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DEPARTMENT OF
WATER RESOURCES

Names of Parties Filing Document:

UNITED STATES OF AMERICA

Attorneys' Names and Addresses:

IGNACIA S. MORENO
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

DAVID L. NEGRI, ISB #6697
Attorney, U.S. Dept. of Justice
Environment and Natural Resources Division
Natural Resources Section
550 West Fort Street, MSC 033
Boise, Idaho 83724
Ph.: (208) 334-1936 FAX: (208) 334-1414

**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 Numbers: 22-13915
	)	
Case No. 39576	)	UNITED STATES' RESPONSE TO
	)	MOTION TO SET ASIDE PARTIAL
	)	DECREE FOR WATER RIGHT NO.
	)	22-13915 PURSUANT TO I.R.C.P. 60(b)

The United States of America, acting on behalf of the United States Department of Agriculture, Forest Service (hereinafter "United States"), hereby files this response to the *Motion To Set Aside Partial Decree For Water Right No. 22-13915 Pursuant To I.R.C.P. 60(b)* (hereinafter "Motion") filed February 3, 2011. As explained below, because the transfer application that forms the only basis for this water right apparently was withdrawn, this water right should be disallowed.

The Motion asserts that the Partial Decree for 22-13915 should be Set Aside for failure to incorporate certain provisions of an administrative order issued by IDWR (Directors 11/6/1990 Final Memorandum Decision and Order) ("Transfer Order"):

"For the reasons set forth below, the partial decree should be set aside and amended to fully incorporate the provisions of an administrative decision entered for the parent right of 22-13915 on November 6, 1990 . . . "

Motion at 2.

"Unfortunately, the part of the Transfer Order that was **not** incorporated into 22-13915 was that the Transfer Order did allow use of up to 2.0 cfs from the Upper POD prior to July 1st, and after August 31st."

Motion at 5.

The Transfer Order appears to be based upon Transfer 3509. The April 7, 2009, NCAP for this water right, 22-13915, describes it as "[n]ew water right created from [a] portion of 22-683A and 22-683B by final order on transfer 3509."

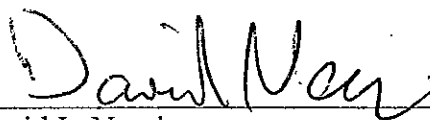
It further appears that, subsequent to the Transfer Order relied upon in the Motion, IDWR questioned an "application for amendment" filed by the water right holder, stating that the "proposal you are presenting to the Department . . . varies substantially from the original proposal for transfer, which was approved," stated that "a transfer would not be appropriate," and advised that the proper procedure was filing of a "new application to appropriate water." Exhibit 1 (emphasis added).

Subsequent to this correspondence, the applicant withdrew Transfer 3509, stating that he was submitting "a new application for permit #22-07710 . . . which we think better suits our needs." Exhibit 2. The Department, noting that Transfer 3509 had been "voluntarily withdrawn," decided that water right 22-0683 (the parent right for this right, 22-13915) "reverts back to its original definition."

It thus appears that, despite the "Final Memorandum Decision and Order" relied upon in the Motion, the transfer was subsequently withdrawn and never finally consummated. Instead, permit # 22-07710 went forward.

Accordingly, it would appear that, should the Court decide that it is appropriate to set aside partial decree 22-13915, rather than the changes to right 22-13915 suggested by the Motion, water right 22-13915 should be disallowed.

Dated this 15th day of March, 2011.

A handwritten signature in black ink, appearing to read "David Negri", is written over a horizontal line.

David L. Negri
U.S. Department of Justice
Environment and Natural Resources Division

Attorney for the United States

CERTIFICATE OF SERVICE

I certify that on March 15, 2011, I served a true and correct copy of foregoing **UNITED STATES' RESPONSE TO MOTION TO SET ASIDE PARTIAL DECREE FOR WATER RIGHT NO. 22-13915 PURSUANT TO I.R.C.P. 60(b)** as indicated below:

By facsimile:

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

United States Mail, postage paid, and addressed as follows:

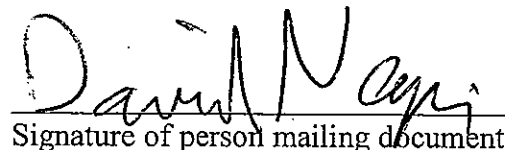
Robert L. Harris
Holden, Kidwell, Hahn & Crapo, PLLC
P.O. Box 50130
Idaho Falls, ID 83404

Sean R. Moulton
P.O. Box 631
Driggs, ID 83422

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, ID 83720-0098

IDWR Document Depository
P.O. Box 83720
Boise, ID 83720-0098

U.S. Department of Justice
General Litigation Section
Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

A handwritten signature in dark ink, appearing to read "David N. Capri", is written over a horizontal line.

Signature of person mailing document



State of Idaho
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 -(208) 327-7900

February 5, 1991

CECIL D. ANDRUS

GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

Richard H. Gebhard
P.O. Box 5022-254 Suite #105
El Toro, CA 92630

RE: Water Right No. 22-0683 and Agreement with Forest Service to
Divert Water During the Non-irrigation Season

I have reviewed the application for amendment form which you prepared with the concurrence of the Forest Service.

Your proposal to divert water for storage in a larger reservoir during the non-irrigation season is not a use identified under your existing water right. Furthermore, a transfer would not be appropriate, since storage of water outside the irrigation season is an enlargement of use. I recognize that what I have said may seem trivial to you, but the transfer statute specifically prohibits an enlargement of use of the water right.

The method for you to establish your storage right is to file a new application to appropriate water. I have enclosed two copies of the application for permit, and instructions for its completion. I have also partially completed one of the applications. You should complete the application, and have it typed and returned to this office with the appropriate filing fee. Please remember to enclose a map which will reasonably locate the storage pond, and the point of diversion you wish to divert the water from.

If I can help you further, please call. I realize this process may seem like more red tape. The proposal you are presenting to the Department, however, varies substantially from the original proposal for transfer, which was approved.

Respectfully,

GARY SPACKMAN, Manager
Water Right Permits Section

GS:js

Enclosures

cc: Eastern Region

EXHIBIT 1

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JUL 22 1991

Department of Water Resources

FROM: Dick Gebhard - Applicant

TO: Idaho Department of Water Resources

RE: Withdrawal of Transfer 3509/22-00683

I am writing to request that transfer 3509 on water right 22-00683 be withdrawn from the Department records. We have decided not to continue to pursue the new point of diversion on JSPS lands for use of irrigation water under right #22-00683.

stead we have made a new application for permit #22-07710 storage which we think better suits our needs.

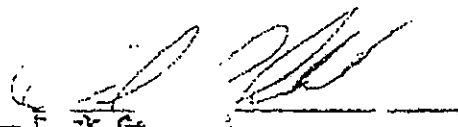

Dick Gebhard

EXHIBIT 2

MEMORANDUM

TO: File No. 22-0683
FROM: Gary Spackman *Gary*
DATE: March 6, 1992

RE: Transfer by Gary Grandy and Dick Gebhard

Permit to appropriate water no. 22-7710 was approved for the purpose of resolving a conflict between Grandy and Gebhard and the Forest Service. The proposal approved by transfer no. 3509 was voluntarily withdrawn by the water right holders.

This memo serves as notice that transfer no. 3509 filed by Grandy and Gebhard has been withdrawn. The water right reverts back to its original definition.

EXHIBIT 3