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Department of Water Resources
Adjudication Bureau

Movants' Names:

Magic Valley Underground Pumpers
Association, Inc. and Its Individual Members
designated in Exhibit A hereto

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OFFICE OF THE
ATTORNEY GENERAL

Attorneys' Names and Addresses:

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Salt Lake City, Utah 84111
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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 No. 36-02080
)	
Case No. 39576)	MOTION FOR LEAVE TO FILE
)	LATE OBJECTION AND
_____)	MEMORANDUM IN SUPPORT

DESCRIPTIVE SUMMARY

This is a Motion for Leave to File Late Objection in the above-referenced subcase by the Magic Valley Underground Pumpers Association, Inc. and each of the Association's individual members, as listed in Exhibit A. The Motion is supported by the attached Memorandum and Exhibits, the Affidavit of Dana L.

Hofstetter, the Affidavit of Orlo H. Maughan, the Affidavit of Layne R. Harper, the Affidavit of Michael S. Telford and the record before the Court and oral argument, if necessary.

MOTION

Pursuant to SRBA Administrative Order 1, and Rules 55(c) and 60(a) of the Idaho Rules of Civil Procedure, the Magic Valley Underground Pumpers Association, Inc., an Idaho non-profit corporation, on behalf of its members, and each of its members individually, by and through their counsel of record, Holland & Hart, respectfully move that the Court grant leave to file the objection attached hereto as Exhibit B.

MEMORANDUM

A. Introduction

A&B Irrigation District ("A&B") purports to be the beneficial owner of Water License No. 20736, now known as 36-02080. The license is said to be held in trust by the United States for A&B and was issued to the United States Bureau of Reclamation ("BOR") in 1965. On its face, the license entitles BOR to pump 1100 cfs of groundwater from 177 wells in the Eastern Snake Plain Aquifer ("ESPA") for irrigation purposes. Under the license, all 177 of the wells have a uniform priority date of September 9, 1948.

The Magic Valley Underground Pumpers Association, Inc. ("Association") is a non-profit association of over 130 individual water right holders who pump ground water from the

ESPA for irrigation purposes. All of the members of the Association have filed claims to water rights in this Court in connection with the Snake River Basin Adjudication ("SRBA").

On July 27, 1994, A&B filed a Petition For Delivery Call (the "Petition") of groundwater from the ESPA before the Idaho Department of Water Resources ("IDWR"). (Exhibit C). The Petition alleges that the diversion of water by junior ground water appropriators located within the ESPA is causing A&B material injury by lowering the ground water level and making A&B unable to divert the full amount it claims under Water Right No. 36-02080.

After receiving the Petition, the IDWR sent a notice of the Petition on August 10, 1994 to over 7,000 ground water appropriators within the ESPA whose priority appears to be junior to the September 9, 1948 priority date asserted by A&B. The notice informed the junior appropriators that their water rights might be subject to future curtailment as a result of the Petition. (Exhibit C).

Some of the water right holders who became aware that the filing of the Petition was imminent began organizing the Association for purposes of preparing a joint response to the Petition. In the course of preparing a response, virtually all of the members of the Association learned for the first time that there were substantial grounds, based on events that took place 30 or more years ago, for objecting to the uniform 1948 priority

date claimed by A&B. (Affidavits of Orlo H. Maughan, Layne R. Harper and Michael S. Telford.)¹ By examining files obtained from the IDWR, they learned, among other things, that:

1) the State Engineer ruled in 1956 and again in 1964 that the wells in the A&B district should have a split, rather than a uniform, priority date--i.e., that the wells constructed prior to November 5, 1955 should have a priority date of Septmeber 9, 1948 and that the wells constructed thereafter should have a priority date of November 5, 1955, provided that proof of completion of works was made no later than November 5, 1958 (Exhibits D and E.²);

2) by BOR's own admission, 67 of the 177 wells in the A&B district were constructed after November 5, 1955;

3) BOR did not make proof of completion of works for any of its wells until January 1964, more than 5 years after the deadline set by the State Engineer (Exhibit F);

4) the Attorney General of Idaho opined in 1964 that BOR's permit had been abandoned by reason of BOR's failure to file timely proof of completion of works and should be cancelled (Exhibit F); and

5) although lawsuits were filed in 1964 and in 1965 challenging the issuance of Water License No. 20736 to the BOR, they were dismissed as untimely and therefore did not involve a review on the merits (Exhibit G).

These are highly significant facts bearing directly on the validity of the priority date claimed by A&B. They are also facts that the Association's members could not reasonably have

¹ The Affidavits of Orlo H. Maughan, Layne R. Harper and Michael S. Telford are representative affifavits from members of the Association who learned about the possible objections to A&B's right for the first time after the Petition was filed.

² Exhibits D through H are true and correct copies of documents obtained from IDWR's files on the issuance of Water License No. 20736, as attested by the Affidavit of Dana L. Hofstetter.

been expected to know prior to the deadline for filing objections to the Director's Recommendations with respect to A&B's claim. The facts became generally known only as a result of the filing of the Petition by A&B and the members' efforts to prepare a response thereto. When the members became aware that there were substantial grounds for objecting to A&B's claimed priority date, they determined to do so as soon as the Stay in this case, imposed last April, was lifted. The Court should therefore grant their motion and allow them to file a late objection to A&B's claimed water right.

A. Standard of Review

The standard for reviewing a motion to file late objection is not specifically addressed in the Idaho Rules of Civil Procedure ("I.R.C.P."), relevant caselaw or in the Court's Orders in this case. The Court has, however, indicated that a motion to file late notice of claim will be reviewed under Rules 55(c) and 60(b) of the I.R.C.P., which set forth the standards for reviewing motions to set aside a default entry or a default judgment, respectively. SRBA Administrative Order 1 at 7. Given the similarities between a motion to file late notice and a motion to file late objection, it would seem appropriate to review both types of motions under the same standards--i.e., those set out in Rules 55(c) and 60(b).

Under Rules 55(c) and 60(b), the setting aside of an entry of default or of a default judgment are both within the sound

discretion of the trial court and will not be reversed on appeal unless an abuse of discretion clearly appears. Clear Springs Trout Company v. Anthony, 123 Idaho 141, 143, 845 P.2d 559, 561 (1992); Newbold v. Arvidson, 105 Idaho 663, 664, 672 P.2d 231, 232 (1983). Judgments by default are not favored and there is a preference for setting them aside so that cases can be decided on the merits. Baldwin v. Baldwin, 114 Idaho 525, 528, 757 P.2d 1244, 1247 (Ct. App. 1988); Gro-Mor, Inc. v. Butts, 109 Idaho 1020, 1024, 712 P.2d 721, 725 (Ct. App. 1985). Even in doubtful cases, relief from a default is favored. Id.

The standard for setting aside an entry of default under Rule 55(c) is said to be more lenient than the standard applicable to setting aside a default judgment under Rule 60(b). This is because the entry of a default is performed by a clerk as a ministerial act rather than by a judge as a considered decision and because entry of a default generally comes earlier in a proceeding and its setting aside is therefore much less likely to prejudice the non-moving party.

The Association and its members believe that granting a motion to file late objection is more akin to the setting aside of a default entry than the setting aside of a default judgment and that therefore the standards in Rule 55(c) should be applied here.³ Under either set of standards, however, it is clear, as

³ The granting of the Association's Motion to File Late Objection will come relatively early in these proceedings and
(continued...)

explained below, that the motion of the Association and its members should be granted.

C. There is Good Cause Under Rule 55(c) for Allowing the Association and Its Members to File a Late Objection

Under Rule 55(c), the "primary considerations" in determining whether to set aside an entry of default are "whether the default was willful, whether setting aside the default would prejudice the opponent, and whether a meritorious defense has been presented." Id. citing Traguth v. Zuck, 710 F.2d 90 (2d Cir. 1983); Meehan v. Snow, 652 F.2d 1074, 1076 (2d Cir. 1981); Cribb v. Matlock Communications, Inc., 236 Montana 27, 768 P.2d 337 (1989).

1. The Failure To File A Timely Objection Was Not Willful

The failure to file an objection to A&B's claimed water right before the deadline established by the Court was not willful. As noted above, virtually all of the members of the Association learned for the first time just recently as they prepared a response to A&B's petition that there are substantial grounds for objecting to A&B's claimed water right. As many of the members were either very young or, indeed, not even born, when the events surrounding the issuance of Water License No. 20736 to BOR took place 30 or more years ago, they cannot reasonably be expected to have known about the basis for an

³(...continued)
before the Court has considered and made any judgments about the validity of A&B's claimed water right.

objection when they reviewed the Director's Recommendations.⁴ The facts about A&B's license became generally known only as a result of research performed in preparation for a response to the Petition filed by A&B last July. The Petition brought sharply into focus the significance of the 1948 priority date being claimed by A&B and motivated the members to pool their resources to thoroughly research IDWR's old records.

**2. Allowing The Filing Of A Late Objection
Will Not Prejudice A&B**

The proceedings of the SRBA are still at a relatively early stage; indeed, until December 7, the proceedings had been stayed while the Court determined whether the adjudication in its present form could proceed at all. No rights have been finally determined, including those of A&B. It is thus clear that no prejudice will result to A&B by allowing the filing of a late objection to their claimed water right. A&B will have ample and adequate time to prepare its defense to the objection and will not be disadvantaged in any way in doing so as a result of the timing of the objection.

On the other hand, it would be a gross injustice, at this early stage of the proceedings, to deny the Association and its members a right to their day in court on an issue that may be vital to their very livelihood--i.e, the validity of the uniform

⁴ Even those members who are old enough to remember the events and may have been aware of them at the time can be forgiven for not recalling the precise facts 30 years later.

priority date that A&B is claiming for all 177 of its wells. It would also undermine the very purpose of the SRBA, which was to provide a forum in which the elements of licenses and other forms of water rights could be fully and finally confirmed on their merits. See Idaho Code § 42-1408A(1)(d) (1990).

3. The Association's Objection Is Meritorious

As described briefly above, the objection that the Association and its members are seeking to file is serious and substantial. If proven valid, the objection will significantly affect the rights of hundreds of water users in the ESPA. The files of the IDWR reveal that the issuance of a license to BOR involved a complex series of events over a period of ten years or more that was highly controversial and that has never been reviewed on the merits by a court of law.

In Septmeber 1948, the BOR applied for a permit to appropriate ground water for 306 proposed wells that were to be developed in connection with the North Side Pumping Division of the Minidoka Project (which was later organized into the A&B Irrigation District). Under the law as it then existed, BOR was required to prove completion of works by November 5, 1953 or forfeit its permit. Idaho Code § 42-204. On September 30, 1953, BOR made application for an extension of time in which to prove completion of works. Although BOR requested a five year extension, the State Engineer granted only a two year extension to November 5, 1955. In explaining his decision, the State

Reclamation Engineer noted that private parties who had drilled wells in the same area since 1948 had strongly objected to an extension of time for BOR. In 1955, BOR requested another extension, this time until November 5, 1958. Mark Kulp, the State Reclamation Engineer at the time, issued an order denying the extension and stating that:

It is the further decision of the State Reclamation Engineer that the priority date of that part of the right initiated by Permit No. G-20736 depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that part of the right initiated under Permit No. 20736 and depending on works not completed by November 5, 1955, may relate back to November 5, 1955.

Kulp also set the deadline for making proof of completion of work on the entire project on November 5, 1958. (Exhibit F).

In 1958, BOR, rather than make proof of completion, requested a further extension of time to November 5, 1963. This extension was denied by Kulp's successor, George Carter, who stated "Proof of completion should now be made." (Exhibit H).

Finally, in January 1964 BOR gave proof of completion of works and application to beneficial use for 177 wells. It claimed a uniform priority date of September 9, 1948 for all of its wells, even though the State Reclamation Engineer had decided in 1956 that it was not entitled to a uniform date.

At the request of the State Reclamation Engineer, the Attorney General then reviewed the history of Permit No. 20736 and concluded that the water right had been abandoned by reason

of BOR's failure to make timely proof of completion of works and that it should therefore be cancelled. (Exhibit F).

On June 25, 1964, the State Reclamation Engineer issued a letter stating that he intended to issue BOR a license with a split priority date--i.e., those wells completed prior to November 1955 would have a September 1948 priority and those completed thereafter would have a November 1955 priority. (Exhibit E). Then, on June 10, 1965, the State Reclamation Engineer, without giving any explanation for his change in position, issued a license to BOR with the single priority date of September 9, 1948 for all 177 wells.

Several lawsuits challenging the proposed issuance of the license announced in June 1964 were dismissed as being premature. Although assurances were made at the time that notice would be provided when the license was actually issued, the parties to the lawsuits received no notice of the license issued in June 1965 until the appeal period had passed. A second attempt to appeal the license thus was determined to be untimely. (Exhibit G).

The Association and its members recite these facts gleaned from the records of the IDWR not as conclusive proof of the invalidity of A&B's claimed uniform priority date, but as evidence that the objection it is seeking to raise is not frivolous and deserves to be heard.

B. A Late Objection Also Is Justified Under The Terms Of Rule 60(b)

Under Rule 60(b), a default judgment may be set aside if the moving party can show at least one of the following: mistake, inadvertence, surprise or excusable neglect. The moving party must also allege facts which, if established, would constitute a meritorious defense to the action. Baldwin at 527, 757 P.2d at 1246. In evaluating whether the mistake, inadvertence, surprise or excusable neglect is legally sufficient to justify setting aside a default judgment, the courts weigh each case in the context of the facts and circumstances presented. Johnson v. Pioneer Title Company of Ada County, 104 Idaho 727, 732, 662 P.2d 1171, 1176 (Ct. App. 1983).

From the facts and circumstances recited above, it is evident that the failure to file a timely objection to A&B's claimed water right rests on grounds even more compelling than those of mistake, inadvertence, surprise or excusable neglect. The members generally were simply not aware until four months ago (and could not have been expected to be aware) of the controversial and complex 30 year old history behind the issuance of Water License No. 20736. Since discovering the bases for an objection, they have moved expeditiously to bring it to the attention of this Court.

Moreover, as recounted in some detail in section C.3. above, the facts underlying their objection, if proven, would constitute a meritorious challenge to the uniform priority date A&B is

claiming. For these reasons, they are entitled to file a late objection, even under the more stringent standards that apply to the setting aside of a default judgment.

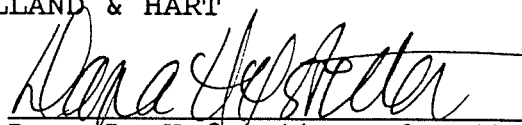
CONCLUSION

For the foregoing reasons, the Court should grant the Motion for Leave to File Late Objection by the Association and its members.

DATED this 21st day of December, 1994.

HOLLAND & HART

By


Dana L. Hofstetter, for the firm
Attorneys for Respondents Magic
Valley Underground Pumpers
Association, Inc., et al.

CERTIFICATE OF SERVICE

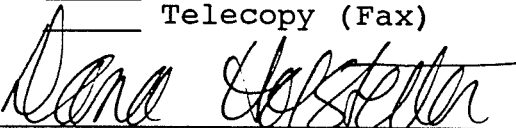
I hereby certify that on this 21st day of December, 1994, I caused to be served a true and correct copy of the foregoing Motion to File Late Objection and Memorandum in Support by the method indicated below, and addressed to the following:

K. Jack Haugrud U.S. Mail
Daria J. Zane _____ Hand Delivered
U.S. Department of Justice _____ Overnight Mail
General Litigation Section _____ Telecopy (Fax)
Environment and Natural
Resources Division
P.O. Box 663
Washington, DC 20044-0663

Roger D. Ling U.S. Mail
Ling Nielsen & Robinson _____ Hand Delivered
615 H Street _____ Overnight Mail
P.O. Box 396 _____ Telecopy (Fax)
Rupert, ID 83350

Chief, Natural Resources U.S. Mail
Division _____ Hand Delivered
Office of Attorney General _____ Overnight Mail
State of Idaho _____ Telecopy (Fax)
P.O. Box 44449
Boise, ID 83711-4449

U.S. Department of Justice U.S. Mail
Environment and Natural _____ Hand Delivered
Resources Division _____ Overnight Mail
550 West Fort Street _____ Telecopy (Fax)
Box 33
Boise, ID 83734


for HOLLAND & HART

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A

MAGIC VALLEY UNDERGROUND PUMPERS ASSOCIATION, INC.

Name	Water Right Numbers
ACEQUIA, INC.	36-02121 * 36-02122 * 36-02123 * 36-02124 * 36-02125 * 36-02126 * 36-02127 * 36-02128 * 36-02129 * 36-02130A * 36-02190 * 36-02191 * 36-02192 * 36-02193 * 36-02194 * 36-02195A * 36-01297 * 36-02198 * 36-02199 * 36-02200 * 36-07182 * 36-07193 * 36-07391 * 36-07403 * 36-07404 * 36-07405 * 36-07850A * 36-07932 * 36-08106A * 36-08133 * 36-11290
ANTONE, Steve	36-07212B
ANTONE, Steve K.	36-02269A
BAGNALL, Bruce	36-02073
BAGNALL FARMS; Norman L. Bagnall	36-20534 * 36-15172
BAILEY, Calvin M.	36-07735
BAILEY, Carl W.	36-02252 * 36-02472 * 36-08643
BALL, Ferrell Dean	36-02690 * 36-02566
BALL, Jim (Jimmy)	36-02167
BELL, Greg	36-02630 * 36-08619
BLINCOE FARMS, INC.; Richard Blincoe	36-04060 * 36-02095 * 36-02230A 36-04057
BMS FARMS; Norman L. Bagnall	36-02075
BUTLER FARMS; Dale H. Butler; Verla Butler	36-02280
COMMONS, Ray L.	36-02633 * 36-13450 J * 36-02059 * 36-07678 * 36-07296 * 36-02177 * 36-02164A * 36-07286 * 45-07044
DEAN, Wendell C.	36-12953 * 36-02066B * 36-02251 * 36-02255 * 36-12953 * 36-02523

Name	Water Right Numbers
DELIS FARMS, INC.; Steve Delis; Costa Delis	36-02448 * 36-02458 * 36-7604 * 36-08192 * 36-02716 * 36-07311 * 36-07039 * 36-07371 * 36-02629
DESERT RIDGE FARMS, INC.; Mike Patterson	36-02471 * 36-04009 * 36-04010 * 36-04248
DEWER DAIRY COMPANY; Herbert Poteet	36-02089
DUNCAN, Jack	45-02461 * 45-02616 * 45-02460 * 45-07108B * 45-02479 * 45-04241 * 45-07232B * 45-07232A
DUNCAN, Paul	45-07462
ELLIS, Lee	36-10048 * 36-07611 * 36-07830
FLAT TOP SHEEP COMPANY; John T. Peavey	36-02455 * 36-08275A * 36-02454B * 36-07007B * 36-07021 * 36-08274 * 36-08275 * 36-08273 * 36-08275B * 36-08275A * 36-07021B * 36-07021A * 36-08274A * 36-08275A * 36-08275B
G.L. DEAN AND SONS, INC.; Dennis Glead	36-02070A * 36-02076B * 36-02085B * 36-11871
GARNER, Gary	36-02381
GILLETTE, Larry R.; Windy Acres, Inc.	36-07039 * 36-11155 * 36-15373 * 36-02643 * 36-04058B
GRANT, Douglas E.	36-02684 * 36-07273
GRANT, Duane R.	36-02684 * 36-02481A
H & P FARMS; Jeff Hunt; Bruce Pincock	36-02321 * 36-02349 * 36-02573 * 36-02578 * 36-02589
MICHAEL J. HALEY as Personal Representative of The Estate of Rosemary Elizabeth Haley	36-07041 * 36-11340
RODNEY HANSEN FARMS, INC.; Bruce Hansen	36-02163 * 36-11147 * 36-11164

Name	Water Right Numbers
HARMAN LAND RANCH; Kent Harman; Jack Harman; Bob Harman	36-08212 * 36-08213 * 36-02220 * 36-02061 * 36-02550 * 36-13113 * 36-15380 * 36-07531 * 36-02136 * 36-02142A * 36-02134 * 36-02137 * 36-02138 * 36-02139 * 36-02140 * 36-02189 * 36-02135 * 36-07186 * 36-07187 * 36-07188 * 36-07189 * 36-01790 * 36-07191
HARPER, Layne; Clint Harper	36-07412 * 36-02288 * 36-07960A * 36-07960B * 36-02401 * 36-02201 * 36-02202
HEPWORTH, William M.	45-02752 * 45-02458 * 45-02459 * 45-07160
MAINLINE RANCHES, INC.; Estate of Ross Hunsaker; Doris Hunsaker; Bruce Hunsaker; Blaine and Deon Cook	36-02097 * 36-0515 * 36-02259 * 36-02092 * 36-02258B
OWYHEE RANCHES, INC.; Estate of Ross Hunsaker; Doris Hunsaker; Bruce Hunsaker, Blaine and Deon Cook	36-10850 * 36-10863 * 36-07246 * 36-02582 * 36-02090
IDA-WOOD FARMS; Rodger Woodward	36-02165
THE IDAHO YOUTH RANCH, INC.; Kent Harman; Jack Harman; Harman Land Ranch	36-02315B * 36-02315E * 36-02315D * 36-02315C * 36-07399 * 36-02315A
IDAHO AG., INC.; Tom Haynes	36-07306 * 36-07493 * 36-07976 * 36-07883 * 36-02195B * 36-02196 * 36-02398 * 36-02403 * 36-07306A * 36-07306B * 36-07306C * 36-07493A * 36-07493B
JENTZSCH, Rodney	36-12027 * 36-02132D * 36-00196 * 22164 * 36-15170 * 36-15167
JONES, Ernest; Steve D. Young	36-02253
JONES, Ron S.	36-02415 * 36-08056 * 36-08110 * 36-15356

Name	Water Right Numbers
KERBS, William (Bill)	36-02727 * 36-07495 * 36-10486
KESTER, Don	36-07170
KESTER, Don., Jr.	36-07122 * 36-07890
K-LINE FARMS INCORPORATED; Richard L. Fassett	36-07264 * 36-08187 * 36-11770
KLINGLER, Dale	36-07209 * 36-02618 * 36-15266I * 36-02434 * 36-15265I * 36-08277I * 36-15264A * 36-07627 * 36-02433 * 36-02435 * 36-15264B * 36-15264
LAND VIEW FERTILIZER, INC.; Steve D. Young; Roy M. Young	36-15347J
LARGE, Sam	36-02268 * 36-10090
LOVELAND, Larry; Steve D. Young	36-02410 * 36-07580
LARSEN, John C.	36-7044 * 36-7158 * 36-2676
MAGIC VALLEY FOODS, INC.; Roger Jones	36-15173 * 36-02076 * 36-02250 * 36-11867 * 36-08456
MAGIC VALLEY FOODS, INC.; Estate of Rolland Jones; Estate of Jock Bell	36-02483 * 36-02484 * 36-02485 * 36-02067
MAGIC VALLEY FOODS, INC.; Estate of Rolland Jones	36-02250 * 36-07211
MAUGHAN, Orlo	36-07964 * 36-02175 * 36-02266 * 36-07669 * 36-02362
MAUGHAN, Wayne L.	36-02263 * 36-04113
McCLELLAN, Steve	36-04004 * 36-02245 * 36-02265
MICKELSEN, Michael	36-02231 * 36-02675
MICKELSEN, Paul M.	36-02468 * 36-02521
MILLER, Calvin	36-02522 * 36-02576
MILLER, Terry Dee	36-7823 * 36-2342 * 36-02469
MOLLER, W.H.; Bruce Bagnall	36-02118 * 36-11643J

Name	Water Right Numbers
MONOGRAM FARMS; Moniogram Farms, Inc.; Warren W. Heins; Greg Heins; Cristi Heins	36-15458 * 36-02066A * 36-02098 * 36-02469D * 36-02469E * 36-02678 * 36-13531
NEIBAUR, Darwin	36-07529C * 36-07529E * 36-02070M * 36-07529C * 36-07529E * 36-02070N * 36-07529F * 36-02070P * 37-02070L * 36-02230K
NEIBAUR, Daryl	36-02230E * 36-15212
NEIBAUR, Mack	36-02070F * 36-02070H * 36-02070J * 36-02070K * 36-07529A * 36-07529B * 36-07529H * 36-11893
NEIBAUR, William	36-02230E * 36-15213 * 36-07490
NEWTON BROTHERS; Newton Farms, Inc.; Randy Newton; Dennis Newton	36-07308
PATTERSON FARMS OF IDAHO, INC.; Charlene Patterson	36-04218 * 36-07718
PATTERSON, Mac Brandon; Ken Patterson	36-07216 * 36-02635 * 36-11328
PHILLIPS, Vernon Callan	36-07674 * 36-02640 * 36-02641 * 36-07920 * 36-02400 * 36-07139 * 36-14807J * 36-15155
POTEET, Herbert; Richard Poteet	36-07600 * 36-02260
RANCHO VERDE, Inc.; Warren W. Heins	36-02062 * 36-02099 * 36-02100 * 36-02221
ROBERTSON, Paul	36-07056 * 36-07690A * 36-11124 * 36-15363
RUSTIC AG, INC.; Ken Patterson	36-2480 * 36-2479 * 36-7476B * 36-15234J
SCHAEFFER, Jim	36-02557 * 36-02344 * 36-07015B * 36-02074A
SERR, Max	36-7965 * 36-7299

Name	Water Right Numbers
SHAW, Dean B.	36-07702
SOMSEN, Frank	45-02491 * 45-02485
SPILT BUTTE RANCH, INC.; Warren W. Heins	36-02190 * 36-02141 * 36-02142B * 36-02143 * 36-02446 * 36-02447 * 36-07356
STEVE NEIBAUR FARMS, INC.; Steve Neibaur	36-02230D
STEVENSON, Dean F.	36-07007A * 36-07956 * 36-02454A * 36-15469
STEVENSON, John A.	36-02070G * 36-02070Q * 36-07529G * 36-07529Q
STEVENSON, Scott A.	36-07651
SUCHAN, Frank	36-12454 * 36-02357 * 36-07629A * 36-07629B * 36-07828 * 36-02574 * 36- 07052
TAYLOR SENTER LAKE FARM; Jack Taylor	36-07881 * 36-07002A * 36-07788B * 36-07788A * 36-07002B * 36-02205 * 36-10180 * 36-10179 * 36-10178 * 36-02642 * 36-02417 * 36-02416 * 36-02456 * 36-02452A * 36-02452B
TELFORD, Michael	36-02408 * 36-02552 * 36-0024 * 36-10025
TELLERIA, Joseba; Richard Edwards	45-02453L
THE THREE G's; Randy Gillette; Perry Gillette; Jerry Gillette; L.A. Gillette	36-2600 * 36-2669 * 36-7046 * 36-7626 * 36-7435 * 36-7542
TRIPLE ACE, INC.; Russell Patterson	36-02060 * 36-12727 * 36-02558 * 36-11590
SOLAR FARMS; Daniel C. Walton	45-02709 * 36-07266

Name	Water Right Numbers
WALTON, Daniel C.	45-02389A * 45-07104B * 45-07102 * 45-02637 * 45-07433 * 45-07159 * 45-07109 * 45-07104A * 45-07292 * 45-7508 * 45-07299 * 45-07103 * 45-02744
WOODLAND, Laurel H.	36-02155 * 36-02154
WOODLAND, Michael D.	36-07461 * 36-02302 * 36-07055 * 36-07930 * 36-02207 * 36-02567 * 36-15179 * 36-02674 * 36-10197 * 36-10009 * 36-08143
YOUNG, Richard	36-07042
YOUNG & YOUNG PARTNERSHIP; Steven D. Young; Roy M. Young	36-02591 * 36-02653B * 36-08070 * 36-08069B * 36-08069E * 36-08069G * 36-02653E * 36-02653G * 36-02075A * 36-08068A * 36-02058A * 36-15366A * 36-02233C * 36-02211A * 36-02209A * 36-02210 * 36-02214 * 36-07795 * 36-02530 * 36-07312 * 36-02210 * 36-15456 * 36-08404 * 36-08251 * 36-07308 * 36-02454B * 36-07007B * 36-07021A * 36-08274A * 36-08275B * 36-02058B * 36-02075B * 36-02290B * 36-02211B * 36-02233D * 36-02653F * 36-02653H
ZOLLINGER, Clayne	36-10030 * 36-02615 * 36-02397

B

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re the General Adjudication of Rights)
to the Use of Water from the Snake River)
Basin Water System)

Water Right No. A-36-02080
(The water right number you are objecting to must be inserted here)

The State of Idaho, ex rel. R. Keith)
Higginson in his official capacity as)
Director of the Idaho Department of)
Water Resources,)

STANDARD FORM 1

OBJECTION

Petitioner,)

vs.)

The United States; the State of Idaho; and)
all Claimants to the Use of Water from the)
Snake River Basin Water System,)

Respondents.)

INSTRUCTIONS

This form must be used to file an objection to a water right recommended in the director's report. *Only one party/claimant may object to one water right per objection form.* To object to more than one water right, you must file a separate objection form for each. Forms may be obtained from the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form. If you do, the text must be on the front and back of each page exactly as it appears here. The objection must be received by the court on or before the deadline specified in the Notice of Filing the Director's Report that IDWR mailed to you. Follow the Instructions for Mailing this objection (Page 6) or the court will not accept it for filing. This form has been adopted by the court in *SRBA Administrative Order 1* (amended June 21, 1993), Section 4, which may be consulted for further information.

Any party filing 25 or more objections must make an appointment with the Clerk of the SRBA Court.

By filing an objection form, you are certifying that the objection is well-grounded in fact; is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and is not filed for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation.

I. GENERAL INFORMATION

Please fill in the following information:

1. **Party/Claimant objecting:**

Magic Valley Underground Pumpers Association, Inc., an
Name: Idaho nonprofit corporation, and its members listed in
Exhibit A

Address: _____

John A. Stevenson, Secretary/Route 5 Box 139
Rupert, ID 83350

Phone: Work: _____ Home: (208) 532-4524

Briefly describe your interest in this water right: Water right
no. A36-02080 provides for the diversion of groundwater
from the Eastern Snake Plain Aquifer. The Magic Valley
Underground Pumpers Association, Inc. has members who also claim
rights to the use of groundwater from the Eastern Snake
Plain Aquifer.

If this objection is filed by an attorney:

Attorney Name:	<u>Lawrence J. Jensen</u>	<u>Dana L. Hofstetter</u>
	<u>Holland & Hart</u>	<u>Holland & Hart</u>
Attorney Address:	<u>Suite 880</u>	<u>P.O. Box 2527</u>
	<u>111 East Broadway</u>	<u>Boise, ID 83701</u>
	<u>Salt Lake City, UT 84111</u>	

Attorney Phone No.: 801/578-6000 208/342-5000

If filed by an attorney, notice of pending court proceedings will be sent to the attorney only.

2. **Owner of the water right. You must identify the owner exactly as it appears in the Director's Report:**

Name: United States of America Acting Through
Regional Director PN Region

Address: Bureau of Reclamation
Box 043
550 West Fort Street
Boise, ID 83724

II. STATEMENT OF THE OBJECTION

Please check each "box" which states your objection to the recommendation in the Director's Report.

1. *Name and Address*: I object to the name and/or address of the owner of the water right.
2. *Source*: I object to the source of water.
3. *Quantity*: I object to:
 - a. the total quantity of water used in cubic feet per second; or
 - b. the total quantity of water stored in acre-feet per year; or
 - c. the total quantity of water reserved for each and every purpose, including all present and future uses.
4. *Priority Date*: I object to the priority date.
5. *Points of Diversion*: I object to the legal description of the point(s) of diversion.
6. *Instream Flow*: I object to the legal description of the beginning and ending points of the instream flow.
7. *Purpose(s) of Use*: I object to the purpose(s) of use.
8. *Period of Year*: I object to the period of year when water is used or is necessary for the purpose stated.
9. *Place of Use*: I object to:
 - a. the legal description of the place of use; or
 - b. the number of irrigated acres within each forty (40) acre subdivision.
10. *Consumptive Use*: I object to the annual volume of consumptive use.
11. *Remarks*: I object to the "remarks" listed with the water right.
12. *Water Right Recommendation*: I object to:
 - a. this water right being recommended at all; or
 - b. this water right not being recommended.

13. *Description of Reservation:* I object to the legal description of the reservation.

14. *Other:* I object to: _____

REASONS SUPPORTING EACH BOX CHECKED

In the space following, you must state the reason(s) by number for each box checked. You may use additional pages if necessary.

4--The proof of completion of works was not timely submitted for water right no. A36-02080 (formerly no. 20736). Accordingly, the priority date should not relate back to the date of permit application submission, September 9, 1948.

CHANGES TO THE DIRECTOR'S REPORT

Specifically describe how you want the Director's Report to be changed. You may use additional pages if necessary.

The members of the Magic Valley Underground Pumpers Association, Inc. seek to have the priority date amended in accordance with applicable legal principles to reflect the actual date(s) of development of the water right for each well.

Please note: You should attach copies of documents which support your objection. Note on each document the "box number" it supports.

Check here if you are submitting documents. Please list each document by the title and number of pages. You may use additional pages if necessary. _____

February 28, 1964 Attorney General Opinion regarding permit no. 20736 (6 pages). June 25, 1964 letter from State Reclamation Engineer to Bureau of Reclamation.

VERIFICATION (Must be Completed)

State of UTAH

County of SALT LAKE

Lawrence J. Jensen, being first duly sworn, upon oath, deposes and says:
(Name of party/claimant filing objection)

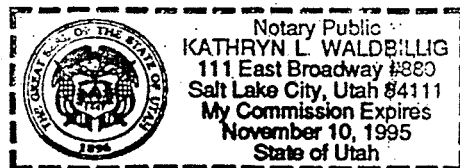
That I am the party/claimant filing this objection (as listed on Page 2, Section 1, "Party/Claimant Objecting"), as defined by I.C. § 42-1401A(1) and (7), and I have read this objection, know its contents and that the statements are true to the best of my knowledge and belief.

Signature of party/claimant filing objection

By: Lawrence J. Jensen
(Attorney signing in representative capacity)

Subscribed and sworn to before me on: 12/20/94
(Insert Date)

Kathryn L. Waldbillig
Notary Public for State of Utah
Residing at: Salt Lake County
My Commission expires: _____



INSTRUCTIONS FOR MAILING

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

You must sign the Certificate of Mailing to show that you followed these steps.

CERTIFICATE OF MAILING

I certify that on _____, 199____, I mailed the original and copies of this objection, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, Idaho 83303-2707

2. One copy to the owner of the water right, and you must fill in the following information:

Owner name: United States of America Acting Through
Regional Director PN Region
Owner's address: Bureau of Reclamation
Box 043
550 West Fort Street
Boise, ID 83724

3. One copy to:

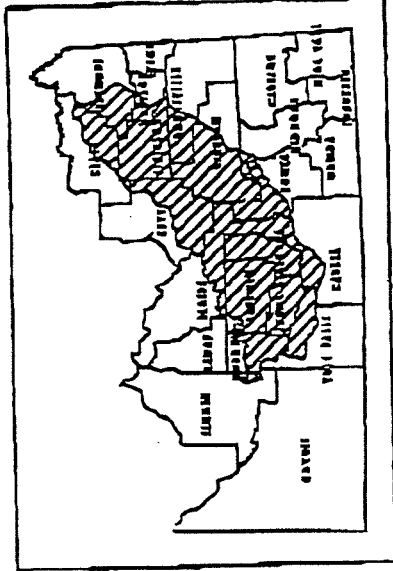
Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

4. One copy to:

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, Box 33
Boise, Idaho 83734

Signature of party/claimant or attorney

C



Area Impacted by petition.

IDWR offices:
IDWR Southern Regional Office
222 Shoshone St. East
Twin Falls, ID 83301 Tel 726-3033
IDWR Eastern Regional Office
900 N. Skyline Dr.
Idaho Falls, ID 83402 Tel 525-7161

BEFORE THE DIRECTOR
OF THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF) DOCKET NO. _____
THE DELIVERY CALL OF A & B)
IRRIGATION DISTRICT FOR) PETITION FOR
THE DELIVERY OF GROUND) DELIVERY CALL
WATER)

COMES NOW A & B Irrigation District, an irrigation district duly organized under the laws of the State of Idaho, and petitions the Director of the Idaho Department of Water Resources as follows:

1. That Petitioner A & B Irrigation District is a duly organized irrigation district under the laws of the State of Idaho, with its principal office located at 414 1 1/2 Street in Rupert, Idaho.

Rule 270.01 provides as follows:

Answers to Pleasings Other than Motions, Answers to applications, claims, or protests, complaints, petitions or protests must be filed and served on all parties of record within twenty-one (21) days after service of the pleading being answered, unless order or notice modifies the time within which answer may be made, or a motion to dismiss is made within twenty-one (21) days. When an answer is not timely filed under this rule, the presiding officer may issue a notice of default against the respondent pursuant to Rule 700. Answers to applications or claims, complaints, petitions, or protests must admit or deny each material allegation of the applications or claims, complaints, petition or protest. Any material allegation not specifically admitted shall be considered to be denied. Matters alleged by cross-complainant or affirmative defense must be separately stated and numbered. (7-1-93)

If you will be represented by someone other than yourself, the Answer may be filed by your representative and must name the person, firm, or organization that will represent you in this matter and give the representative's address for receipt of all official documents. If you do not respond, it will be assumed that you do not intend to participate in the matter, but you may nevertheless be bound by IDWR's decision.

IDWR will attempt to resolve the issues raised by the petition first through informal procedures and then, if necessary, by holding a contested case hearing and issuing an order based upon the hearing record. Persons filing timely Answers will be notified of the date, time and location of meetings, conferences or hearings as they are scheduled on this matter. Failure to file a timely Answer may result in default and preclude your further participation in this matter.

Dated this 10th day of August, 1994 at Boise, Idaho

R. Keith Haggins, Director

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION)
FOR DELIVERY CALL OF A & B) DOCKET NO. 37-03-11-1
IRRIGATION DISTRICT FOR THE)
DELIVERY OF GROUND WATER AND)
FOR THE CREATION OF A GROUND)
WATER MANAGEMENT AREA.) NOTICE OF
PETITION

You are hereby notified that on July 27, 1994, the A & B Irrigation District of Rupert, Idaho, filed a petition for delivery call for ground water from the Eastern Snake Plain Aquifer and for the creation of a Ground Water Management Area. A copy of the petition is included with this notice and is hereby incorporated as a part of this notice.

You are further notified that the Director of the Idaho Department of Water Resources (IDWR) will consider the petition in accordance with the provisions of the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.03.01000 et seq) and the Temporary Rules Governing Conclusive Management of Surface and Ground Water (IDAPA 37.03.1000 et seq). Official copies of these rules can be obtained from the Office of the Rules Coordinator, State Auditor's Office, P.O. Box 83720, Boise, Idaho 83720-0011. Unofficial copies can be obtained by contacting any office of IDWR.

IDWR records indicate that as the holder of a right to divert ground water from the Eastern Snake Plain Aquifer that is junior in priority to the September 9, 1948 priority date claimed by A & B Irrigation District you are a potential respondent in this matter. Diversion and use of water under your water right may be subject to future curtailment as a result of the petition. The petition does not request the immediate curtailment of junior water rights.

Answers by respondents to the petition shall be filed with the IDWR State Office by September 16, 1994. Respondents shall send a copy of their Answer to the attorney for the Petitioner: Roger D. Ling, Esq., LING, NIELSEN & ROBINSON, P.O. Box 396, Rupert, ID 83350. Answers must be filed in accordance with Rule 270.01 of IDWR's Rules of Procedure.

Post-It [®] Fax Note	To <i>Debra H.</i>	Co/Dept	Phone #	Fax #
7/7/94	From <i>Phil R.</i>	Co. <i>IDWR</i>	Phone #	Fax #
Date				

NOTICE TO USERS OF GROUND WATER FROM THE EASTERN SNAKE PLAIN AQUIFER

is required for the proper irrigation of lands served by the said wells.

8. The names, addresses and description of the water rights of the ground water users who are causing material injury to the rights of the Petitioner is not now known by Petitioner.

9. That the Eastern Snake Plain Aquifer is an area of common ground water supply within which junior-priority ground water withdrawals must be regulated.

10. That the Eastern Snake Plain Aquifer is a ground water basin which may be approaching the conditions of a critical ground water area and the ground water supply is insufficient to meet the demands of Petitioner and other water rights within the Eastern Snake Plain Aquifer, an area of common ground water supply.

WHEREFORE, Petitioner prays that the Director of the Department of Water Resources of the State of Idaho take such action as is necessary to insure the delivery of ground water to Petitioner as provided by its water right, to do all things reasonable necessary and appropriate to protect the people of the State of Idaho of (from) depletion of ground water resources which have caused material injury to Petitioner, and to designate the Eastern Snake Plain Aquifer as a ground water management area as provided by Section 42-233b, Idaho Code, and to otherwise supervise the allotment of water from and the use of water from the ground water management area above described to insure the full utilization of the water rights of the Petitioner by the Petitioner for the benefit of the lands within A & B Irrigation District.

DATED this 26 day of July, 1994.

A & B Irrigation District

By: /s/ Larry Moore
President

ATTEST

/s/ Virgil D. Spensh
Secretary

The needs for printing and mailing this notice are being paid by the Petitioner, A & B Irrigation District.

Idaho Dept of Water Resources
1301 N. Orchard St.
Boise, ID 83708

2. A & B Irrigation District is the beneficial owner of Water License No. 20736, now known as A-38-02080, which entitles the Irrigation District to divert eleven hundred (1100) cfs from one hundred seventy-seven (177) wells for the irrigation of sixty-two thousand six hundred four and three tenths (62,604.3) acres within the Irrigation District, with a priority of September 9, 1948.

3. That said water right is held in trust by the United States, for the benefit of the owners of said 62,604.3 acres, all of whom are landowners within and are included within A & B Irrigation District.

4. The 177 wells by which the water under the above-described water right is diverted are located in Township 7 South, Ranges 23, 24 and 25 East of the Boise Meridian; Township 8 South, Ranges 21, 22, 23, 24 and 25 East of the Boise Meridian; Township 9 South, Ranges 21, 22 and 23 East of the Boise Meridian; and Township 10 South, Ranges 21 and 22 East of the Boise Meridian, all within the boundaries of A & B Irrigation District, known as the Northside Pumping Division of the Brinkley Project of the Bureau of Reclamation.

5. That these said 62,604.3 acres of which the above-described water right is appurtenant are located in Townships 7, 8, 9 and 10 South, in Ranges 21, 22, 23, 24 and 25 East of the Boise Meridian, all within the boundaries of A & B Irrigation District.

6. By reason of the depression of water by junior ground water appropriators located within the Eastern Snake Plain Aquifer, the Petitioner is suffering material injury as the result of the lowering of the ground water pumping level within the Eastern Snake Plain Aquifer by an average of twenty (20) feet since 1969, with some areas of the Aquifer lowered in excess of forty (40) feet since 1969, reducing the diversions of A & B Irrigation District to one hundred seventy-four (974) cfs, a reduction of one hundred twenty-six (126) cfs from the diversion rate provided in the water right above referred to.

7. That the reduction in diversion rate as the result of the reduction in the ground water table has reduced the diversions from forty (40) wells serving approximately twenty-one thousand (21,000) acres to approximately one thousand (1,000) acres.

Printed
Form No. 1
Boise, ID

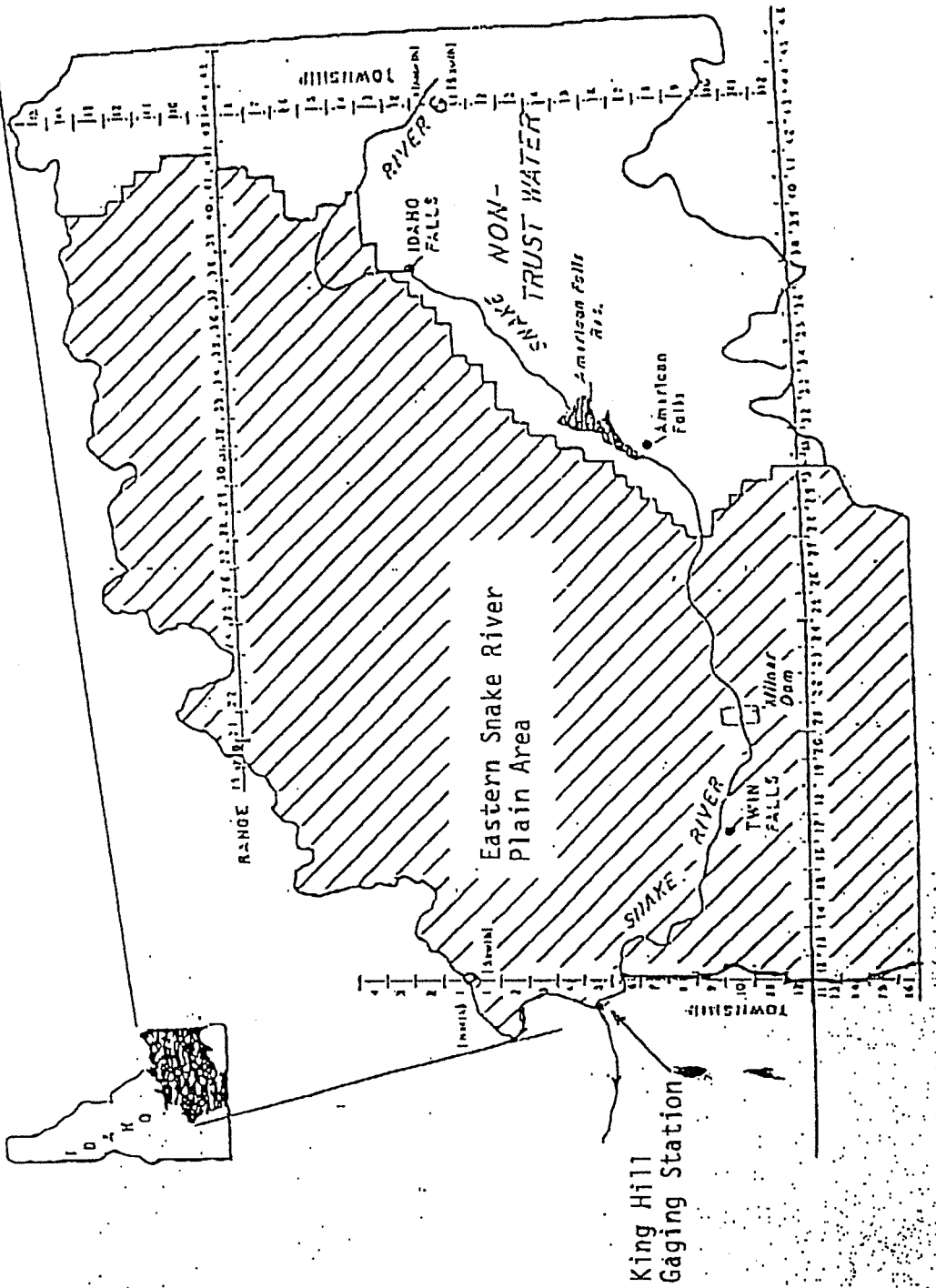


Exhibit A

D

October 31, 1956

RE: Permit No. 20736

Mr. H. T. Nelson
U.S. Bureau of Reclamation
Box 937
Boise, Idaho

Dear Mr. Nelson:

On April 5, 1956 - In the Matter of the Application for Extension of Time for Completion of Works on Permit No. 20736 by the U. S. Bureau of Reclamation, Minidoka North Side Extension Subterranean Waters - a "Denial of Application and Decision of the State Reclamation Engineer" was issued which stated:-

"It is the further decision of the State Reclamation Engineer, that the priority date of that part of the right initiated by Permit No. 20736 depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that part of the right initiated under Permit No. 20736 and depending on works not completed by November 5, 1955, may relate back to November 5, 1955. "

As a matter of procedure, Proofs of Completion of Works on the whole of the works to be completed under Permit No. 20736 may be submitted as soon as all the works are completed but not later than November 5, 1958.

The time for completion of works for items not completed by November 5, 1955, is extended three years from November 5, 1955, and the time for making proof of completion of works on all work is extended to November 5, 1958.

Very truly yours,

MARK R. KULP
State Reclamation Engineer

K:hll

20736

4-5-56

STATE OF IDAHO
DEPARTMENT OF RECLAMATION

In the matter of the application
for Extension of Time for Completion
of Works on Permit No. 20703 by the
U. S. Bureau of Reclamation Minidoka
North Side Extension, Subterranean
waters.

DENIAL OF APPLICATION
AND
RECEIVED OF THE STATE
RECLAMATION ENGINEER

On September 9, 1943, Application was made for permit to appropriate 1353.22 cubic feet per second of unappropriated public underground water from 21 wells for the irrigation of 8684.5 acres of Unit "B" North Side Pumping Division of the Minidoka Project by the United States of America acting through the United States Bureau of Reclamation.

The application was approved and Permit No. 20703 was issued with one of the requirements of the permit being completion of works by November 5, 1943. In 1933 Application for five years extension of time for completion of works was made and two years extension was approved to November 5, 1935, with the informal proviso that any further application for extension of time for completion of works would be advertised so that anyone interested might have an opportunity to express his views.

There is statutory authority in section 42-101 Idaho Code for extension of time beyond the original five year period for Federally financed projects.

An application for a three year extension of time for completion of works was made by the holder of the permit in 1933 and the application was advertised in papers in Minidoka and Jerome Counties.

Impressions both for and against the approval of the extension of time were received.

Geological Survey Circular 271, Ground water in the North Side Pumping Division, Minidoka Project, Minidoka County, Idaho, says: "Local lowering of water levels by continued heavy pumping in the North Side Pumping Division and adjacent areas probably will cause low-order regional lowering of water levels."

It is the opinion of the state Reclamation Engineer that water rights initiated in the vicinity of the Project since 1943 would not be seriously injured by approval of the application for extension of time and it is also the opinion of the state Reclamation Engineer that the water rights of the Project as a whole would not be seriously injured by denial of the application for extension of time.

It is the decision of the state Reclamation Engineer that the application for extension of time for completion of works should be denied and the application is hereby denied.

It is the further decision of the state Reclamation Engineer that the priority date of that part of the right initiated by Permit No. 20703 depending on works completed prior to November 5, 1933, shall relate back to September 9, 1943, and that the part of the right initiated under Permit No. 20703 and depending on works not completed by November 5, 1933, may relate back to November 5, 1933.

Persons feeling dissatisfied by this decision and denial of application for extension of time for completion of works under Permit No. 20788 may appeal the same to the District Court for Lincoln County, Idaho, or the District Court for Jerome County, Idaho, as provided in Section 43-204 of the Idaho Code as amended.

Given under my hand and seal of the State Department of Reclamation at Boise, Idaho, this 6th day of April, 1936.

MARK R. KEMP
State Reclamation Engineer

247736

E

ROBERT E. SMYLLIE
Governor



CARL E. TAPPAN
State Reclamation Engineer

STATE OF IDAHO

DEPARTMENT OF RECLAMATION
107 STATE HOUSE
BOISE, IDAHO 83701

June 25, 1964

RECEIVED BY

JUL - 9 1964

DUFFIN and DUFF

Re: Permit No. 20736

Regional Director
U. S. Bureau of Reclamation
P. O. Box 937
Boise, Idaho

Dear Sir:

Notice of intention to make final proof of Completion of Works and Proof of Application to Beneficial Use was duly published, according to Idaho Statutes, and a date for making such final proof was set for January 13, 1964. Proof was accepted that day. No formal protests were presented.

Affidavits of Holder and two witnesses were forwarded to this office February 3, 1964.

Proof of Completion of Works and Proof of Application to Beneficial Use having been made as advertised, and in accordance therewith, and it appearing that the Department of Reclamation, by its Decision and Order, dated April 5, 1956, had determined that the priority date of that part of the right initiated by Permit No. 20736, depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that part of the right initiated under Permit No. 20736, and depending on works not completed by November 5, 1955, may relate back to November 5, 1955, therefore, Permit No. 20736 will be licensed as follows:

The priority date of that part of the right initiated by Permit No. 20736, depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that part of the right initiated under Permit No. 20736, and depending on works not completed by November 5, 1955, may relate back to November 5, 1955. The licensee will provide a list of the wells and lands which will be licensed under the date of priority as set out herein.

Very truly yours,

CARL E. TAPPAN
State Reclamation Engineer

F



RECEIVED
FEB 28 1964

Department of Reclamation

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

BOISE

ALLAN G. SHEPARD
ATTORNEY GENERAL

February 28, 1964

Mr. Carl Tappan
State Reclamation Engineer
B U I L D I N G

Dear Mr. Tappan:

You have asked for our opinion concerning Proof of Completion of Works and Application to Beneficial Use on Permit No. G-20736, North Side Pumping Division, Minidoka Project, Idaho.

As you have noted, in 1956 former State Reclamation Engineer Mark Kulp ordered that works on the project constructed prior to November 5, 1955, would have a date of priority as of the date of the permit September 9, 1948, while works constructed subsequent to November 5, 1955, would relate back to November 5, 1955, even though all the works were constructed under Permit No. G-20736.

The question you asked is, in essence, this:

"Should the date of priority as set out by Kulp be allowed, or should the permit be cancelled?"

In approaching the answer to this question, a review of the sequence of events would be helpful.

The Bureau of Reclamation applied in 1948 for a permit to appropriate 1,333 cfs of underground water from 306 wells for irrigation purposes, to be applied on 66,664 acres of land in Minidoka and Jerome Counties. The State Department of Reclamation issued a permit with a date of priority as of September 9, 1948.

Under the applicable law, Section 42-204, Idaho Code, proof of completion of works would then have been due five years later, or on September 9, 1953, and proof of application to beneficial use on September 9, 1959, Sec. 42-217, Idaho Code.

20736

In 1953 when proof of completion of works would have been due, the Bureau of Reclamation made formal application for an extension of time for this completion of works to 1958, because the status of plans and design and construction funds had not progressed to the point where completion of works would have been possible by November 5, 1953.

In early 1954, then State Reclamation Engineer, Mark Kulp, allowed a two year extension to November 5, 1955, stating that private developments had been started in the same area, which presumably used the same source of subterranean water.

In 1955, the Bureau of Reclamation was notified that proof of completion of works would be due November 5, 1955, to which the Bureau of Reclamation replied by way of a formal application for extension of time to November 5, 1958, stating again that completion was impossible due to lack of appropriations by Congress. A number of protests were received and Kulp deferred action until these could be properly considered.

On April 5, 1956, Kulp issued an order which is the crux of the problem here.

In this order, Kulp denied the application for extension of time for proof of completion of works. He also stated:

"It is the further decision of the State Reclamation Engineer that the priority date of that part of the right initiated by Permit No. G-20736 depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1943, and that part of the right initiated under Permit No. 20736 and depending on works not completed by November 5, 1955, may relate back to November 5, 1955."

Then, in 1956, Kulp wrote the Bureau of Reclamation:

"The time for completion of works for items not completed by November 5, 1955, is extended three years from November 5, 1955, and the time for making proof of completion of works on all work is extended to November 5, 1958."

The Bureau of Reclamation then ~~was~~ asked for a further extension in 1958, to November 5, 1963, which was denied by Kulp's successor, George N. Carter, and he stated, "Proof of completion should now be made."

Apparently, nothing was done by either the Bureau of Reclamation or the Department of Reclamation, for in January, 1961, Carter wrote the Bureau of Reclamation that the time for completion of works was overdue, and that while the permit was subject to cancellation, it would not be cancelled.

In 1963 the Bureau of Reclamation made notice of proof of completion of works and application of water to beneficial use, with a statement that, "The date of priority at which said user is prepared to establish is September 9, 1948."

Thus, the permittee here, the Bureau of Reclamation, is making proof of completion of works some five years later than the date limited for such proof in Kulp's letter in 1956.

Section 42-204, Idaho Code, as it stood in 1948, allowed extensions of time for completion of works only for construction of reservoirs of more than 200,000 acre feet of capacity, which of course was not applicable to the permit here in question.

Session Laws of 1949, Chapter 127, amended Section 42-204, Idaho Code, to add the following provision:

"3. In connection with permits held by the United States, whether acquired as the original applicant, by assignment or otherwise, the State Reclamation engineer may extend the time for completion of the works for such additional period or periods of time as he may deem necessary upon application supported by a showing that such additional time is required by reason of the status of plans, authorization, construction fund appropriations, construction, or any arrangements which the Secretary of the Interior or his authorized representative has found to be requisite to completion of the construction of such works. The extension of time for completion of works under this provision shall automatically extend the time for completion of the one-fifth required to be done in half the time, and for making proof of application of water to beneficial use."

Thus, in 1955 Kulp had the authority to make an extension of time for completion of works. But the language of the amendment is not mandatory; that is, the granting of an extension is an act within the discretion of the State Reclamation Engineer. The provision states, "The state reclamation engineer may extend the time for completion of works for such additional period or periods of time as he may deem necessary . . . "

Kulp's denial of the extension was within his discretion as State Reclamation Engineer, and his later granting of a three year extension to November 5, 1958, was also within his discretion.

Parenthetically, I might add that Section 42-204, Idaho Code, provides for appeal to the District Court from the endorsement by the Engineer on an application (the Engineer's extension of Permit No. 20736 would be endorsed thereon) the appeal required to be taken within sixty days. The Bureau's failure to appeal is conclusive upon it.

With the Bureau's failure to file proof of completion of works, the last paragraph of Section 42-204, Idaho Code, comes into operation. This states:

"The holder of any permit who shall fail to comply with the provisions of this section within the time or times specified shall be deemed to have abandoned all right under his permit."

The Bureau was bound by state law. See Pioneer Irr. Dist. vs. American Ditch Assn., et al., 50 Idaho 732, 1 P.2d 196 (1931); U. S. vs. American Ditch Assn., et al., 2 Fed2d 867, D. Idaho (1932); 43 U.S.C.A. 383.

Thus, for failure to file proof of completion of works, the Bureau, as permittee of Permit No. 20736, has technically abandoned its right under the Permit. Abandonments in the field of water rights are not favored, Hodges vs. Trail Creek Irr. Co., 78 Idaho 10, 297 P.2d 524; Graham vs. Leek, 65 Idaho 279, 144 P.2d 475.

Nevertheless, compliance with the statute concerning water right permits and licenses is essential. As the Idaho Supreme Court said in Big Wood Canal Co. vs. Chapman, 45 Idaho 380, 263 Pac. 45, in speaking of the regulation of the appropriation and use of the public waters:

"These statutes prescribe minutely the steps of procedure to be taken to acquire a right to put such public waters to a beneficial use. By application for permit under such statutes, permittee secures an inchoate right which will ripen into a legal and complete appropriation by compliance with the statutory steps. Such right is merely a contingent right, which may ripen into a complete appropriation, or may be defeated by a failure of the holder to meet the statutory requirements. The permit, therefore, is not an appropriation of the public waters of the state. It is not real property. It is

merely a consent given by the state to construct and acquire real property." 45 Idaho at 402. (Emphasis added).

In Basinger vs. Taylor, 30 Idaho 289, 164 Pac. 522 (1917), Justice Rice stated,

"A permit merely expresses the consent of the state that the holder may acquire a water right, and if the holder of the permit substantially complies with all the requirements of the statute, to and including the actual application of the water to the beneficial use specified in the application for the permit, he may become the owner of a water right, the priority of which will relate back to the date of the permit; but until all the requirements have been complied with, including the actual application of the water, the holder of the permit has nothing but an inchoate right. Proof of ownership of a permit will not sustain a decree founded upon a pleading alleging ownership of water. After the holder of a permit has fulfilled all the requirements of the statute, and made proof to the state engineer that he has put the water to beneficial use for which the diversion was intended, he is entitled to a license from the state engineer confirming such use. (Sec. 3261, Rev. Codes.) Under the provisions of sec. 3262, such license is prima facie evidence of a water right, but no certificate issued by the state engineer prior to the issuance of such license is made prima facie evidence of a water right.

"In the case of Washington State Sugar Co. v. Goodrich, 27 Ida. 26, at p. 38, 147 Pac. 1073, 1077, this court said: 'The granting by the state engineer of a permit for the right to use of water of this state, in and of itself secures to the applicant no right to the use of the waters applied for in said permit, unless there be a substantial compliance with each and every provision of the statute relating to or in any manner affecting the issuance of such permit, and a fulfilment of the conditions and limitations therein, but a compliance with the conditions and limitations prescribed in such permit initiates a right to the use of the water in the applicant, and said right then becomes a vested one and dates back to the issuance of said permit.'"

Because of the lack of diligence vis-a-vis compliance with the requirements of the law, the inchoate right initiated by Permit No. 20736 has not ripened, and the permit is subject to cancellation.

It is therefore the opinion of the Attorney General that Permit No. 20736 should be cancelled.

As noted above, Kulp's order of April 5, 1956, divided the dates of priority under Permit No. 20736 around November 5, 1955. There is no indication in that order of what statutory or other basis Kulp utilized in making that portion of the order, and our research reveals none. The question of the effect of this order becomes moot, however, in view of our opinion that the permit should be cancelled, should you so decide.

The effect of a cancellation of a permit will be to remove the project as a whole from the purview of statutory licensing provisions, and into the constitutional method of appropriation, on an individual basis. That is, instead of a license giving the North Side Project a priority date of September 9, 1948, each landowner or settler within the project will have a date of priority as of the time when water was actually diverted and applied to beneficial use, Rabido vs. Furey, 33 Idaho 56, 190 Pac. 73 (1920); Jones vs. McIntire, 60 Idaho 338, 91 P.2d 373 (1939); Sec. 42-103, 42-106, Idaho Code.

As you have noted in your abstract of file on Permit No. 20736, there are a large number of wells on private land on the periphery of the project, and while you cannot consider this fact in cancelling the permit, the effect of cancellation will be to place all of the underground water users in that area on an equal footing, rather than allowing lands within the project an earlier priority date, since some of these project lands were put under water at a much later date than many of the private lands. Should the underground aquifer in the Minidoka area ever become depleted and declared a critical groundwater area as per Sec. 42-233(a), this equality may become of great importance.

Should you so decide to cancel Permit No. 20736, you should proceed under Sec. 42-311, Idaho Code.

Very truly yours,

FOR THE ATTORNEY GENERAL



STEPHEN W. BOLLER
Assistant Attorney General

SWB/lr

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M E M O R A N D U M

February 16, 1968

TO: R. KEITH HIGGINSON, State Reclamation Engineer
FROM: WILLIAM D. COLLINS, Assistant Attorney General
SUBJECT: Legal Proceedings Regarding Permit No. G-20736
from 1964 to 1967.

On June 25, 1964, Carl E. Tappan, State Reclamation Engineer, sent to the ~~original~~ Director, United States Bureau of Reclamation, Boise, Idaho, a letter stating that a license would be issued for permit No. G-20736. Suit was brought in five separate counties between August 12 and August 20, 1964, challenging the validity of the license.

Humphrey v. Tappan, Jerome County
Eleventh Judicial District

Honsinger v. Tappan, Blaine County,
Fourth Judicial District

Clark v. Tappan, Lincoln County
Fourth Judicial District

G. L. Dean & Sons, Inc. v. Tappan
Minidoka County, Eleventh Judicial District

McCarty v. Tappan, Cassia County
Eleventh Judicial District

All five suits were denominated as notices of appeal and were appealing from the decision of June 24, 1964, by Carl E. Tappan.

A pretrial hearing was held in the Cassia County Appeal on December 1, 1964, before the Honorable Lloyd J. Webb, District Judge of the Eleventh Judicial District, at the Courthouse, Burley,

Idaho, and at that hearing all parties to the action agreed that the Cassia County Appeal be dismissed and that the appeals pending in Jerome, Lincoln, Blaine and Minidoka Counties rest upon the Court's decision in the Minidoka County appeal. The Court, at that time, agreed to this Stipulation, with a reservation that since the Blaine and Lincoln County Cases were not in the Eleventh Judicial District, the Court could not hear or control those cases. Upon this Stipulation, Respondent's then attorney of record, Stephen W. Boller, Assistant Attorney General, filed a Motion to Dismiss in the Minidoka County Appeal on the ground that the appeal had been prematurely taken and on the further ground that the Appellant had no standing to appeal. Appellant's attorney together with Respondent's attorney and counsel for A and B Irrigation District, appearing as amicus curiae, filed briefs and presented oral argument to the Court. On May 6, 1965, the Honorable Lloyd J. Webb, granted the Motion to Dismiss, in which he stated:

"Court finds Motion to Dismiss was filed. Filing made under the old water law of 1951 and is subject to old water account. Appeal can be taken under the old law under certain circumstances which have not yet been met.

"Court finds the Appeal is premature and Motion to Dismiss is granted." (Civil Action No. 4405)

Motions to Dismiss were not made in the other cases by Respondent's counsel because of the Stipulation entered into with Appellant's counsel at the pretrial hearing held in the Cassia County Appeal.

On June 10, 1965, State Reclamation Engineer, Carl E.

the protestants including the five persons who had brought the previous appeals. On September 28, 1965, Appellant's attorney prepared an Amended Notice of Appeal which was filed in this action and a Notice of Appeal which was filed in the Minidoka action and served them upon the State Reclamation Engineer on September 30, 1965, some 112 days after the license was issued. No Amended Notice of Appeals or Notice of Appeals were ever filed in the Blaine and Lincoln County Appeals; Respondent's attorney, William D. Collins, Assistant Attorney General, on November 8, 1965, prepared and served by mailing, Motions to Dismiss in the Minidoka, Lincoln, Blaine, and Jerome County Appeals. On December 21, 1965, oral argument on the Motion to Dismiss was presented in the Minidoka County Appeal. On February 9, 1966, the Honorable Lloyd J. Webb, granted the Motion to Dismiss upon the ground that the Court was without jurisdiction since the time for appeal had lapsed and that Respondent's alleged agreement that he would keep Appellant's counsel advised of whatever action would be taken upon the United States' application for the waters in question could not extend the time for perfecting the appeal.

On March 3, 1966, Respondent's Motion to Dismiss in both the Lincoln and Blaine County Appeals was heard by the Honorable Charles Scoggin of the Fourth Judicial District of the State of Idaho. On March 17, 1966, the Motions to Dismiss were granted in both Appeals.

On March 21, 1966, Respondent's Motion to Dismiss in the Jerome County case was heard by the Honorable Theron W. Ward of the Eleventh Judicial District. Judgment and Order of Dismissal of that Appeal was entered in January of 1967.

The several appellant's were represented by the firm of Duffin & Duff in Jerome. The licensee's assignee, A and B Irrigation District, participated in all negotiations and arguments in support of the state's Motion to Dismiss by amicus curiae brief through the firm of Parry, Robertson & Daly in Twin Falls and, primarily, John R. Coleman and John Daly of that firm. The licensee, Bureau of Reclamation, through the Field Solicitor, William Burpee, was present at the hearing on the second Motion to Dismiss in the Minidoka case, but did not formally appear in any of the actions. Mr. Burpee, however, was kept advised of all motions and was supplied briefs in support thereof and was informed of the final outcome in each action.

I have attached hereto all Orders of Dismissal, and where Findings of Fact and Conclusions of Law were entered pursuant to the orders of dismissal, those motions have also been ^{en}~~dis~~closed.

H

November 13, 1958

Re: Permit No. 20736

Mr. H. T. Nelson, Regional Director
Bureau of Reclamation
P. O. Box 937
Boise, Idaho

Attention: 150

Dear Mr. Nelson:

Thorough consideration has been given to your request of September 22, 1958 for an extension of time of five additional years within which to make Proof of Completion of Works on Permit No. 20736, United States of America Permit Holder. Said permit appropriates 135.23 cubic feet per second of underground water from various wells for the irrigation of "Unit B", North Side Pumping Division of the Minidoka Project, Idaho, a Federal reclamation project.

The application for the permit was approved by the State November 5, 1948, and by its provisos proof of Completion of Works was required to be made not later than November 5, 1953. Request for an extension of time of five years dated September 30, 1953, within which to make the required proof of Completion of Works was filed in this office and upon considering it the State Reclamation Engineer approved an extension of time of two years only, thus advancing the due date of the required proof to November 5, 1955.

On September 1, 1955 this office mailed to you the usual form notice for making proof of Completion of Works on Permit, said notice stating the proof was required on or before November 5, 1955. In response to the notice you filed in affidavit form, dated October 25, 1955, an application for further extension of three years time within which to make the required proof which would have brought the required proof date forward to November 5, 1958.

The State Reclamation Engineer gave publicity to the request for further time within which to make the required proof, through the newspapers of the two counties in which the project is situated. The published notice invited written objections or expressions on or before December 15, 1955, of interested parties stating same would be received and considered by the Department of Reclamation.

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Mr. H. T. Nelson

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November 13, 1958

As a result of this public notice various protests against allowing further extension of time for making the proof were filed in the Department of Reclamation office and also a number of recommendations that the government's request for more time be granted. The permit file in this office indicates you were supplied copies of the protests against and recommendations in favor of granting the extension of time requested.

On April 5, 1956 the State Reclamation Engineer denied the request of the United States for three years additional time within which to make its Proof of Completion of Works on Permit No. 20736, stating among other things that:

" It is the opinion of the State Reclamation Engineer that water rights initiated in the vicinity of the Project since 1948 would not be seriously injured by approval of the Application for extension of time and it is also the opinion of the State Reclamation Engineer that the water rights of the Project as a whole would not be seriously injured by denial of the Application for Extension of Time.

It is the further decision of the State Reclamation Engineer that the priority date of that part of the right initiated by Permit No. 20736 depending on works constructed prior to November 5, 1955, shall relate back to September 9, 1948, and that the part of the right initiated under Permit No. 20736 and depending on works not completed by November 5, 1955, may relate back to November 5, 1955."

On October 31, 1956, the State Reclamation Engineer wrote you further regarding denial of your application for the extension of time requested as follows:

" As a matter of procedure, Proof of Completion of Works on the whole of the works to be completed under Permit No. 20736 may be submitted as soon as all the works are completed but not later than November 5, 1958.

The time for completion of works for items not completed by November 5, 1955, is extended three years from November 5, 1955, and the time for making proof of completion of works on all work is extended to November 5, 1958."

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Mr. H. T. Nelson

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November 13, 1958

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In view of the previous rulings of the State Reclamation Engineer on this matter, the vehement protests lodged against granting further extensions of time for proof of Completion of Works on this permit and the present status of construction of the North Side Pumping Division of the Minidoka Project no justifiable reason for granting your current request for more time is apparent; consequently Proof of Completion of Works should now be made.

The usual notice and forms for the proof are enclosed.

Very truly yours,

GEO. N. CARTER
State Reclamation Engineer

GNC/lw
Enclosures

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