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COPY

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

Case No. 39576

AFFIDAVIT OF DARRELL M. FUNK

STATE OF IDAHO)
) ss.
County of Jerome)

DARRELL M. FUNK, first being duly sworn, deposes and says as follows:

1. I am an adult over the age of 18 years. I have personal knowledge of all things testified to herein.

2. I am the co-owner of approximately 305 acres of agricultural real property in Township 11 South, Range 20 East, Section 26 ("Section 26 Property"), along with my brother David Funk.

3. Appurtenant to the Section 26 Property are three water rights:

- a) *Water Right No. 45-2275*. This right was partially decreed in this case on May 4, 2005. The right is limited to the irrigation of 200 acres within the Section 26 Property in a single irrigation season.
- b) *Water Right No. 45-4103*. This right was partially decreed in this case on May 5, 2005. The right is limited to the irrigation of 105 acres within the Section 26 Property in a single irrigation season.

c) *Water Right No. 45-07478.* (the "License") This right is a license issued originally to Double Eagle Inc., c/o Gary Funk. It is appurtenant to the Section 26 property but is also appurtenant to real property in Sections 16, 25 and 36 of Township 11 South, Range 20 East. Although the acreage to which the License is appurtenant totals 1,454.7 acres, this right is limited to the irrigation of 480 acres within the entire place of use described in the license in Sections 16, 25, 26, and 36.

4. The Partial Decrees for Water Rights Nos. 45-2275 and 45-4103 also contain the following limitation:

Use of this right with the rights listed below is limited to the irrigation of a combined total of 480 acres in a single irrigation season. Combined Right Nos. 45-4103, 45-7478.

5. The Water Right License issued on February 4, 1995 for Water Right No. 45-7478 does not contain the joint limitation with right nos. 45-2275 and 45-4103.

6. Until recently, it has always been our understanding that the License had a stand alone value of 480 acres and it was not limited to the joint place of use limitation contained in the Partial Decrees for Water Right Nos. 45-2275 and 45-4103.

7. We obtained the License in connection with property we lease in Section 16 of Township 11 South, Range 20 East (the "State Land").

8. In 1981, we successfully bid to purchase agricultural real property from the Idaho State Land Board. During the bidding and negotiating process representatives of the Land Board represented to me that a well could be drilled for purposes of irrigating this real property.

9. It was advertised that a water right could be obtained. The Idaho Department of Water Resources in Twin Falls, Idaho, approved the drilling and it then went to, Ken Dunn at the Idaho Department of Water Resources, who would not approve the permit without the study. We could drill on property about 5 miles away and got the permit to drill on the land to supply most of the water for the land. It was always intended to go to the State land except for a few acres on SEC 16 & SEC 26. SEC 16 has canal water from Milner low lift and SEC 26 has 2 ground water rights that covered that ground except a few acres that the pivot went over that were not covered. It would be unwise and of no need to put water on these lands that already had good rights.

10. At that point, we refused to finalize the purchase of the State Land. There was considerable dispute about what was represented to us about the property and what was not. Conversations were recorded during the bidding and negotiating process but those recordings were never found.

11. Without going into too much detail, the dispute was resolved with us being able to lease the State Land, rather than purchase it. We have successfully bid for the right to lease the State Land since 1981.

12. In order to irrigate the State Land, We applied for and obtained the License. We originally applied for the license in 1981 and finally obtained it in 1995. The place of use on the License encompasses 1,454.7 acres. However, the license is limited to 480 acres within a single irrigation season. We have consistently used the License to irrigate the State Land since 1981 to 2016.

13. Prior to 2016, there was never any mention of the License being limited in combination with Water Right Nos. 45-2275 and 45-4103. Moreover, such a limitation would never make any logical sense for how my farming operations used the License and irrigated the State Land. I would never agree to any such limitation.

14. Early in 2016 we contracted with Brockway Engineering to accomplish a transfer of several water rights in order to achieve greater consistency between the rights we owned and the evolution of how our operation uses each right over the years.

15. Dr. Erick Powell, Ph.D, P.E., with Brockway Engineering provided an in depth assessment of my farming operations, specifically the irrigation of the various parcels that make up my farming operations.

16. Mr. Powell concluded that every parcel and water right east of the 4900 East Road in Twin Falls County was part of the same system. He proposed to combine all my water rights in such area into a single place of use in order to provide consistency between the rights and the practical use of such rights.

17. Mr. Powell did not include the License (Water Right No. 45-7478) in the proposed transfer because it was originally licensed as supplemental surface water, not groundwater, on the State Land. Also, our historical use of the License was for the irrigation of the State Land and it was never used as a part of a larger system like the other rights east of 4900 East.

18. The Department of Water Resources ("IDWR") took the position that because of the joint place of use limitation stated in the Partial Decrees for Water Right Nos. 45-2275 and 45-4103, the License also had to be included in the transfer.

19. In addition, for the first time, IDWR is indicating it will enforce the joint place of use limitation. The effect of which significantly decreases the value and usability of the License. We have always used the License to irrigate 480 acres of the State Land. IDWR's interpretation will limit the value of the License to 175 acres.

20. Importantly, less than one month before the License was issued, Gary Funk, met with Shelley W. Keen of the Department to discuss the License and a recent Field Report. Mr. Keen memorialized such meeting with a Memorandum dated January 12, 1995. The January 12, 1995 Memorandum reveals that the Department wanted to describe the License as "supplemental groundwater," which we rejected. We compromised on describing the License as appurtenant to 480 acres within the 1,454 acre place of use. This was acceptable to us as we intended to use the License to irrigate the State Land. There was no discussion about including a combined limitation with right nos. 45-2275 and 45-4103. Moreover, we would never have accepted or agreed to such a limitation as it would have severely limited what we wanted to accomplish with the License.

21. After 1995, we continued to use the License to irrigate the State Land as described herein. We used it consistently as described herein. No issues with my usage were raised by the Department or any other person or entity.

22. On about June 25, 2002, we received a letter from the Department drafted by Ms. Vikie Hancock summarizing various water rights of mine involved in the Snake River Basin Adjudication. In that letter, she discusses Water Right Nos. 45-2275 and 45-4103 together. In that paragraph, she identifies the place of use. She also makes the following statement regarding the License:

License 45-7478 is also appurtenant to these acres but use under that right began after commencement of the Adjudication and will not be included in or superceded by SRBA decree. I believe that you also have TFCC shares that are considering a transfer to simplify water delivery on this farm.

The License is not otherwise discussed in the June 25, 2002 letter from Ms. Hancock. In addition, in her discussion of Water Right Nos. 45-4103 and 45-2275, there is no mention made of a joint

place of use limitation between Water Right Nos. 45-4103, 45-2275 and the License. Thus, prior to and after 2002, we had no reason to believe the place of use limitation with the License would be part of the partial decrees for Water Right Nos. 45-4103 and 45-2275.

23. On about February 19, 2003, we visited the Department offices and had a personal conversation with Ms. Vikle Hancock regarding her conclusions regarding Water Right Nos. 45-4103 and 45-2275. Specifically we discussed her conclusion that 45-4103 was an expansion of right 45-2275. At no point during that conversation did we discuss the License being subject to a joint place of use limitation with rights 45-4103 and 45-2275. Going into the adjudication and during the process, we had no reason to believe such a joint limitation between 4103, 2275 and the License was even being considered.

24. During the adjudication, we received and reviewed more than 80 partial decrees. I admit we let the limitations stated in the Partial Decrees for Water Right Nos. 45-4103 and 45-2275 slip past us. We were not represented by legal counsel at the time. We expected the partial decrees to reflect our conversations and correspondence with the Department. We were not aware of any intention to include the joint place of use limitation.

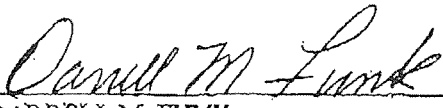
25. After the adjudication, unaware of the joint place of use limitation, we continued to use the License as we had for the previous 24 years. We continued to do so until the present time, as described above. The Department has never sought to enforce the joint place of use limitation as it currently threatens to do.

26. It is our sincere belief that inclusion of the joint place of use limitation was never the intention at the time of the adjudication and that its inclusion was a mistake.

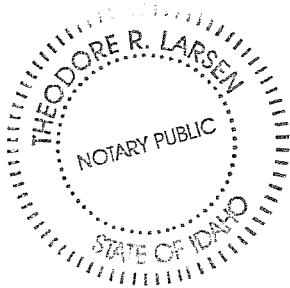
27. Regarding the delay in bringing this motion, I would have brought it much sooner had the Department made any effort to enforce the joint place of use limitation.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 20 day of December, 2016.


DARRELL M. FUNK

SUBSCRIBED and sworn to before me this 20 day of December, 2016.



TL/LRS

Notary Public for Idaho

Residing at: Jerome ID

Commission Expires: Oct 25, 2022

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 9th day of January, 2017, I caused to be served the foregoing document as follows:

Idaho Attorney General's Office
Department of Water Resources
Post Office Box 83720
Boise, Idaho 83720-0098

☒ Via US Mail, Postage Paid
☐ Via Facsimile (208) 287-6700
☐ Hand-Delivered - Court Folder
☐ Other _____

TL/LRS

THEODORE R. LARSEN