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Department of Water Resources
Adjudication Bureau

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Claimants:

Hagerman Water Right Owners, Inc.
and its individual members

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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

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36-3A

In Re SRBA

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Subcase No. See Attached Exhibit A

Case No. 39576

BRIEF IN SUPPORT
OF SUMMARY JUDGMENT

* * * * *

I. INTRODUCTION.

This brief is submitted in support of the motions for summary judgment filed on behalf of claimants to 24 rights from the Hagerman Valley, each of whom admittedly possess a water right, long ago established and confirmed by a federal court decree. Each claimant is entitled to judgment on the previously decreed elements because the decree is the sole and unrefuted evidence concerning the establishment of the right by the original appropriator. All other assertions about those defined elements, including IDWR's

1 recommendations, are irrelevant and immaterial because they do not relate to the
2 establishment of the right. Each claimant is also entitled to judgment on the elements of I.C.
3 § 42-1411(2) which are not defined in the prior decree, e.g. annual volume of consumptive
4 use, because there is no genuine issue in that regard.

5 In sum, each claimant possesses a right which has been confirmed by the
6 United States District Court in New International Mortgage Bank v. Idaho Power Company,
7 et. al., in Equity No. 1602 (D. Idaho, Southern Division, March 22, 1932). That decree
8 specifies the source, quantity, priority, point of diversion, purposes of use, and places of use
9 for each right. For each right, it identifies the rightholder as of 1932, and, by affidavit and
10 deed, each claimant is the proven successor-in-interest to the decreed rightholder. Because
11 that evidence incontrovertibly proves each right was established in the late 1800's or early
12 1900's, the only cognizable question is whether any particular right has been lost.

13 Not one of the rights has been lost by abandonment or forfeiture. IDWR
14 acknowledges use of each right by recommending the right, with the singular exception of
15 claim no. 36-00063 which was recommended for disallowal on the basis of forfeiture, not
16 because of nonuse, but because IDWR wrongly concluded it was unnecessary for the
17 claimant to have that right since the appurtenant land has other rights. As is explained
18 below, the reason IDWR recommended the reduction of decreed rights was based on partial
19 forfeiture, which is not the law. IDWR should be estopped from now disavowing that its
20 recommendations were based on the decree combined with partial forfeiture, as the
21 claimants have litigated for more than 3 years based on such representations.

1 In sum, putting these rights in the proper evidentiary perspective of the decree
2 leads to one simple, overriding conclusion: the decreed elements are the only evidence of
3 the establishment of the rights. The rights should be decreed as previously established and
4 confirmed by decree.

5 There is no reason for the court to delay entering judgment in order to request
6 some sort of evidentiary presentation from IDWR. IDWR has admitted its knowledge of the
7 rights based on its investigations does not predate 1986. The law, including our state's
8 constitution, case law and statutes, all recognize that a right established when a lawful
9 appropriation is made. Therefore, in the instant subcases, the relevant time period is on or
10 before the entry of the decree in 1932. IDWR's investigations in recent years are simply
11 inapposite to the question of whether a lawful appropriation occurred, and a right was
12 established, decades ago.

13 II. BACKGROUND.

14 Under I.R.C.P. 56(c) summary judgment will be granted where there is no
15 genuine issue as to any material fact on an issue, and the moving party is entitled to
16 judgment as a matter of law. Courts look to "the pleadings, depositions, and admissions on
17 file, together with the affidavits, if any . . ." to determine whether the moving party is
18 entitled to judgment. I.R.C.P. 56(c). Typically, facts are liberally construed in favor of the
19 nonmoving party, including all favorable inferences which might reasonably be drawn from
20 the evidence. G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991).
21 However, if the case is to be tried to the judge, rather than a jury, and the parties bring the
22 evidentiary facts before the court, conflicting inferences do not bar summary judgment so
23

1 long as the evidence is confined to the record. Aid Ins. Co. v. Armstrong, 119 Idaho 897,
2 811 P.2d 507 (Ct.App. 1991).

3 These instant motions are presented in subcases where the master is the fact
4 finder, and do not involve two parties. There is a single party in this subcase, the claimant
5 of the water right. There is no party opposing the Motion. The only dispute is between the
6 elements of the rights described in the Director's Report and those in the affidavits of the
7 claimants, based on their objections. Hence, IDWR cannot be treated by the court as the
8 nonmoving party in this Motion because IDWR was removed as a party. I.C. § 42-1401B(3)
9 (1994); In re SRBA Case No. 39576, 912 P.2d 614, 624-625 (1995). Consequently, while
10 the Director's Report may constitute *prima facie* evidence under I.C. § 42-1411(4), that
11 presumption is rebutted by the affidavits and the prior decree. The presumption has no
12 further effect, i.e. the bubble created by the presumption is broken. I.R.E. 301; Bongiovi
13 v. Jamison, 110 Idaho 734, 718 P.2d 1172 (1986).

14 The New International Mortgage decree establishes all of the § 42-1411(2)
15 elements except name and address of claimant and the annual volume of consumptive use
16 (and in some instances, the number of irrigated acres within each 40 acres subdivision).
17 Those elements are rebutted in each subcase by the affidavit of the claimant in support of
18 summary judgment including the claimants testimony about the specific elements. With
19 respect to annual volume of consumptive use, the presumption is overcome by the affidavits
20 concerning alfalfa production in the Hagerman Valley and the affidavit of Dr. Charles
21 Brockway. Additionally, if the Director's recommendations could in any way be construed
22 to be recommendations based on facts establishing abandonment or forfeiture, all
23

1 presumptions regarding abandonment or forfeiture in a particular subcase are rebutted by
2 the affidavit of the claimants.

3 **III. WATER RIGHTS VEST AND ARE ESTABLISHED**
4 **WHEN THE ORIGINAL APPROPRIATOR FIRST DIVERTS**
5 **AND APPLIES WATER TO BENEFICIAL USE.**

6 Summary Judgment should be entered on the previously decreed elements of
7 these rights. The reason is simple: from before statehood up until the present, the law has
8 been that once a lawful appropriation and application to beneficial use occurs, a right is
9 established, vested and cannot be taken away unless abandoned, forfeited, or adversely
10 dispossessed. E.g. Malad Valley Irr. Co. v. Campbell, 2 Idaho 411, 414, 18 P.52 (1888) (".
11 . . the law of this territory is that the first appropriation of water for a beneficial purpose
12 gives the better right thereto; and when the right is once vested, unless abandoned, it must
13 be protected and upheld. The Legislative will is clearly expressed in the following language:
14 'As between appropriators, the one first in time is the first in right.'"); Idaho Constitution,
15 Art. X.V., § 3 and § 4; Kirk v. Bartholomew, 3 Idaho 367, 372, 29 P.40 (1892) (Under the
16 Territorial Act of February 10, 1881, where the successor-in-interest claims a right, the court
17 must determine the amount of water appropriated for a beneficial purpose by the initial or
18 original appropriator, and the date of that appropriation.); Sand Point Water & Light Co. v.
19 Panhandle Development Co., 11 Idaho 405, 414, 83 P.347 (1905) (explaining that an
20 appropriation of water which establishes a right is complete, regardless of whether by
21 constitutional method or by compliance with a statutory method, when the water is diverted
22 and applied to a beneficial purpose); Nielson v. Parker, 19 Idaho 727, 729-732, 115 P.488
23 (1911) (An appropriation is complete and a right arises when water is actually diverted and

1 applied to a beneficial purpose, and the State Engineer has no authority to deprive such a
2 rightholder of his property right after it has thus vested.); Big Wood Canal Co. v. Chapman,
3 45 Idaho 380, 405-406, 263 P.45 (1927) (a right vests under the statutory method of
4 appropriation when water is beneficially applied and other conditions of a permit are
5 satisfied. Once vested, the State Engineer cannot in any manner interfere with the vested
6 rights.); Cantlin v. Carter, 88 Idaho 179, 186, 397 P.2d 761 (1964) (a legal appropriation
7 is made by actually diverting and applying water to a beneficial use).

8 Thus, properly understood in its legal context, a water right is a legal construct
9 entitling the original appropriator or his or her successor:

10 "in due order of priority and within the maximum appropriated,
11 to use that amount of water which reasonably suffices for the
12 owner's needs at any particular time. The factors [are] variable,
13 the amount is variable, not only season to season, but day by
14 day, even hour to hour. Consequently it is obvious the court
15 cannot justly prescribe any fixed schedule. It must be left to
16 the honest judgment of the owner in application, subject to
17 control by the court's water master [sic], who interferes in any
[of] the owner's abuse, and prescribes limits for immediate use.

18 This was recognized as the true rule by the Idaho Supreme
19 Court in McGinness v. Stanfield, 6 Idaho, [sic] 372, 55 P. 1020,
20 1021 and why, when, and where departed from prior to the
21 suits herein, has not been made known to the court."

22 Order Re: Basin-Wide Issue 5, p. 13 (quoting United States v. American Ditch Ass'n, 2
23 F.Supp. 867, 869 (D. Idaho 1933).

24 In other words, the "true rule" in Idaho is that a court, in properly adjudicating
25 a water right, will decide what the right is based on evidence that addresses how much
26 water was originally appropriated and diverted to a beneficial use.

1 As a necessary part of such a determination, a court considers not merely the
2 quantity of water originally diverted, but also whether that quantity is reasonable and
3 necessary to the beneficial purposes for which it was appropriated. Farmers' Co-Operative
4 Ditch Co. v. Riverside Irrig. Dist., 16 Idaho 525, 532, 102 P.481 (1909). When irrigation
5 is one of the purposes, that analysis includes a determination concerning the amount of
6 water needed to irrigate the lands for which the right is appropriated. Id. Such a finding
7 and decree is important because it becomes "the measure of each appropriator's right as to
8 quantity of water under his appropriation and diversion. Scott v. Nampa & Meridian Irrig.
9 Dist., 55 Idaho 672, 680-681, 45 P.2d 1062 (1034) (quoting from Farmers' Co-Operative
10 Ditch Co. v. Riverside) (emphasis added).

11 In these subcases, the New International Mortgage decree is the only relevant
12 or material evidence concerning how much water was originally appropriated, needed for
13 irrigation and applied to beneficial use. Therefore, summary judgment is appropriate on the
14 elements defined by that decree.

15 **IV. THE NEW INTERNATIONAL MORTGAGE DECREE IS**
16 **THE SOLE EVIDENCE WHICH IS RELEVANT OR MATERIAL**
17 **TO THE QUESTION OF WHEN AND TO WHAT EXTENT**
THE RIGHTS VESTED WERE ESTABLISHED.

18 In the instant subcases, it is incontrovertibly true that each right has been
19 established and confirmed by findings and decree based on the original appropriation and
20 diversion. Included in the New International findings and decree is the determination of
21 how much water is required for irrigation of the particular lands. Finding number 4 states
22 the following:
23

1 "That all of the land described in the complaint of the plaintiff, and in
2 the answers, cross-complaints and counter-claims of the defendants and
3 intervenors, and each of them, is semi-arid in character and requires the
4 artificial application of water or irrigation in order to produce thereon ordinary
5 agricultural crops; that said land is situated in what is known as the Hagerman
6 Valley, east of and adjacent to the Snake River, and that the same lies
7 between the rim rock, or canyon wall, to the east of the Snake River and said
8 Snake River; that the subsoil of said valley underlying said valley and all of
9 the same is shattered, fissured lava flow, upon which has been deposited
10 layers of clay and gravel, interspersed with water worn boulders, fragments
11 of rock, and the soil is composed mainly of decomposed lava rock, oxidized
12 lava rock and sand, and that owing to the nature of the soil and subsoil, the
13 coarse texture and the mechanical composition of the soil and its free
14 drainage, the said land and all of the land in Hagerman Valley requires a large
15 amount of water, as hereinafter specified, for its successful irrigation and
16 production thereon of ordinary agricultural crops."

17 The findings continue as referred to above, and specify the quantity required for each parcel
18 of land to which an appropriation applies. The decree incorporates those findings, both in
19 terms of deciding there is the need for large amounts of water to successfully irrigate
20 (paragraph 2) and in specifying the quantity required for each parcel of land. Each affidavit
21 of the claimant in these subcases has attached to it the portion of the decree which specifies
22 the amount of water for that claimant's lands.

23 By contrast, IDWR admitted in court that its knowledge of the rights extends
from 1986 thru 1991.

Consequently, the New International decree constitutes the sole evidence
before this court which is probative of or material to the measure of each claimant's right
based on the amount of water originally appropriated and applied to beneficial use. It
establishes the facts about how much was appropriated and beneficially applied upon the
appurtenant lands up to the time of the decree in 1932. Jenkins v. State, Department of

1 Water Resources, 103 Idaho 384, 389, 647 P.2d 1256 (1982).

2 **V. IDWR ADMITS THE NEW INTERNATIONAL MORTGAGE DECREE**
3 **CONFIRMS THESE RIGHTS WERE ESTABLISHED AND**
4 **VESTED, AND THAT THE DECREE AND PARTIAL FORFEITURE,**
5 **NOT BENEFICIAL USE, IS THE BASIS FOR IDWR'S REDUCTION**
6 **OF THE ELEMENTS DEFINED IN THE DECREE.**

7 Interesting is IDWR's recent equivocation and denial that its recommendations
8 were based on partial forfeiture. Its admissions when it was a party to the SRBA are more
9 telling: In IDWR's First Supplemental Answers to Discovery by Hagerman Water Right
10 Owner's, Inc., IDWR stated that the policies and procedures ". . . for review and
11 recommendation of all claims, including the claims of members of Hagerman, are set forth
12 in the Claims Investigation Manual . . .," which was given to counsel for HWRO in open
13 court on April 7, 1993 by IDWR's counsel. p. 6-7. In the Claims Investigation Manual, p.
14 15, IDWR states the following:

15 "For purposes of preparing the director's report, a right will be deemed to
16 have been decreed where the decree determines the amount, priority, and
17 source of the right as against claimants of other water rights."

18 * * *

19 There may be rights described in [IDWR's] water right database with a basis
20 of decree, that are based on a decree that did not adjudicate a right [such as
21 divorce, bankruptcy or foreclosure decrees]. Such rights should be reviewed
22 as rights based on beneficial use, and if recommended, should be
23 recommended with a basis of beneficial use [rather than as "decreed"].

24 Thus, under IDWR's system of recommending rights with the "decreed" basis
25 if the right has been adjudicated, or with the designation of "beneficial use" if not, it is clear
26 that IDWR has plead that each of the rights involved here has been adjudicated; each right
27 is reported as "decreed." Consequently, according to IDWR's designation and its Claims

1 Investigation Manual, IDWR adopted the position that each of these water rights

2 "was determined to exist as described in the decree at the time
3 it was adjudicated; [the decree] is conclusive as to facts before
4 the decree but not afterward.

5 Forfeiture and changes in use are two circumstances that could
6 arise after the decree to change the water right. Forfeiture can
7 also include use of water that was beneficial at the time of the
8 decree but is no longer beneficial because it is unreasonably
9 wasteful under current standards. What is considered
10 reasonable changes over time as technology improves or other
11 circumstances change.

12 Claims Investigation Manual, p. 7-8. (emphasis added).

13 IDWR's statements make two pertinent points about its recommendations.
14 First: it admits the New International decree conclusively determined that each right existed
15 in 1932 and conclusively determined, as far as IDWR was concerned, all facts before the
16 decree. Additionally, in court on May 28, 1996, through Mr. David Shaw, IDWR
17 represented that its "factual" investigation does not predate 1986. Hence, according to the
18 court's direction, for purposes of these motions, the court will not consider IDWR to have
19 personal knowledge of facts before 1986. Therefore, because the existence of a water right
20 is to be determined based on the facts at the time of establishment, i.e. when the water was
21 first appropriated, and because the New International decree establishes those facts,
22 summary judgment should be entered based on the decree.

23 Second point: IDWR's statements expose the disingenuous and misleading
representations which have been made to the court in recent weeks by IDWR personnel
including Lynne Krogh and David Shaw. Mr. Shaw has been asked by both Master
Haemmerle and Judge Hurlbutt, in open court, if IDWR's recommendations were based on

1 partial forfeiture. Each response to the court has been in the negative: Each stated that
2 recommendations were not based on partial forfeiture, but beneficial use. Both in regards
3 to forfeiture and beneficial use, those statements are misleading and inaccurate.

4 According to IDWR's Claim Investigation Manual and its designation of the
5 rights as "decreed," the basis for the recommendation is not beneficial use, but the decree.
6 Also, to state or imply that the recommendations were not based on partial forfeiture is
7 incredulous. The Claims Investigation Manual is replete with descriptions of how IDWR
8 made its recommendations by reducing decreed rights based on partial forfeiture. Some
9 examples:

10 IDWR (or any party challenging the right) generally bears the burden
11 with respect to forfeiture and abandonment of a decreed or licensed water
right. [p. 6].

12 Forfeiture of a water right results from five years continuous nonuse.
13 Since a water right is limited by beneficial use, a water right may be partially
14 forfeited by nonuse of a portion of the right. "Nonuse" includes actual use
that is not beneficial. . ." [p. 131].

15 * * *

16 Where an irrigation right was originally decreed or licensed in an amount that
17 was in excess of current standards, then the portion of the amount that was
18 in excess of current standards will be analyzed as a partial forfeiture, on the
basis that there is some reason to believe that the excess was not beneficially
used. [p. 132],

19 Additionally, both Mr. Shaw and Ms. Krogh have admitted to this counsel that
20 partial forfeiture was the basis for its recommending a reduction in decreed rights. Ms.
21 Krogh explained this in the following colloquy:

22 "Mr. Brown: So if it's more than an inch per acre even if it's decreed,
23 your analysis isn't really a forfeiture analysis, it's an analysis that says the

1 claimant has the burden of proof.

2 Ms. Krogh-Hampe: I think we're talking, I think we are getting into
3 semantics. What we're trying to determine is whether a portion of the water
4 right has been forfeited. The way we do that is by looking to see whether
under current circumstances that amount in excess of an inch per acre that
was decreed some decades ago is still reasonable.

5 Mr. Brown: Okay, you mentioned and the book mentions that there's
6 differences between old decrees and new decrees. Can you explain that
distinction?

7 Ms. Krogh-Hampe: There can be a number of reasons why there might
8 be a difference between an old decree and a new decree. For example, in
the Payette adjudication, that was a decree done pursuant to the current
9 adjudication statute – well, no, done under a statute that's similar to the
current adjudication statute. The director was a party to it. It is therefore
10 going to be more complete and more consistent than many of the decrees that
were done back at the turn of the century, and the decrees themselves vary
11 a grade [sic] deal in what they determine. Some decrees determine point of
diversion, some decrees don't. Some decrees determine season of use, some
12 decrees don't. The recent decrees in which the Department has participated
will, but some of the old ones simply have omissions. There's probably other
13 examples I can't think of off the top of my head, but those are the ones that
jump immediately to mind.

14 Mr. Brown: So it doesn't depend on the age of the decree, it depends
15 upon what was omitted or included in a decree based on what kind of
deference you give to the decree?

16 Ms. Krogh-Hampe: No. Well, it's not a matter of whether or not we
17 defer to the decree on the forfeiture issue. Forfeiture we're looking at after
the decree and the decree determined what it determined as of the date it
18 determined it. With forfeiture, you're looking at, okay, some decades after
that decree are the circumstances still the same. Have the circumstances
19 changed so that what was reasonable at the time of the decree is no longer
reasonable under current practices.

20 Mr. Hohnhorst: Let me ask you a question on something that you said
21 earlier because I want to make sure I understand it. Let's say that John Doe,
Claimant, makes a claim and says I have a farm in Hagerman, Idaho, and I
22 think I'm entitled to two-and-a-half inches of water an acre and he sends you
a copy of a decree that says John Doe, you get two-and-a-half inches of water
23

1 per acre, a 1935 decree. Do I have it right that you're going to respond to
2 the claimant by saying we want to make you justify two-and-a-half inches an
3 acre under existing today's conditions without regard to your existing decree;
4 right?

5 Ms. Krogh-Hampe: If the Department did not already information
6 available to it to demonstrate that two-and-a-half inches per acre were
7 reasonable under current standards, then, yes, we would contact the claimant
8 seeking information that would justify two-and-a-half inches per acre.

9 Mr. Hohnhorst: And if the claimant responded and you did not regard
10 the response as satisfactory, the way that that would manifest itself in the
11 recommendation is everything over the inch per acre would be deemed
12 forfeited?

13 Ms. Krogh-Hampe: Anything that was claimed in excess of the amount
14 that the information available to us supported as reasonable would be
15 recommended for disallowal on the basis of partial forfeiture.

16 Mr. Hohnhorst: Okay.

17 Transcript, April 16, 1993, Conference regarding disclosure of information by IDWR, p. 80,
18 l. 18 - p. 83, l. 13.

19 **VI. IDWR MAY NOT DISAVOW THE DECREE, OR THE**
20 **TRUE BASIS FOR ITS RECOMMENDATIONS.**

21 A. THE "STATE OF IDAHO, DEPARTMENT OF WATER RESOURCES," IS
22 BOUND BY THE DECREE ENTERED IN NEW INTERNATIONAL
23 MORTGAGE BANK V. IDAHO POWER CO. PURSUANT TO THE
DOCTRINE OF RES JUDICATA.

Res judicata denotes "a thing or matter settled by judgment." BLACK'S
LAW DICTIONARY 1174 (rev. 5th ed. 1979). The doctrine of res
judicata precludes the relitigation of a matter previously adjudicated.
Functionally, the doctrine has two components—claim preclusion and
issue preclusion. "[C]laim preclusion," or true res judicata . . . treats
a judgment, once rendered, as the full measure of relief to be accorded
between the same parties on the same "claim" or "cause of action."
* * * When the plaintiff obtains a judgment in his favor, his claim
"merges" in the judgment; he may seek no further relief on that claim
in a separate action. Conversely, when a judgment is rendered for a

1 defendant, the plaintiff's claim is extinguished; the judgment then acts
2 as a "bar." * * * Under these rules of claim preclusion, the effect of
3 a judgment extends to the litigation of all issues relevant to the same
4 claim between the same parties, whether or not raised at trial.

5 Aldape v. Akins, 105 Idaho 254, 256 (Ct.App. 1983).

6 In the form of claim preclusion, the doctrine of res judicata serves
7 three fundamental purposes. First, it "[preserves] the acceptability of
8 judicial dispute resolution against the corrosive disrespect that would
9 follow if the same matter were twice litigated to inconsistent results."
10 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND
11 PROCEDURE Sec. 4403, at 12 (1981). Second, it serves the public
12 interest in protecting the courts against the burdens of repetitious
13 litigation; and third, it advances the private interest in repose from the
14 harassment of repetitive claims. *Id.* at 13-16.

15 Id. at 257.

16 In Joyce v. Murphy Land & Irrigation Co., 35 Idaho 549, 208 P. 241 (1922),
17 the Court applied res judicata to an action seeking to enjoin a change in the place where
18 water was diverted and used under a decreed water right. The decree had been entered in
19 prior litigation involving the same water and the same parties or their predecessors in
20 interest. The Court held that although the effect of a dam, which had changed the place of
21 use, was not expressly determined in the first trial, the underlying claim of right to use the
22 water had been considered and decided. The Court stated,

23 We think the correct rule to be that in an action between the
same parties upon the same claim or demand, the former
adjudication concludes parties and privies not only as to every
matter offered and received to sustain or defeat the claim but
also as to every matter which might and should have been
litigated in the first suit.

Id. at 553.

1 The same principle was applied in Reynolds Irrigation District v. Sproat, 65
2 Idaho 617, 151 P.2d 773 (1944). In Reynolds, the Irrigation District sought to enjoin
3 defendants from diverting any water from Warm Springs Creek or its tributaries. A decree
4 from Bachman v. Reynolds Irr. Dist., 56 Idaho 507, 55 P.2d 1314, was introduced into
5 evidence which held that the Irrigation District had the right to divert and use the water
6 from Warm Springs Creek. The defendants, however, were not parties, or privy to that case.
7 The Court stated,

8 It is true that the decree was final and conclusive as to the
9 rights of all parties and privies to the action in the Bachman
10 case. There is nothing, however, in the record, indicating that
11 the Sproats were ever parties to the original action or privies to
12 any person or persons who were parties to that action. it is an
13 elementary principle of justice that, in order to bind a party by
14 a judgment, he must have his day in court and his opportunity
15 to present his case.

16 Id. at 621-622.

17 In this case, the "State of Idaho, Department of Water Resources" is bound by
18 the 1932 decree entered in the New International Mortgage due to res judicata and the fact
19 that it is in privity with the Department of Fish and Game. The Idaho Department of Fish
20 and Game filed a Notice of Claim to a Water Right in this action on November 5, 1990.
21 That department claimed its right to water from Len Lewis Springs alleging that it was a
22 successor in interest to the right asserted by Kate C. and James Bedal ("Bedal"). Subcase No.
23 36-00012. Bedal's claim to that water right was decided in the 1932 Decree at p. 7.

Both the Department of Water Resources and the Department of Fish and
Game are state agencies. See I.C. §§ 67-5201(2); 36-101 and 42-1732. It is undisputed that

1 both agencies have acted at all relevant times for and on behalf of the State of Idaho. The
2 Department of Water Resources acted on behalf of the State of Idaho in filing this lawsuit.
3 The Department of Fish and Game acted on behalf of the State of Idaho in filing the Notice
4 of Claim to a Water Right in this litigation.

5 It is undisputed that the State of Idaho granted each department the authority
6 to act on its behalf in the manner in which it acted. There is no allegation that either the
7 Department of Water Resources or the Department of Fish and Game acted outside the
8 authority granted to it by its principal, the State of Idaho, in filing this lawsuit or in filing the
9 Notice of Claim to a Water Right.¹

10 These undisputed facts lead to the conclusion that the State of Idaho, acting
11 through the Department of Fish and Game is the successor in interest to Bedal's water right
12 as set forth in the 1932 Decree and as alleged in its Notice of Claim to a Water Right. The
13 State of Idaho expressly relies upon and seeks to enforce the terms of the 1932 Decree as
14 evidenced by the filing of its Claim as successor in interest to Bendal's water right.

15 Res judicata therefore precludes the State of Idaho, acting through the
16 Department of Water Resources, from taking a contrary position and seeking to relitigate that
17 water right claim by denying the binding effect of the 1932 Decree. The doctrine of res
18 judicata or claim preclusion bars the State of Idaho from taking these contradictory positions.
19 This Court should rule accordingly.
20

21 ¹ The departments' actions are binding upon the State under general agency principles.
22 See discussion, *infra*, regarding the State being estopped from denying the validity of the
23 1932 Decree.

1 B. THIS COURT SHOULD ESTOP THE DEPARTMENT OF WATER
2 RESOURCES FROM DISAVOWING THE TERMS OF THE 1932 DECREE, OR
3 THE BASIS FOR ITS RECOMMENDATIONS.

4 Estoppel applies on two grounds. First, as is explained later, on the grounds
5 that IDWR has represented that the decree and partial forfeiture were the basis for the
6 recommendation in this case, including when it was a party to this case. The claimants
7 have relied to their detriment on those representations. The second grounds are because
8 it is undisputed that both the Department of Water Resources and the Department of Fish
9 and Game are agencies of the State of Idaho which have acted at all relevant times for and
10 on behalf of the State of Idaho. It is also undisputed that both agencies have acted within
11 the authority granted to them by their principal, the State of Idaho.

12 It is a general principle of the law of agency, that the principals
13 are bound by the acts of their agents which fall within the
14 apparent scope of the authority of the agents and that the
15 principals will not be permitted to deny the authority of their
16 agents against innocent third parties, who have dealt with those
17 agents in good faith.

18 White v. Doney, 82 Idaho 217, 351 P.2d 380 (1960).

19 "The principal cannot claim that an agent with apparent authority to act had
20 no such authority when he claims benefits of such agent's acts. He cannot approve the part
21 that is beneficial to him and reject the part that creates a burden." Stout v. McNary, 75
22 Idaho 99, 267 P.2d 625, 627 (1954). An agent's acts are, by definition, those of his
23 principal's. See, eg., Fowler v. Uezzell, 94 Idaho 951, 500 P.2d 852 (1972); Clements v.
lungert, 90 Idaho 143, 408 P.2d 810 (1965); Commercial Ins. Co. v. Hartwell Excavating
Co., 89 Idaho 531, 407 P.2d 312 (1965).

1 These same principals apply to governments as well as to individuals and
2 other entities. In Pitner v. Federal Crop Ins. Corp., 94 Idaho 496, 502, 491 P.2d 1268
3 (1971), the Court estopped the defendant from denying insurance coverage. The Court
4 stated,

5 It is a generally accepted principle that an agent of the federal
6 government can bind the United States to any agreement he is
7 actually authorized to make. See United States v. Georgia-
8 Pacific Co., 421 F.2d 92 (9th Cir. 1970), and authorities cited
9 therein. We believe that an agent of the federal government
10 should also be able to bind the United States to any agreement
11 which Congress has empowered his department or agency to
12 make, even where he is not actually authorized to do so, the
13 binding effect being derived on the basis of apparent authority
14 or estoppel as normally applied to agents of private parties.

15 Id. at 502.

16 See also, Lloyd Crystall Post No. 20, the American Legion v. Jefferson County,
17 72 Idaho 158, 237 P.2d 348, 351 (1951) ("The people in their collective and sovereign
18 capacity ought to observe the same rules and standard of honesty and fair dealing that is
19 expected of a private citizen.") citing Boise City v. Wilkinson, 16 Idaho 150, 102 P. 148,
20 157; Johnson v. Willford, 682 F.2d 868, 871 (9th Cir. 1983), citing United States v. Lazy
21 FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973) ("'[W]here justice and fair play require it'
22 estoppel will be applied against the government, even when the government acts in its
23 sovereign capacity if the effects of estoppel do not unduly damage the public interest.").

24 The State of Idaho is bound by the actions of its agent, the Department of Fish
25 and Game. The Department of Fish and Game asserts that it is the successor in interest to
26 Bedal's water rights as set forth in the 1932 Decree. Therefore, the State of Idaho's water

1 right also relates back to and is controlled by the terms of the 1932 Decree. This Court
2 should estop the State of Idaho, including IDWR, from taking a position inconsistent with
3 the 1932 Decree, in order to prevent manifest injustice.

4 There is no doubt that the Fish and Game gains advantage by claiming under
5 the decree. There is no doubt that IDWR has caused a disadvantage to the parties seeking
6 estoppel and induced them to change their position to its detriment; and that it would be
7 unconscionable to allow IDWR to maintain a position which is inconsistent with the
8 applicability of the decree.² City of Sandpoint v. Sandpoint Independent Highway Dist.,
9 126 Idaho 145, 879 P.2d 1078, 1084 (1994).

10 Prior to the 1987 filing of this lawsuit and for 55 years, the State of Idaho did
11 not seek to interfere or change the terms of the 1932 Decree. The parties to that Decree,
12 including the State of Idaho, abided by, relied upon and benefitted from the terms of the
13 1932 Decree. The State of Idaho would not have a viable water right claim under the 1932
14 Decree and thereby benefit from that right were it not for Bedal's right under the 1932
15 Decree. It would be unconscionable for this Court to now allow any agency of the State
16 of Idaho to maintain a position which is inconsistent from this prior position from which it
17 has already derived a benefit. This Court should estop the State of Idaho and IDWR from
18

19 ²Equitable estoppel requires a concealment or misrepresentation of fact; that the party
20 asserting estoppel not have knowledge of the true facts; and that the misrepresentation must
21 be relied on to the party's detriment. Tommerup v. Albertson's Inc., 101 Idaho 1, 5, 607
22 P.2d 1055 (1980). The doctrine applies here because, if beneficial use is the basis for
23 IDWR's recommendation and is different from partial forfeiture of a decreed right, IDWR
misrepresented how it recommended the rights and the claimants relied on those
misrepresentations by objecting and pursuing litigation, including on partial forfeiture, for
over three years and at significant cost.

1 denying the validity of the 1932 Decree or its applicability to these subcases.

2 **VII. UNDER THE ADJUDICATION STATUTES, ONLY THE ELEMENTS**
3 **OF A RIGHT WHICH ARE NOT DEFINED IN THE DECREE MAY BE BASED**
4 **ON EVIDENCE OF CONDITIONS EXISTING WHEN THE SRBA COMMENCED.**

5 IDWR's attempt to diminish the rights by evidence of contemporary conditions
6 and the notion of partial forfeiture is contrary to the adjudication statutes. By specific
7 provision enacted in 1994, the Legislature acknowledged that the existence of a water right
8 is to be determined by the amount of water diverted and beneficially applied by the original
9 appropriator when the right was originally established. I.C. § 42-1427(1)(b). It also decided
10 that only the "undefined elements" of a previously decreed right would be recommended
11 or decreed based on evidence of the conditions existing or extent of beneficial use being
12 made of a right at the time the adjudication is commenced. I.C. § 42-1427(1) and (2).

13 In section (1)(a) of that statute, the Legislature acknowledged that many
14 established water rights are defined only by source, priority, and diversion rate, and that one
15 of the purposes of the adjudication statutes was to more particularly and uniformly describe
16 those rights. In order to achieve that end, without unfairly impacting claimants by placing
17 the burden of producing evidence about the undefined elements "as they existed on the date
18 the right was established," it allows undefined elements to be proved based, not on the
19 establishment date of the right which occurred long ago, but on evidence probative of the
20 conditions and beneficial use made as of the commencement of the adjudication. I.C. § 42-
21 1427(1)(b) and (2).

22 This specific statute addressing the treatment of defined and undefined
23 elements of previously decreed rights clearly, unambiguously and plainly states what the

1 Legislature intended by the statute. The Legislature unambiguously acknowledges that a
2 right comes into being on the "establishment date." It plainly recognizes that prior decrees
3 or licenses define some, but not all, elements of those rights based on the conditions
4 existing when the right was originally appropriated. It expressly provides only one
5 exception to the rule of looking to evidence pertinent to the establishment date in order to
6 define a right only if the elements which were not previously decreed or licensed. Finally,
7 the exception providing for the use of contemporary conditions to recommend or decree
8 existing, decreed rights applies only to missing elements, not on previously defined ones.
9 In sum, § 42-1427 clearly states how defined and undefined elements of decreed rights will
10 be treated, what exception exists concerning proof by conditions other than those existing
11 at establishment, and why the exception is created. There is no occasion for the court to
12 construe the statute other than by the plain and ordinary meaning of those express and
13 unambiguous statements. Rim View Trout Farm v. Higginson, 121 Idaho 819, 822, 828
14 P.2d 848 (1994).

15 Finally, it should be emphasized that § 42-1427 is the specific, and therefore,
16 controlling statute with regard to whether the court must look to evidence surrounding the
17 establishment date or that concerning present uses. It therefore controls if other statutes are
18 inconsistent with it. City of Sandpoint v. Sandpoint Independent Highway Dist., 126 Idaho
19 148, 149, 879 P.2d 1078 (1994).

20 If past assertions in court are any indication, someone may ignore that legal
21 point and attempt to argue one of the following: that IDWR has discretion to recommend
22 elements as it sees fit under § 42-1411(2); that § 42-1402 compels the court to determine
23

1 how much water is being presently beneficially used and limit the decree accordingly; or
2 that § 42-220 requires the court to find anew and under evidence about present conditions
3 that greater than one inch per acre is necessary for irrigation.

4 No response to the first assertion is needed. What is said above and in the
5 Special Master's Recommendation on Basin-Wide Issue 5A is correct.

6 The response to the second assertion is that it misunderstands the language
7 and purpose of I.C. § 42-1402 and its applicability here. The statute states merely that the
8 amount of water allotted shall not exceed "the amount actually used for beneficial
9 purposes." The statute has been construed to require actual use in order to address the
10 question of whether an appropriation by statutory method may be decreed, and relate back
11 in time to when a permit was obtained if the water has not yet been used. Reno v.
12 Richards, 32 Idaho 1, 11, 178 P.81 (1918). It was not the purpose of the statute, in view
13 of Art. 15, § 3 of the Constitution, "to deprive an actual appropriator of water of his vested
14 right to the use [of his water]," Id. 32 Idaho at 11; Nielson v. Parker, 19 Idaho 727, 115 R.
15 488 (1911).

16 Moreover, in each of the present subcases there is no dispute whatsoever
17 about the fact that each of the claimants' predecessors actually used water from the time
18 their rights were established until at least 1932. By affidavit, each claimant also testifies that
19 the use of the right has continued to the present. And by its recommendations, IDWR
20 admits that some quantity of water was being used during some time from 1986 through
21 1991 when IDWR "investigated" the rights.

1 The response to the third possible assertion that I.C. § 42-220 requires the
2 court to apply evidence of present conditions in determining the duty of water is that there
3 is no way to properly construe this statute to require such a determination where a court of
4 law has already considered and decided that matter. Because the rights have been
5 determined, including the duty of water, the claimants presently possess water rights, i.e.
6 real property rights. I.C. § 55-101. Interpreting the statute to require a readjudication of
7 those property rights under new criteria would be unconstitutional, would constitute a
8 failure to construe the statute as a whole and in conformity with I.C. § 42-1427; and would
9 be a derogation of the presumption that the Legislature does not intend to overturn long
10 established principles of law when it creates a statute, I.C. §§ 73-102(1); 73-103; 73-106;
11 George W. Watkins Family v. Messenger, 118 Idaho 537, 540, 797 P.2d 1385 (1990).

12 First, the court should not engage in the "semantics" which could lead to the
13 conclusion that reducing a right thusly is anything more or less than a "partial forfeiture,"
14 an unconstitutional taking of a portion of a property right. Second, it is significant that the
15 proviso of the statute would have prevented the issuance of a court decree in the first
16 instance if that showing had not been made. To say that such a showing must again be
17 made under new standards rather than simple reliance on the previous determination, would
18 abrogate the doctrine of res judicata. Further, as applied to the subcases where the rights
19 arose prior to the adoption of the statute in 1903 would be to apply the statute to rights to
20 which it is inapplicable as a matter of law.

21 In short, the findings and decree in the New International Mortgage case is the
22 only evidence about how much water was necessary to establish the rights. Those
23

1 documents specifically find that certain amounts are necessary given the structure of the soil
2 and subsoils in Hagerman. There is no reason for the court to think or believe that the
3 subsoil or soils have changed or that said soils would not need just as much water now as
4 they have needed for the past 100 years. It is not this court's role to go beyond the
5 elements enumerated in I.C. § 42-1411(2) nor to create an additional, unspecified exception
6 to I.C. § 42-1427 through § 42-222. It is not the court's role to diminish a right to
7 beneficially use water when the water is needed because IDWR would like to regulate
8 irrigation practices. If that is IDWR's goal, it may make appropriate rules and regulations
9 restricting the exercise of existing rights. In the meantime, the court should not be delayed
10 from entering summary judgment on the basis that IDWR, a nonparty, would like to force
11 relitigation of the issue and disavow the decree upon which it based its recommendations.

12 **VIII. ANNUAL VOLUME OF CONSUMPTIVE USE, A PREVIOUSLY UNDEFINED**
13 **ELEMENT, IS ESTABLISHED BY DR. BROCKWAY'S TESTIMONY.**

14 Regarding the undefined element of annual volume of consumptive use, the
15 only evidence before the court is the affidavit of Dr. Brockway, the article by Dr. Wright,
16 and the affidavits of Mr. McFaddan and Mr. Jones. Consequently, because that is the only
17 evidence of consumptive use and because it irrefutably rebuts the directors'
18 recommendation regarding that element, summary judgment should be granted.

19 **IX. CONCLUSION.**

20 For the reasons set forth above, the claimants in the subcases respectfully
21 request that the court grant summary judgment on each defined element of their respective
22 rights as defined in the New International Mortgage decree and in the affidavit of respective
23

1 claimant. The claimants further request that the undefined element, annual volume of
2 consumptive use, be summarily adjudged as 3.75 acre feet per annum based on the only
3 evidence in that regard.

4 Dated this 31st day of May, 1996.

6 HEPWORTH, LEZAMIZ & HOHNHORST,
7 CHARTERED

8 By 

9 Patrick D. Brown

10 Attorneys for HWRO, Inc. and its individual
members

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EXHIBIT "A"

List of Subcases

Lynn J. Babington and Karen L. Babington	36-00003C
Walter J. Bonning, II and Judy L. Bonning	36-00108B
Dale E. Boyer and Elaine Boyer	36-00079
William E. Norris, David L. and Linda C. Cropper,	
Blaine Richard and Vivian Cropper, Dave and	
Nancy Anderson	
Mildred Culbertson	36-00047
Frank C. Erwin and Peggy Erwin	36-10409
Michael J. Fleming	36-00092
Keith L. Fuell and Jolene Fuell	36-00064B
Frank L. Glauner and Jean Glauner	36-00086C
Mattie P. Grigg	36-00039E
George J. Korbis and Nellie W. Korbis	36-10283B
Marilyn J. Miller	36-00039N
Howard L. Morris and Rhonda K. Morris	36-00085A
Howard L. Morris and Rhonda K. Morris	36-00061
Howard L. Morris and Rhonda K. Morris	36-00062
Mark Potter and Susan Potter	36-00063
Edna M. Rea	36-00039J
Roger Shaffer	36-00003A
Doyt H. Simcoe and Roxie Simcoe	36-00034B
Richard D. Simon	36-00003F
Dick J. Veenendaal and Sigrid E. Veenendaal	36-00035J
Edith L. Vernon	36-00039C
Paul E. Watkins and Inez S. Watkins	36-00003E
Basil Lester Zink and Myrle Hyde Zink	36-00106
	36-00103F