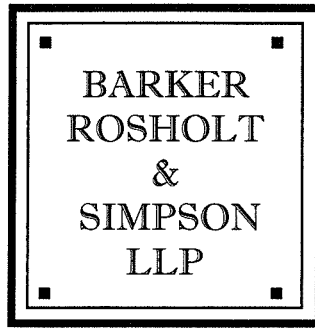


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January 31, 2012

Andrea Courtney
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

RE: *Simon Water Right No. 37-2543*

Dear Andrea:

This is a follow up to our conversation during the initial hearing for the above water right. Since that time, I have reviewed the *Order* creating the Big Wood River Ground Water Management Area ("WRGWMA"), including the accompanying *Management Policy*. I have also reviewed our briefing before the presiding judge and the history of the resumption of use by Mr. Simon. Following a conversation with my client, we do not believe that the WRGWMA prevents resumption of use of water right 37-2543. Likewise, we do not believe that there is any need to advance the priority date of the water right.

First, as discussed in the *Memorandum in Support of Motion to File Late Notice of Claim*, a water right is not automatically lost after 5 years of nonuse. Rather, a judicial decree of forfeiture or a subsequent claim of use for that water must occur. None of that has happened here. In fact, there has been no objection to Mr. Simon's claim of water right 37-2543 in the SRBA. Perhaps more importantly, Mr. Simon diverted water under this water right for each of the last two irrigation seasons (2010 and 2011). During that time, there have been no known complaints about Mr. Simon's resumption of use.

During our discussion, you indicated that, perhaps, designation of the WRGWMA would prevent resumption of use. After reviewing that *Order* and *Management Policy*, I do not believe that this is the case. First, both documents speak directly to "new ground water uses." *Order* at 1. Water right 37-2543 is not a "new ground water use." In fact, the right was licensed in 1958. Since no action was ever taken to determine whether or not this right had been lost due to nonuse, it would have been considered as part of the cumulative diversions that led to the WRGWMA designation. As such, it cannot now be considered a "new ground water use."

Furthermore, I cannot find any reference in the *Order* or *Management Policy* that allows the Department to prevent the resumption of use of a water right that predates the *Order*. There is discussion of transfers seeking to move points of diversion, but that is not the case here. If there are any separate policies or management guidelines that purport to give the Department authority to prevent resumption of use in this case, please provide that information.

An analogous decision recently issued by Judge Wildman is insightful here. See *Memorandum Decision & Order on Motion to Strike Affidavits & Motion for Accounting*, Subcase No. 27-11375 (July 14, 2011). In that matter, the State of Idaho moved the SRBA Court for an accounting pursuant to the certain provisions of the Fort Hall Agreement. There, the Tribes had agreed to subordinate their water right to certain junior surface water rights. Through the accounting, the State sought an identification of the water rights that benefited from the subordination.

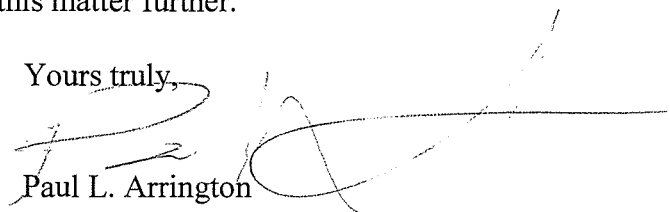
The Committee of Nine asserted that the subordination was limited. It asserted that, during the negotiations, the parties identifies the potential water rights that would benefit from the subordination provision based on 1986-87 diversion data. As such, even though the Agreement provided subordination for "persons diverting natural flow from the Blackfoot River prior to January 1, 1990," the parties' intent was to only subordinate to those rights actually diverted in 1986-87. Rights that were not being diverted during that time were not considered and, therefore, should not benefit from the subordination.

According to the Court, the Committee of Nine was attempting to read something into the Agreement (i.e. a limitation on the benefits provided in the agreement) that contradicted the plain language of the Agreement. In the *Memorandum Decision*, the Court concluded that the Agreement was "unambiguous regarding the scope of protected non-Indian water rights."

Similarly, the Department should not read anything into the WRGWMA *Order* and *Management Policy* that is not there. Here, the "unambiguous" and plain language of the documents speaks of "new ground water uses." This language should not be expanded to prevent the lawful resumption of pre-order ground water rights.

It is my hope that we will be able to resolve the objection to this water right short of litigation. Please give me a call to discuss this matter further.

Yours truly,


Paul L. Arrington

PLA/jn

cc: David Simon
Doug Jones