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Department of Water Resources

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Attorneys for Claimant Charles Burgess

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. 34-00074 and 34-02464

Case No. 39576

**BRIEF IN SUPPORT OF
MOTION IN LIMINE**

DESCRIPTIVE SUMMARY

This document is a brief in support of the motion in limine filed by claimants in the above referenced subcases.

BRIEF

Claimant, Charles Burgess, by counsel and pursuant to I.R.C.P. 7(b)(1) and 7(b)(3) submits this Brief in Support of his Motion in Limine and requests the Court to explicitly rule that the right to informal rotation of water rights is part of any right with irrigation as a purpose of use.

LAW AND ARGUMENT

Rotation is a practice whereby a schedule is devised, either through an agreement among water users or by court order, giving individual users the right to divert the entire flow of the stream, or that portion owned by the parties to the agreement, for a short period of time. Rotations can be between multiple owners of a single water right, or between owners of independent diversions. The purpose of

1 rotation is to combat the inefficiencies that often result from continuous diversions of small amounts of
2 water. Instead, the use of the larger flow "enables [the user] to complete his current irrigation in a
3 comparatively short time, after which the water is shut off. Under ordinary conditions this method results
4 in better irrigation of the crops, and with less waste of water, than can be accomplished with a smaller
5 stream of continuous flow or over a longer period." Simonson v. Moon, 72 Idaho 39, 47, 237 P.2d 93
6 (1951).

7 Although Idaho courts have dealt with the issue of a water user's right to rotate, or the
8 requirement of rotation, there does not appear to be any law specifically delineating this issue. For this
9 reason a ruling by this Court is appropriate.

10 A water right is a usufructuary right, but it is still a real property right. Beecher v. Cassia Creek
11 Irr. Co., 66 Idaho 1, 154 P.2d 507 (1944). As with any property right, it is made up of various rights
12 and duties, sometimes referred to as the "bundle of rights" which make up the property right as a whole.
13 An example of this with land would be the ability of an owner with a fee simple estate to convey or encumber
14 the land. An example of this with a water right would be the inherent right of a water user to transfer
15 the place of use or point of diversion, if there is no harm to other rights. Although such transfers are now
16 regulated by statute, that statute does not provide the sole power for a water user to transfer the right.
17 Instead this power predates the statute and rests on an independent basis.

18 The right of a water user to engage in rotation is another of this so called "bundle of rights" which
19 makes up the water right as a whole. Some states provide specific statutory authority for rotation among
20 several users, i.e Nevada: Nev. Res. Stat. § 533.075; Oregon: Or. Rev. Stat. § 540.150; Washington:
21 Wash Rev. Code Ann. § 90.03.390; and Wyoming: Wyo. Stat. Ann. § 41-3-612. However, as with the
22 ability to transfer a point of diversion, the right to rotation is not dependent on the statute, instead the
23 statute regulates the inherent right.

24 Rotation has also been imposed on water users by Court order. Hufford v. Dye, 162 Cal. 147,
25 121 P. 400, 406 (1912) ["While this remedy of rotation and use of waters for irrigation purposes has been
26 more generally applied as between riparian proprietor . . . in principle there is no reason why it should
27

not be made applicable as between claimants by appropriation."].

In Idaho, courts have only dealt with the issue of rotation in passing. Perhaps this is because of the inherent nature of the right so that there is little opportunity for controversy regarding the use. The most direct statement from Idaho is Simonson, *supra*, recognizing rotation as fulfilling the policy of the State to encourage the most efficient and least wasteful use of water, and therefor a beneficial use. Simonson, 72 Idaho at 47.

The Court has recognized that in some circumstances, forced rotation of rights due to interference with water availability is "harm". Savage Ditch Water Users v. Pulley, 125 Idaho 237, 240, 869 P.2d 237 (1994). Idaho courts have also apparently recognized and possibly enforced a rotation scheme established between contesting parties as part of a restraining order. Durrant v. Christensen, 117 Idaho 70, 72-73, 785 P.2d 634 (1990). Such rotation plans are acceptable, providing that no other water user is harmed thereby. Beecher v. Cassia Creek Irr. Co., 66 Idaho 1, 154 P.2d 507 (1944).

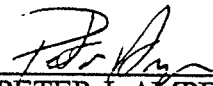
These opinions provide implicit acceptance of rotation of water rights. Further, because there is no explicit limitations or procedure for the practice, the ability or right to rotate must be one of the rights inherent in a water right. The Idaho legislature has not chosen to explicitly deal with this issue and have promulgated no requirements regarding rotation. As such, the Court should recognize that rotation of water rights may be informal, i.e. may be accomplished without filing any formal plan or creating any type of public record regarding such use. Although such informal rotation must be accomplished without harming any other water right, but the Court should not establish the requirement that those engaging in rotation need prove a lack of harm prior to any claim of harm. However once such a claim of harm is brought, it would be the rotator's burden to show a lack of harm to a specific right.

CONCLUSION

The right to engage in rotation among water users is a basic and inherent part of any water right. Idaho Courts have never explicitly ruled on this issue, however a review of case law shows an implicit acknowledgment that water users may engage in rotation. The sole basis for the ability to rotate would

1 appear to be that such a use in inherent right contained within the "bundle of rights" which govern water
2 use. Because the right to rotate does exist, and the legislature has not deemed it necessary to regulate
3 such practices, informal rotation, that is rotation without entering into any written or formal agreement,
4 should be recognized by the Court. For the above reasons, the Court should enter an order explicitly
5 finding that a water user may engage in the practice of informal rotation so long as existing rights are not
6 harmed.

7
8 Dated this 28 day of February, 1996

9
10 
11 PETER J. AMPE
Attorney for Claimants

12 CERTIFICATE OF SERVICE

13 I, PETER J. AMPE, hereby certify that on the 28 day of February, 1996, I served a courtesy
14 copy of the foregoing document by placing a true and correct copy in the United States mail, first class
15 postage pre-paid, and addressed as follows:

16 Matt J. Howard
17 Department of Water Resources
18 1301 North Orchard Street
Statehouse Mail
Boise, ID 83720-9000

19
20 
21 PETER J. AMPE