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REPORT REGARDING PURPOSE OF USE

In Re SRBA

Twin Falls County Civil Case No. 39576
Sub-case No.'s 36-00135A and 36-00134B

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
David B. Shaw, Adjudication Bureau Chief

May 15, 1996

The Director of the Idaho Department of Water Resources submits this report regarding the basis for its recommendations of the purpose of use of water right nos. 36-00135A and 36-00134B pursuant to Idaho Code §42-1412(4).

These rights were decreed by the *New International Mortgage* decree¹ with priority dates of April 1, 1908 and October 9, 1884, respectively. IDWR recommended irrigation and domestic use as the purposes of use. The claimant seeks to add fish propagation use, with a year-round season of use.

As to *most* of the water rights described in the *New International Mortgage* decree, the decree did not expressly describe purposes of use for each water right. Instead, the decree included language generally describing the purposes of use of all the water rights. The claim to fish propagation use is based upon this language.²

In investigating these claims and preparing its recommendation that the rights did not include fish propagation as a purpose of use, IDWR concluded the following.

First, IDWR determined that it had insufficient information to support a finding that water was used pursuant to these rights for fish propagation purposes at or prior to the time of the New International Mortgage decree. (The affidavit

¹ New International Mortgage Bank v. Idaho Power Co., et. al, District Court of the United States for the District of Idaho, Southern Division, Equity No. 1602, 1932.

² "It is hereby ordered, adjudged, and decreed that the defendants, counterclaimants, cross-claimants and intervenors hereinafter named do have the use of, and the right to use, for irrigation, domestic, power and *other purposes* on the lands set after their respective names, from the streams and other sources hereinafter named, the amounts of water and priorities set after their respective names" [Italics added.]

attached to the motion for summary judgment indicates that construction of the fish propagation facilities commenced in 1950.)³

Second, IDWR determined that the general language in the decree does not apply to the water rights claimed by the claimant. The general language, by its terms, applies to water rights listed in tabular form immediately after the general language. Following this list, the decree separately describes in narrative form the rights of Big Bend Irrigation and Mining Company and the High & Fritchman Company. The High & Fritchman Company rights were designated by IDWR as water right nos. 36-00134 and 36-00135; of which the claimant now claims a portion. The decree expressly provides that these rights are for irrigation and domestic purposes.

Finally, IDWR determined that fish propagation could not be recommended as a change in use of the water right due to injury and enlargement that would result from adding fish propagation to a water right initially appropriated for irrigation and domestic purposes. The addition of fish propagation would result in substantial injury to junior water rights, particularly due to use of the amount of water decreed for irrigation beyond the irrigation season. Injury would result

³ IDWR relied upon the following cases in reaching its conclusion. *Washington State Sugar Co v. Goodrich*, 27 Idaho 26, 147 P. 1073 (1915); *Morgan v. Udy*, 58 Idaho 670, 79 P.2d (1938). In reconsidering its recommendations after the filing of the objection and reaching its conclusion not to amend its recommendations, IDWR relied upon the following statement by Judge Hurlbutt that "Idaho Code §42-1427 cannot change or exceed the previously decreed or recorded element of the decreed or licensed right" nor "be used to claim an expansion of use beyond the beneficial use existing at the time the right was originally memorialized in a decree or license." Revised Memorandum Decision and Order on Basin-Wide Issue 4, dated May 17, 1995, at page 9. Judge Hurlbutt subsequently confirmed that, "the purpose of use is defined by the intentional application of water to an intended beneficial use of water," Memorandum Decision and Order Re : Basin-Wide Issue 5, dated April 26, 1996, at page 8.

because use of the water outside the irrigation season would subject junior water rights with a wintertime use to a prior right to which they were not previously subject.⁴ The potential for injury is especially significant because the source of these rights is the Curren Tunnel, to which the Snake Plain Aquifer is tributary; rights to the aquifer may be subject to call by the users of water from Curren Tunnel.⁵

Enlargement is a second criteria for changes in use of a water right, independent from the injury criteria.⁶ A change in purpose of use occurs where one use ceases and another is initiated. An enlargement occurs where the original use continues and another use is added. Enlargements in use may result in a second water right with a priority as of the date of enlargement. The claimant claimed and IDWR recommended water right nos. 36-02551 and 36-07694 to water from the Curren Tunnel for fish propagation purposes with priority dates subsequent to the date of the *New International Mortgage* decree.

⁴ IDWR relied upon the following in reaching its conclusion: *Jenkins v. State Dept. Of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

⁵ See *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994).

⁶ IDWR relied upon the following in reaching its conclusion: Idaho Code §42-222 (prohibiting injury *or* enlargement) and §42-1425 (permitting accomplished transfers to be claimed in the adjudication where there is no injury *or* enlargement). See *also* Idaho Code §42-1426 (allowing enlargements in violation of the mandatory permit statute to be claimed in the SRBA with a priority as of the date of the enlargement).

DATED this 15th day of May, 1996.

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DAVID B. SHAW
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Idaho Department of Water Resources

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of May, 1996, I mailed copies of the foregoing document, with sufficient first class postage, to the following:

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