569 60th Dr.
Elmhurst, N.Y 11373

REF: SRBA Rights 27-4020

Subject: Basin 27 Objections to Irrigation Use

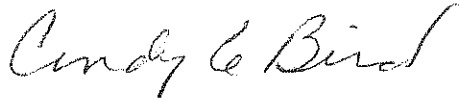
Dear Claimants:

This letter concerns the objection filed by the Shoshone-Bannock Tribes and/or the Bureau of Indian Affairs (collectively referred to as "the Tribal Objectors") to your water right in the Snake River Basin Adjudication (SRBA) and the concurrence of the Idaho Department of Water Resources (IDWR) in a proposed settlement agreement to resolve the objection.

It is IDWR's understanding that you have agreed to settle the volume objection made by the Tribal Objectors to your water right by including a specific total annual volume limit on your irrigation water right. Recently, the Tribal Objectors requested that IDWR concur in the settlement agreement. IDWR is reluctant to concur in such settlements because of a lack of information regarding actual diverted volumes in Basin 27. If a volume limit is to be included in a water right, IDWR wants to make sure that the volume limit is as accurate as possible. To this end, IDWR is currently in the process of implementing a study intended to provide a basis for determining diverted volumes in Basin 27. Still, IDWR realizes that that some water users might have information that would provide actual diverted volumes for their water rights, thus eliminating the need to wait for completion of the study. As such, IDWR is requesting any information you have to support historical diversion amounts for your water right. If you have any such information, please send it to the address listed above.

If you have any questions please feel free to contact me at 547-3993.

Respectfully,

A handwritten signature in cursive script that reads "Cindy E. Bird".

Cindy E. Bird
Adjudication Bureau

CC: BIA, U.S. Dept. Of Justice
Jeanette Wolfley, Shoshone-Bannock Tribes
State Of Idaho, David Barber
Andrea Courtney, Deputy Attorney General

EXHIBIT E

December 18, 2007

Jeanette Wolfley
Attorney at Law
202 North Arthur
Pocatello, ID 83204

I am enclosing my answers to the Discovery requests that were recently mailed to me.

I am also enclosing a letter with attached documents from the Shoshone Bannock Tribes Water Resources Department proposing a possible settlement. I am very interested in the proposed attachment.

I am also enclosing a copy of an order granting motion to file late objection and setting deadline that I received from Brigitte Bilyeu, Special Master.

I am also enclosing a letter from Cindy Bird regarding the volume objection on my irrigation water right.

I was told by Cindy Bird of the Idaho Dept of Water Resources that the Department had not granted my irrigation claim because there was no volume measure. It was my understanding that Cindy went out to my farm in the summer of 2007 to take some pressure tests so she could determine the amount of water I have used over the years. Unfortunately 2007 was a low water year so I am not sure if the measurement she took will accurately reflect the correct volume. I have not been told of the results of her tests.

I am anxious to settle this as soon as possible in a fair and equitable way for everyone involved. I would appreciate the support of the Idaho Department of Water Resources, the Shoshone-Bannock Tribes and the Special Master of the SRBA District Court in getting this resolved.

Although this is a small amount of water which never enters the Blackfoot River, it is nevertheless important to me and my family. We feel we have used the water prudently over the last 50-plus years and have not deprived any other person or entity of any water that was available to them. If we were not using this water it would not increase the water for anyone else. We would like to continue to use the water as we have in the past.

Should you have any questions or if I have not properly responded to any question or procedure, please contact me.



Wm. Bart Conlin
8569 60th Drive
Elmhurst, NY 11373
718-672-2031