

ROBERT E. WILLIAMS

IDAHO STATE BAR NO. 1693

WILLIAMS, MESERVY & LOTHSPREICH, LLP

Attorneys at Law

153 East Main

P. O. Box 168

Jerome, Idaho 83338

Telephone: (208) 324-2303

Facsimile: (208) 324-3135

Attorney for Mitchell B. Schmidt and

Gordon and Dorothy Schmidt, husband and wife

RECEIVED
MAR 17 2014
DEPARTMENT OF
WATER RESOURCES

JAMES P. SPECK

IDAHO STATE BAR NO. 2067

SPECK & AANESTAD

A Professional Association

120 East Avenue North

P.O. Box 987

Ketchum, ID 83340

Telephone: (208)726.4421

Facsimile: (208)726.0752

Attorney for William Fruehling

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT
LICENSE NO. 37-20628 IN THE NAME
OF WILLIAM FRUEHLING

EXCEPTIONS TO ORDER DENYING
PETITION FOR RECONSIDERATION
DATED FEBRUARY 27, 2014 AND BRIEF
IN SUPPORT OF EXCEPTIONS

TO THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES
("IDWR"):

ROBERT E. WILLIAMS of Williams, Meservy & Lothspeich, LLP, on behalf of
Mitchell B. Schmidt, and Gordon Schmidt and Dorothy Schmidt, husband and wife
(collectively "Schmidts"), and JAMES P. SPECK, of Speck & Aanestad, A Professional
Association, on behalf of William Fruehling ("Fruehling"), pursuant to IDWR Rule of

Procedure 730.02.b.iii, do hereby take exception to the Order Denying Petition for Reconsideration dated February 27, 2014 ("Order"), executed by Shelley Keen, on behalf of the Idaho Department of Water Resources (hereinafter "IDWR" or "Department").

I.

PROCEDURAL BACKGROUND

A. On January 28, 2014, IDWR issued License Number 37-20628 to Fruehling under a preliminary order. A copy of the preliminary order and Water Right License is attached hereto as **EXHIBIT A**.

B. On February 11, 2014, Charles G. Brockway, P.E., filed a Petition for Reconsideration of the Preliminary Order issuing the license ("Petition for Reconsideration"). A copy of the Petition for Reconsideration is attached hereto as **EXHIBIT B**.

C. On February 27, 2014, Robert E. Williams, of Williams, Meservy & Lothspeich, LLP, on behalf of Gordon and Dorothy Schmidt, sent to Shelley Keen of IDWR, a letter supporting the Petition for Reconsideration of the Preliminary Order filed by Mr. Brockway. A copy of the letter is attached hereto as **EXHIBIT C**.

D. IDWR subsequently acknowledged that Mr. Keen had not received or reviewed Exhibit C before issuing the Order. See *Affidavit of Robert E. Williams*, copied and attached hereto as **EXHIBIT D**.

II.

FACTUAL BACKGROUND

A. The Schmidts own Water Right No. 37-13251. A true and correct copy of the Partial Decree for Water Right No. 37-13251 issued September 24, 2010 in the Snake River Basin Adjudication is attached hereto as **EXHIBIT E** ("Partial Decree").

B. Water Right No. 37-13251 has two (2) points of diversion. One is in Township 1 South, Range 15 EBM, Section 10, NENESW on property owned by Fruehling ("North

Well”). The other is in the NESESW of the same section, township and range (“South Well”) on the Schmidts’ property.

C. Under the Partial Decree, no limits are placed on the ability of the Schmidts to divert some or all of their irrigation water from either point of diversion.

D. From 1987 through 2022 the Schmidts have contracted for placement of approximately 263.4 acres of their real property within the place of use of Water Right No. 37-13251 in the Conservation Reserve Program (“CRP”). (See *Affidavit of Gordon Schmidt*, copied and attached hereto as **EXHIBIT F**). Since 1987 the Schmidts have not irrigated the 263.4 acres in the CRP. However, the Schmidts have diverted irrigation water from Water Right No. 37-13251 through the South Well to real property within the place of use for Water Right No. 37-13251 that is not enrolled in the CRP. (See EXHIBIT F.)

E. The North Well is also the sole point of diversion for Water Rights Nos. 37-7282B, and 37-7333B owned by Fruehling. The North Well is also the proposed point of diversion under License No. 37-20628.

F. The Schmidts were not a co-applicant for License No. 37-20628, nor do they have any ownership in License No. 37-20628 that has been issued to Fruehling.

III.

EXCEPTIONS TAKEN

The Schmidts and Fruehling take exceptions to Findings of Fact and Conclusions of Law contained in the Order Denying Petition for Reconsideration as follows:

FINDING OF FACT NO. 4. The last sentence of Finding of Fact No. 4 determining that the present diversion capacity of the system at the South Well is 2.35 cfs is irrelevant to the licensing procedure for License No. 37-20628. Fruehling has no ownership interest in or right to use the South Well for any purpose. The South Well is not a point of diversion for 37-20628.

FINDING OF FACT NO. 7. This finding observes in part that if the Schmidts had diverted water under Water Right 37-13251 during “the authorized development period for the permit”,

presumably meaning the period of the development for Permit No. 37-20628, they would have been limited to the combined capacity of the pumping systems at the North and South Well. This finding is erroneous because the Schmidts did use irrigation water from the South Well during the period the Fruehling permit was developed (i.e. June 2002 to June 2007), but did not apply it to the portion of the place of use in the CRP. (See EXHIBIT F). Moreover, during this time period the Schmidt's claim to 37-13251 was pending in the SRBA and thus not subject to partial forfeiture for non-use of any portion of that water right. The Schmidt's would have had the right to enhance the capacity of the South Well to allow them to divert the full amount of their water right except for the fact that a portion of the place of use for 37-13251 was then in the CRP. Any theoretical development at the South Well during the period that Fruehling's permit was being developed would have had no impact on the Fruehling permit because Fruehling never had and does not now have an ownership interest in the South Well. This finding also erroneously assumes that the current capacity of the South Well is a limiting factor to Schmidts' rights as partially decreed for Water Right No. 37-13251.

FINDING OF FACT NO. 9. This finding is erroneous because it limits the combined rights of 37-7282B, 37-7333B, 37-13251 and 37-20628 to a total diversion of 6.52 cfs. IDWR does not have jurisdiction in the pending proceedings to license 37-20628 to Fruehling to alter the elements of Water Right No. 37-13251 as set forth in the Partial Decree because, as discussed below, a partial decree is a final judgment and cannot be modified in an administrative proceeding except pursuant to Idaho Code Section 42-222 which does not apply to the licensing of 37-20628. The finding should be modified to provide that the Schmidts may continue to exercise their right to divert a total of 4.88 cfs for irrigation purposes from either the North Well or the South Well exclusively, or in any combination. The current capacity of either the South Well or the North Well should not be a limiting factor on the Schmidts' rights under the Partial Decree.

CONCLUSION OF LAW NO. 1. This conclusion of law is unlawful because it implies that the Schmidts had a duty to increase the diversion capacity of the South Well during the development of the Fruehling permit, even though the Schmidts were not a party to that application for permit. It begs the question why anyone in Schmidts' position would increase

the current capacity of the South Well to provide water for CRP acres that could not be irrigated. This conclusion of law also amounts to an unlawful modification of the Partial Decree. The Order offers no explanation as to how Idaho Code 42-219, that forbids issuing a license for more water than has been applied to beneficial purposes, should apply to any water right not owned or applied for by the applicant. Nor does it explain the basis upon which the statute would imply such a duty exists on any right holder not a party to an application for a permit. Furthermore, the system which delivers water to Fruehling's Water Rights 37-7282B, 37-7333B and 37-20628 is NOT now, and was not during the period of development of 37-20628, connected to the system that delivers water to 37-13251 (*See* Exhibit F). The diversion of water under the last water right had nothing to do with the development of 37-20628. Fruehling does not have any right to use the South Well as a point of diversion for any of his water rights, so the capacity of that well must not be a limiting factor for the diversion of water under the Fruehling water rights.

CONCLUSION OF LAW NO. 2. This conclusion is unlawful because it provides that Schmidts, as part of the licensing procedure for Water Right No. 37-20628, in which they have no ownership interest, have now had their Partial Decree for Water Right No. 37-13251 modified by limiting the diversion rate of water they can withdraw from the South Well.

CONCLUSION OF LAW NO. 3. This conclusion should be changed to grant the Petition for Reconsideration and delete Condition of Approval #9 from the License for 37-20628.

IV.

BRIEF

Schmidt and Fruehling take exception to the Department's inclusion of "Condition of Approval 9" in Water Right License no. 37-20628 because the effect of such action by the Department violates Rule 14d of the Local Rules of the Snake River Basin Adjudication. Rule 14d states "Parties seeking to modify a partial decree shall comply with I.R.C.P 60(a) or 60(b). Partial decrees are final judgments and cannot be modified by an administrative proceeding except as provided in I.C. 42-222." The present proceeding is not one under I.C. § 42-222. Water right 37-13251 was decreed by partial decree in September 2010 and included a diversion rate of 4.88 cfs that may be utilized in full or in part at one or both of two points of

diversion (the North Well and/or the South Well). The partial decree is a final judgment and cannot be modified in an administrative proceeding such as the present proceeding. The inclusion of "Condition of Approval 9" unlawfully modifies an element of water right no. 37-13251.

In addition, proceedings before the Idaho Department of Water Resources are governed by the Idaho Administrative Procedure Act. Idaho Code § 67-5240. Decisions issued by the Department may be overturned when the Department's findings (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious or an abuse of discretion. Idaho Code § 67-5279(3); *Barron v. Idaho Dep't of Water Res. (in Re Transfer No. 5116)*, 135 Idaho 414, 417 (2001). No constitutional, statutory or regulatory provision authorizes the Department, in issuing a new water right license, to modify an element of a partially decreed water right under Idaho Code 42-1412(6) owned by a person who is not a party to the application under consideration and who has no ownership interest in the real property where the water right being applied for will be used. The Department's decision to include "Condition for Approval 9" in Water Right License for right no. 37-20628 violates statutory and constitutional provisions, exceeds the Department's statutory authority, is not supported by substantial evidence in the record and is arbitrary and capricious and should, therefore, be removed.

The Department exceeded its statutory authority when it considered the capacity of the South Well and the quantity of water apportioned to right no 37-13251. The Order Denying Petition for Reconsideration refers to Idaho Code § 42-219 as authority supporting the Department's action. Section 42-219 speaks in terms of the license under consideration. It does not authorize the Department to look beyond the application under consideration to other users' decreed water rights or to points of diversion that are not used for the water right to be licensed. Such action by the Department exceeds the authority provided to it by 42-219.

Furthermore, the Department's interpretation of the authority given to it by section 42-219 would allow it to routinely violate Rule 14d of the Local Rules of the Snake River Basin Adjudication. Once decreed by partial decree, the elements of a water right cannot be modified

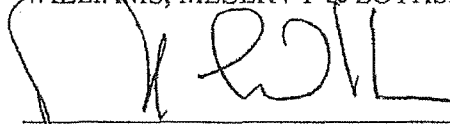
through an administrative proceeding unless the owner of the decreed water right applies under Idaho Code Section 42-222 to change all or a portion of that water right, which is simply not the proceeding now before the Department. If, in considering applications for unappropriated water, the Department could routinely modify the quantity of water apportioned to already decreed rights, finality would never be accomplished in the SRBA. Sustaining the inclusion of "Condition of Approval 9" not only violates and exceeds statutory provisions and rules of procedure, it eviscerates the purposes and goals of the SRBA.

CONCLUSION

For the foregoing reasons, the decision of the Department is in error. It has violated and exceeded statutory authority and local rules of procedure. It has interpreted its authority under section 42-219 so broadly that it violates the clear mandate of local rule 14d that partial decrees are final judgments and are not subject to modification in an administrative proceeding. The breadth of the Department's interpretation of 42-219 sets dangerous precedent that would allow the Department to modify the rights of those who have no interest in an administrative proceeding not involving a transfer under I.C. 42-222. "Condition for Approval 9" is clearly in excess of the Department's authority and jurisdiction and it must be removed.

DATED this 14th day of March, 2014.

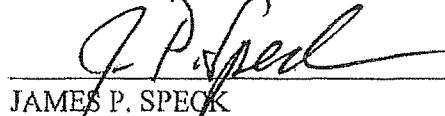
WILLIAMS, MESERVY & LOTHSPREICH, LLP



ROBERT E. WILLIAMS

Attorney for Mitchell B. Schmidt and
Gordon and Dorothy Schmidt, husband and wife

SPECK & AANESTAD



JAMES P. SPECK

Attorney for William Fruehling

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 14 day of March, 2014, I caused to be served the foregoing document as follows:

IDWR Southern Region 1341 Fillmore Street, Suite 200 Twin Falls, ID 83301-3380	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☐ Other _____
IDWR Document Depository P.O Box 83720 Boise, ID 83720-0098	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☐ Other _____
Gary L. Spackman, Director Deborah Gibson IDWR 322 East Front Street PO Box 83720 Boise ID 83720-0098	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☒ Other Electronically to: gary.spackman@idwr.idaho.gov deborah.gibson@idwr.idaho.gov
Charles G. Brockway Brockway Engineering 2016 N. Washington St., Suite 4 Twin Falls ID 83301	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☒ Other Electronically to: charles.g.brockway@brockwayeng.com

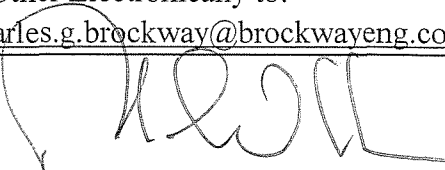

ROBERT E. WILLIAMS

EXHIBIT A



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Website: www.idwr.idaho.gov

C.L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Director

January 28, 2014

WILLIAM FRUEHLING
PO BOX 4508
KETCHUM ID 83340

RE: License No. 37-20628

Issuance of License

Dear Water Right Holder(s):

The Department of Water Resources has issued the enclosed Water Right License confirming that a water right has been established in accordance with your permit. Please be sure to thoroughly review the conditions of approval and remarks listed on your license.

The license is a PRELIMINARY ORDER issued by the Department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action by the Department unless a party petitions for reconsideration or files an exception and/or brief within fourteen (14) days of the service date as described in the enclosed information sheet.

Please note that water right owners are required to report any change of water right ownership and/or mailing address to the Department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the Department or visit the Department's homepage on the Internet to obtain the proper forms and instructions.

If you have any questions, please contact me at 208-287-4916.

Sincerely,

Craig L. Saxton

Water Rights Supervisor

Enclosure(s)

cc: JAMES P SPECK
BROCKWAY ENGINEERING PLLC
GORDON & DOROTHY SCHMIDT

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2014, I mailed a true and correct copy, postage prepaid, of the foregoing **PRELIMINARY ORDER (Approved License)** to the person(s) listed below:

RE: WATER RIGHT NO.

37-20628

**JAMES P SPECK
PO BOX 987
KETCHUM ID 83340**

**WILLIAM FRUEHLING
PO BOX 4508
KETCHUM ID 83340**

**BROCKWAY ENGINEERING PLLC
C/O CHARLES G BROCKWAY
2016 N WASHINGTON ST STE 4
TWIN FALLS ID 83301**

**GORDON & DOROTHY SCHMIDT
630 E HWY 20
FAIRFILED ID 83327**



Darla Block
Technical Records Specialist

EXPLANATORY INFORMATION TO ACCOMPANY A PRELIMINARY ORDER

(To be used in connection with actions when a hearing was not held)

(Required by Rule of Procedure 730.02)

The accompanying order or approved document is a "Preliminary Order" issued by the department pursuant to section 67-5243, Idaho Code. It can and will become a final order without further action of the Department of Water Resources ("department") unless a party petitions for reconsideration, files an exception and brief, or requests a hearing as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the department within fourteen (14) days of the service date of this order. **Note: the petition must be received by the department within this fourteen (14) day period.** The department will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after: (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding with the Director. Otherwise, this preliminary order will become a final order of the agency.

REQUEST FOR HEARING

Unless a right to a hearing before the Department or the Water Resource Board is otherwise provided by statute, any person aggrieved by any final decision, determination, order or action of the Director of the Department and who has not previously been afforded an opportunity for a hearing on the matter may request a hearing pursuant to section 42-1701 A(3), Idaho Code. A written petition contesting the action of the Director and requesting a hearing shall be filed within fifteen (15) days after receipt of the denial or conditional approval.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with IDAPA Rules 37.01.01302 and 37.01.01303 (Rules of Procedure 302 and 303).

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its service date if a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) The petition for reconsideration is disposed of; or
- (b) The petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

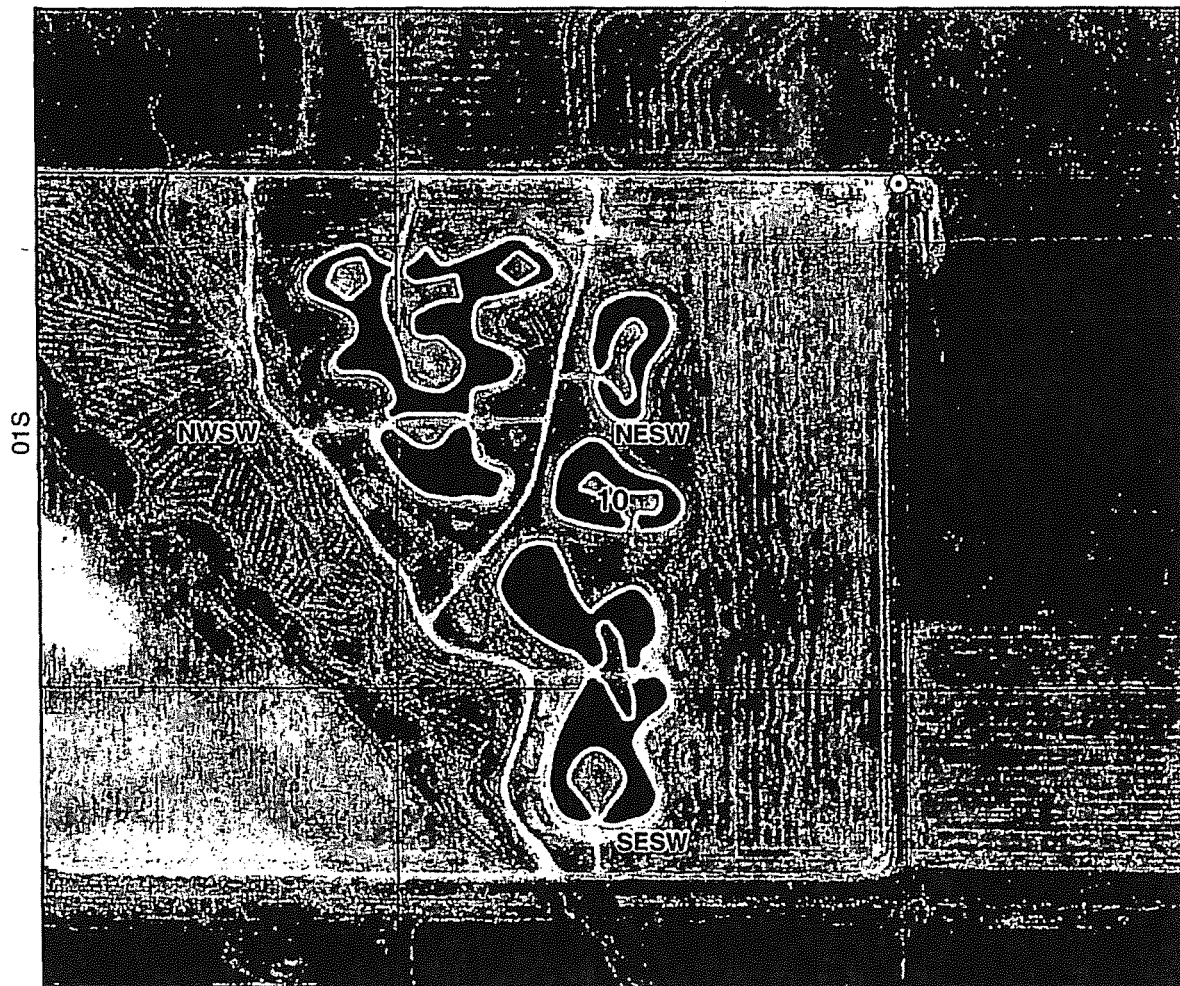
- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

State of Idaho
Department of Water Resources
Attachment To Water Right License
37-20628

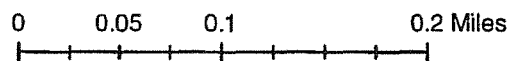
This map depicts the WILDLIFE STORAGE, RECREATION STORAGE, AESTHETIC STORAGE, AESTHETIC, WILDLIFE and RECREATION place of use boundary for this water right at the time of this approval and is attached to the approval document solely for illustrative purposes.

15E



- ⊙ Point of Diversion
- Place Of Use Boundary

-  Townships
-  PLS Sections
-  Quarter Quarters



State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 37-20628

Priority: October 15, 2001

Maximum Diversion Rate: 4.00 CFS
Maximum Diversion Volume: 652.0 AF

It is hereby certified that WILLIAM FRUEHLING
PO BOX 4508
KETCHUM ID 83340 has complied with the terms and
conditions of the permit, issued pursuant to Application for Permit dated October 15, 2001; and has
submitted Proof of Beneficial Use on May 21, 2007. An examination confirms water is diverted from:

SOURCE

GROUND WATER

and a water right has been established as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>DIVERSION RATE</u>	<u>ANNUAL DIVERSION VOLUME</u>
WILDLIFE STORAGE	04/01 to 10/31		25.5 AF
RECREATION STORAGE	04/01 to 10/31		25.5 AF
AESTHETIC STORAGE	04/01 to 10/31		25.5 AF
WILDLIFE	04/01 to 10/31	4.00 CFS	652.0 AF
RECREATION	04/01 to 10/31	4.00 CFS	652.0 AF
AESTHETIC	04/01 to 10/31	4.00 CFS	652.0 AF
DIVERSION TO STORAGE	04/01 to 10/31	4.00 CFS	

LOCATION OF POINT(S) OF DIVERSION:

GROUND WATER NE¼SW¼ Sec. 10, Twp 01S, Rge 15E, B.M. CAMAS County

PLACE OF USE: WILDLIFE AND WILDLIFE STORAGE, RECREATION AND RECREATION
STORAGE, and AESTHETIC AND AESTHETIC STORAGE

Twp Rge Sec	NE				NW				SW				SE				
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	Totals
01S 15E 10									X	X		X					

CONDITIONS OF APPROVAL

1. The issuance of this right does not grant any right-of-way or easement across the land of another.
2. Uses of water described in this right are for a waterfowl habitat project.
3. The diversion and use of water described in this right may be subject to additional conditions and limitations agreed to by the protestant and the right holder under a separate agreement to which the Department is not a party. Because the Department is not a party, the Department is not responsible for enforcement of any aspect of the agreement not specifically addressed in other conditions herein. Enforcement of those portions of the agreement not specifically addressed in other conditions shall be the responsibility of the protestant and the water right holder.

State of Idaho
Department of Water Resources
Water Right License

WATER RIGHT NO. 37-20628

CONDITIONS OF APPROVAL CONTINUED

4. Evaporative losses under this right shall be mitigated by the reduction of irrigation under Rights 37-7282B and 37-7333B as approved in Transfer No. 69650. All water diverted under Rights 37-7282B, 37-7333B and 37-20628 shall be maintained on the property for the beneficial uses associated with these rights and/or allowed to recharge back to ground water and shall not be allowed to leave the property as runoff.
5. After specific notification by the Department, the right holder shall install a suitable measuring device or shall enter into an agreement with the Department to determine the amount of water diverted from power records and shall annually report the information to the Department.
7. Use of water under this right will be regulated by a watermaster with responsibility for the distribution of water among appropriators within a water district. At the time of this approval, this water right is within State Water District No. 37B.
6. The following rights are diverted through the point of diversion described above: 37-20628, 37-7282B, 37-7333B and 37-13251.
8. Rights 37-7282B, 37-7333B, and 37-20628 when combined shall not exceed a total diversion rate of 4.17 cfs.
9. Rights 37-7282B, 37-7333B, 37-13251 and 37-20628 when combined shall not exceed a total diversion rate of 6.52 cfs.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. The water right confirmed by this license is subject to all prior water rights and shall be used in accordance with Idaho law and applicable rules of the Department of Water Resources.

Signed and sealed this 27th day of January, 2014.

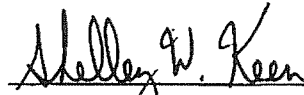
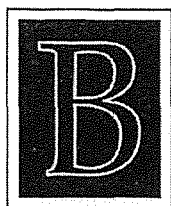

for GARY SPACKMAN
Director

EXHIBIT B



BROCKWAY
ENGINEERING
P.L.L.C.

Hydraulics

Hydrology

Water Resources

February 11, 2014

Mr. Shelley Keen
Idaho Department of Water Resources
322 East Front Street
PO Box 83720
Boise, Idaho 83720-0098

Re: Licensing of Permit 37-20628 / Fruehling

Dear Shelley:

Please consider this letter as a formal Petition for Reconsideration of the preliminary order issuing a license for the above-referenced permit.

It appears that the combined-use condition limiting irrigation diversion rate with associated rights (condition 9) does not take into account the additional diversion authorization provided by permit 37-20628. This permit was intended to be additive to the irrigation rights on the permittee's property, up to the capacity of the north well. It was further intended that the same diversion rate structure for irrigation usage from both the north and south wells be maintained under rights 37-7282B, 37-7333B, and 37-13251.

If the north well is diverting its measured capacity of 4.17 cfs, the remainder of the irrigation (Gordon Schmidt's 4.88 cfs under 37-13251) should be allowed to be diverted from the south well, so the total rate limit should be $4.17 + 4.88 = 9.05$ cfs. With the license as proposed, condition 9 would limit the south well to a diversion of $6.52 - 4.17 = 2.35$ cfs, which represents a cutback relative to the decreed irrigation structure and in fact would reduce Mr. Schmidt's per-acre rate to 0.25 miners inches/acre, down from an already thin 0.5 inches/acre.

The source of the miscalculation may be that it was assumed that all of the 4 cfs from the north well was irrigation usage, and therefore would be subject to the original combined-use limit for the irrigation rights. In fact, only 1.52 cfs of that amount is for irrigation (under 37-7282B and 37-7333B).

Please do not hesitate to contact me to discuss this issue at any time.

Cordially,

Charles G. Brockway, P.E.

Cc: Bill Fruehling
Jim Speck

CHARLES E.
BROCKWAY,
PH.D., P.E.

CHARLES G.
BROCKWAY,
PH.D., P.E.

2016 NORTH
WASHINGTON
STREET • SUITE 4

TWIN FALLS,
IDAHO 83301

208•736•8543

FAX: 736•8506

EXHIBIT C

Williams, Meservy & Lothspeich, LLP
Attorneys at Law

153 East Main Street
Post Office Box 168
Jerome, Idaho 83338-0168



ROBERT E. WILLIAMS
JAMES C. MESERVY
JOHN B. LOTHSPREICH
BRIAN J. WILLIAMS - ASSOCIATE
THEODORE R. LARSEN - ASSOCIATE
EUGENE D. FREDERICKSEN - RETIRED

TELEPHONE: (208) 324-2303
TELECOPIER: (208) 324-3135
E-MAIL: REWILLIAMS@CABLEONE.NET

February 27, 2014

Idaho Department of Water Resources
Attn: Mr. Shelley Keen
322 East Front Street
PO Box 83720
Boise ID 83720-0098

*RE: Petition for Reconsideration of Preliminary Order for License No. 37-20628,
dated January 28, 2014*

Dear Mr. Keen:

I represent Gordon and Dorothy Schmidt of Fairfield, Idaho. Mr. and Mrs. Schmidt have an ownership interest in Water Right No. 37-13251, mentioned in Condition No. 9 of the license above referenced.

My clients have reviewed the preliminary order issued January 28, 2014, In The Matter Of The Issuance Of The License Of Water Right No. 37-20628. The license is owned by William Fruehling of Ketchum, Idaho. My clients have also been provided a copy of the Petition for Reconsideration addressed to the Idaho Department of Water Resources ("IDWR") under date of February 11, 2014, signed by Charles G. Brockway on behalf of Mr. Fruehling. I request that this letter on behalf of the Schmidts be made part of the permanent record of the matter involving the licensing of water right no. 36-20628.

My clients object to the combined diversion rate limitation of 6.52 cfs. described in the Condition of Approval No. 9 in the license. My clients, who have no ownership interest in the license, or in the underlying Permit and Application for Permit related to the license, do have an ownership interest in Water Right No. 37-13251. The partial decree for Water Right No. 37-13251 in the SRBA issued on September 24, 2010, provides for two separate points of diversion for the right. One point of diversion is located in the NENESW of Section 10, Township 1 South Range 15 EBM, Section 10, Camas County, Idaho ("North Well"). The second point of diversion for the right is within the NESESW of Section 10, Township 1 South, Range 15 EBM, Camas County, Idaho ("South Well"). Only the North Well is involved with the licensing of Water Right No. 37-20628.

The Schmidts believe that the Fruehling licensing procedure is not a means by which IDWR can lawfully modify their partial decree rights in the South Well point of diversion under Water Right No. 37-13251. If the Fruehling license stands as now approved in the preliminary order, my clients would only be permitted to divert 2.35 cfs. from the South Well under their right. This is an unacceptable material alteration of the partial decree for Water Right 37-13251. My clients contend that it is unlawful for IDWR to modify the terms of any partial decree as part of a licensing procedure of another right to which the owner of the water right under the partial decree was not a party. Further, the licensing procedure for Water Right No. 37-20628 is not with any of the grounds specified by Idaho Rule of Civil Procedure 60(b) as a basis for the possible modification of an order of a court like the partial decree for the Schmidts' right.

My clients fully support the Petition for Reconsideration filed on behalf of Mr. Fruehling and request that Condition No. 9 of the license be modified to provide that the combined diversion rate in Condition No. 9 be changed to 9.05 cfs. To permit Condition No. 9 of the Fruehling license to stand as now constituted will cause significant harm to my clients in that the remaining diversion rate for Right No. 37-13251 would be reduced to 2.35 cfs., a loss of 2.53 cfs. from the amount now available under the partial decree for that right.

Please contact me with any questions you may have.

Very truly yours,

WILLIAMS MESERVY & LOTHSPREICH, LLP



ROBERT E. WILLIAMS

REW/bsb
Encl.
C: Client
Jim Speck
Chuck Brockway, Jr.
Director of Idaho Department of Water Resources
William Fruehling
\\SERVER\share\data\Schmidt, Gordon & Dorothy\IDWR\Keen 14 Feb 26th.doc

EXHIBIT D

ROBERT E. WILLIAMS
IDAHO STATE BAR NO. 1693
WILLIAMS, MESERVY & LOTH SPEICH, LLP
Attorneys at Law
153 East Main
P. O. Box 168
Jerome, Idaho 83338
Telephone: (208) 324-2303
Facsimile: (208) 324-3135
Attorney for Mitchel B. Schmidt and
Gordon and Dorothy Schmidt, husband and wife

JAMES P. SPECK
IDAHO STATE BAR NO. 2067
SPECK & AANESTAD
120 East Avenue North
P.O. Box 987
Ketchum, ID 83340
Telephone: (208) 726.4421
Facsimile: (208) 726.0752
Attorney for William Fruehling

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT
LICENSE NO. 37-20628 IN THE NAME
OF WILLIAM FRUEHLING

AFFIDAVIT OF ROBERT E. WILLIAMS IN
SUPPORT OF EXCEPTIONS TO ORDER
DENYING PETITION FOR
RECONSIDERATION DATED
FEBRUARY 27, 2014 AND BRIEF IN
SUPPORT OF EXCEPTIONS

STATE OF IDAHO)
)ss.
County of Jerome)

ROBERT E. WILLIAMS, being first duly sworn, deposes and says as follows:

1. I am a licensed and practicing attorney in the state of Idaho. I am a partner in
the firm of Williams, Meservy and Lothspeich, LLP.

2. I represent Gordon and Dorothy B. Schmidt and Mitchell B. Schmidt in these proceedings.

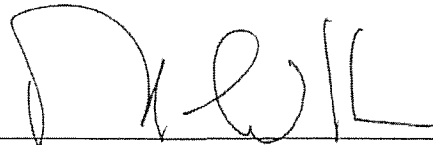
3. On February 27, 2014, I caused to be deposited in the United States mail, first class postage prepaid, a letter addressed to Shelley Keen at the Idaho Department of Water Resources on behalf of Gordon and Dorothy Schmidt. A copy of the letter is attached hereto as EXHIBIT A.

4. On Monday, March 3, 2014, I was provided a copy of the Order Denying Petition for Reconsideration in the Matter of Water Right License No. 37-20628 which had been signed by Shelley Keen on February 27, 2014.

5. Later, on Monday, March 3, 2014, I received a telephone call from personnel at the state office of the Idaho Department of Water Resources advising that Shelley Keen had not seen or read my letter of February 27, 2014, prior to entering the Order Denying Petition for Reconsideration on the same date.

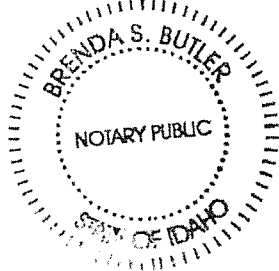
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 14th day of March, 2014.



ROBERT E. WILLIAMS

SUBSCRIBED AND SWORN To before me this 14th day of March, 2014.



Notary Public for Idaho

Residing at:

Comm. Expires:

Gooding
3/5/2016

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 14th day of March, 2014, I caused to be served the foregoing document as follows:

IDWR Southern Region 1341 Fillmore Street, Suite 200 Twin Falls, ID 83301-3380	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☐ Other _____
IDWR Document Depository P.O Box 83720 Boise, ID 83720-0098	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☐ Other _____
Gary L. Spackman, Director Deborah Gibson IDWR 322 East Front Street PO Box 83720 Boise ID 83720-0098	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☒ Other Electronically to: gary.spackman@idwr.idaho.gov deborah.gibson@idwr.idaho.gov
Charles G. Brockway Brockway Engineering 2016 N. Washington St., Suite 4 Twin Falls ID 83301	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☒ Other _____ charles.g.brockway@brockwayeng.com

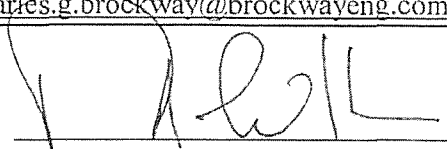

ROBERT E. WILLIAMS

EXHIBIT A

Williams, Meservy & Lothspeich, LLP
Attorneys at Law

153 East Main Street
Post Office Box 168
Jerome, Idaho 83338-0168



ROBERT E. WILLIAMS
JAMES C. MESERVY
JOHN B. LOTHSPEICH
BRIAN J. WILLIAMS - ASSOCIATE
THEODORE R. LARSEN - ASSOCIATE
EUGENE D. FREDERICKSEN - RETIRED

TELEPHONE: (208) 324-2303
TELECOPIER: (208) 324-3135
E-MAIL: REWILLIAMS@CABLEONE.NET

February 27, 2014

Idaho Department of Water Resources
Attn: Mr. Shelley Keen
322 East Front Street
PO Box 83720
Boise ID 83720-0098

*RE: Petition for Reconsideration of Preliminary Order for License No. 37-20628,
dated January 28, 2014*

Dear Mr. Keen:

I represent Gordon and Dorothy Schmidt of Fairfield, Idaho. Mr. and Mrs. Schmidt have an ownership interest in Water Right No. 37-13251, mentioned in Condition No. 9 of the license above referenced.

My clients have reviewed the preliminary order issued January 28, 2014, In The Matter Of The Issuance Of The License Of Water Right No. 37-20628. The license is owned by William Fruehling of Ketchum, Idaho. My clients have also been provided a copy of the Petition for Reconsideration addressed to the Idaho Department of Water Resources ("IDWR") under date of February 11, 2014, signed by Charles G. Brockway on behalf of Mr. Fruehling. I request that this letter on behalf of the Schmidts be made part of the permanent record of the matter involving the licensing of water right no. 36-20628.

My clients object to the combined diversion rate limitation of 6.52 cfs. described in the Condition of Approval No. 9 in the license. My clients, who have no ownership interest in the license, or in the underlying Permit and Application for Permit related to the license, do have an ownership interest in Water Right No. 37-13251. The partial decree for Water Right No. 37-13251 in the SRBA issued on September 24, 2010, provides for two separate points of diversion for the right. One point of diversion is located in the NENESW of Section 10, Township 1 South Range 15 EBM, Section 10, Camas County, Idaho ("North Well"). The second point of diversion for the right is within the NESESW of Section 10, Township 1 South, Range 15 EBM, Camas County, Idaho ("South Well"). Only the North Well is involved with the licensing of Water Right No. 37-20628.

Mr. Shelley Keen
February 27, 2014
Page 2

The Schmidts believe that the Fruehling licensing procedure is not a means by which IDWR can lawfully modify their partial decree rights in the South Well point of diversion under Water Right No. 37-13251. If the Fruehling license stands as now approved in the preliminary order, my clients would only be permitted to divert 2.35 cfs. from the South Well under their right. This is an unacceptable material alteration of the partial decree for Water Right 37-13251. My clients contend that it is unlawful for IDWR to modify the terms of any partial decree as part of a licensing procedure of another right to which the owner of the water right under the partial decree was not a party. Further, the licensing procedure for Water Right No. 37-20628 is not with any of the grounds specified by Idaho Rule of Civil Procedure 60(b) as a basis for the possible modification of an order of a court like the partial decree for the Schmidts' right.

My clients fully support the Petition for Reconsideration filed on behalf of Mr. Fruehling and request that Condition No. 9 of the license be modified to provide that the combined diversion rate in Condition No. 9 be changed to 9.05 cfs. To permit Condition No. 9 of the Fruehling license to stand as now constituted will cause significant harm to my clients in that the remaining diversion rate for Right No. 37-13251 would be reduced to 2.35 cfs., a loss of 2.53 cfs. from the amount now available under the partial decree for that right.

Please contact me with any questions you may have.

Very truly yours,

WILLIAMS MESERVY & LOTH SPEICH, LLP



ROBERT E. WILLIAMS

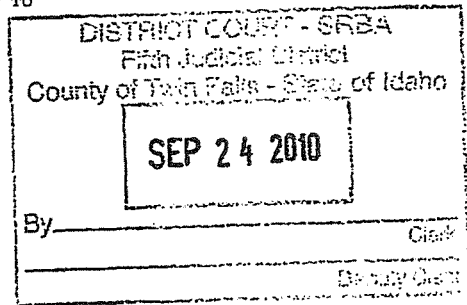
REW/bsb
Encl.
C: Client
Jim Speck
Chuck Brockway, Jr.
Director of Idaho Department of Water Resources
William Fruehling
\\SERVER\\share\\data\\Schmidt, Gordon & Dorothy\\IDWR\\Keen 14 Feb 26th.doc

EXHIBIT E

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)
_____)

PARTIAL DECREE PURSUANT TO
I.R.C.P. 54(b) FOR
Water Right 37-13251



NAME AND ADDRESS: MITCHELL B SCHMIDT
PO BOX 524
GOODING, ID 83330

DOROTHY SCHMIDT
GORDON SCHMIDT
RT 1 BOX 1113
630 E 000 N
FAIRFIELD, ID 83327

SOURCE: GROUND WATER

QUANTITY: 4.88 CFS
1753.50 AFY

PRIORITY DATE: 01/14/1974

POINT OF DIVERSION: T01S R15E S10 NENESW Within Camas County
NESESW

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	04-01 TO 11-01	4.88 CFS 1753.50 AFY

PLACE OF USE:	Irrigation	Within Camas County
	T01S R15E S10	
		NENE 39.0 NWNE 40.0
		SWNE 40.0 SENE 39.0
		SWSW 22.0 SESW 16.0
		NESE 39.0 NWSE 39.0
		SWSE 36.0 SESE 35.0
	S15	NENE 38.0 NWNE 39.0
		SWNE 40.0 SENE 39.0
	501.0 Acres Total	

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS
NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT
ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY
DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE
ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Eric J. Wildman
Presiding Judge of the
Snake River Basin Adjudication

EXHIBIT F

ROBERT E. WILLIAMS
IDAHO STATE BAR NO. 1693
WILLIAMS, MESERVY & LOTH SPEICH, LLP
Attorneys at Law
153 East Main
P. O. Box 168
Jerome, Idaho 83338
Telephone: (208) 324-2303
Facsimile: (208) 324-3135
Attorney for Mitchell B. Schmidt and
Gordon and Dorothy Schmidt, husband and wife

JAMES P. SPECK
IDAHO STATE BAR NO. 2067
SPECK & AANESTAD
120 East Avenue North
P.O. Box 987
Ketchum, ID 83340
Telephone: (208) 726.4421
Facsimile: (208) 726.0752
Attorney for William Fruehling

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF WATER RIGHT LICENSE NO. 37-20628 IN THE NAME OF WILLIAM FRUEHLING	AFFIDAVIT OF GORDON SCHMIDT IN SUPPORT OF EXCEPTIONS TO ORDER DENYING PETITION FOR RECONSIDERATION DATED FEBRUARY 27, 2014 AND BRIEF IN SUPPORT OF EXCEPTIONS
--	--

STATE OF IDAHO)
)ss.
County of Jerome)

GORDON SCHMIDT, being first duly sworn, deposes and says as follows:

1. I am a resident of Camas County, Idaho. I am married to Dorothy Schmidt. Mitchell B. Schmidt is my brother. Collectively we are the owners of Water Right No. 37-13251.

2. Mitchell B. Schmidt, Dorothy Schmidt and myself also collectively own all of the real property constituting the place of use for Water Right No. 37-13251 as it has been partially decreed.

3. In 1987, Bar H Bar, Inc., an Idaho corporation, owned by my wife and I; Lola H. Schmidt; and Mitchell B. Schmidt, signed a contract with the Commodity Credit Corporation placing approximately 263.4 acres of the real property within the place of use for Water Right No. 37-13251 in the Conservation Reserve Program. Mitchell B. Schmidt, Dorothy Schmidt and myself are the successors in ownership for the real property comprising the lawful place of use under Water Right No. 37-13251 with respect to Bar H Bar, Inc. and Lola H. Schmidt.

4. The 263.4 acres referenced in the previous paragraph have remained in the Conservation Reserve Program through the present date. The current CRP contract expires in 2022.

5. Since 1987, the south point of diversion referenced in the Partial Decree for Water Right No. 37-13251 has been used to provide irrigation water to the portions of the real property constituting the place of use for that right which were never enrolled in the Conservation Reserve Program. Water pumped from the south point of diversion for Water Right No. 37-13251 was used for such purposes during the 2013 farming season. No irrigation water from the north point of diversion for Water Right No. 37-13251 has been provided to any of the place of use for that water right since 1987.

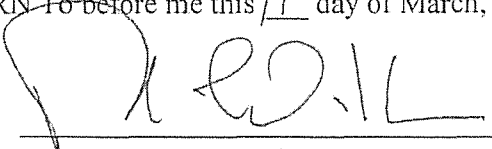
6. I am familiar with the current system which delivers water under William Fruehling's water rights 37-7282B, 37-7333B and 37-20628 to his real property. That system is not presently connected to the separate system that delivers irrigation water to Water Right No. 37-13251, nor has it ever been. The two systems were therefore not connected between October 15, 2001, the date that William Fruehling filed his application for permit that led to the issuance of the license for Water Right No. 37-20628, and the date of this affidavit.

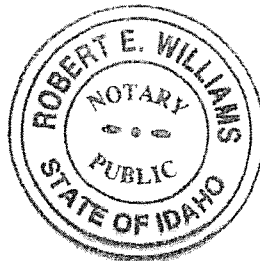
FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 14th day of March, 2014.


GORDON SCHMIDT

SUBSCRIBED AND SWORN To before me this 14th day of March, 2014.

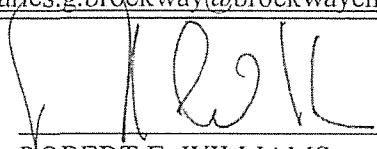

Notary Public for Idaho
Residing at: Jersey
Comm. Expires: 1/27/17



CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 14th day of March, 2014, I caused to be served the foregoing document as follows:

IDWR Southern Region 1341 Fillmore Street, Suite 200 Twin Falls, ID 83301-3380	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☐ Other _____
IDWR Document Depository P.O Box 83720 Boise, ID 83720-0098	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☐ Other _____
Gary L. Spackman, Director Deborah Gibson IDWR 322 East Front Street PO Box 83720 Boise ID 83720-0098	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☒ Other Electronically to: gary.spackman@idwr.idaho.gov deborah.gibson@idwr.idaho.gov
Charles G. Brockway Brockway Engineering 2016 N. Washington St., Suite 4 Twin Falls ID 83301	☒ Via US Mail, Postage Paid ☐ Via Facsimile - ☐ Hand-Delivered - Court Folder ☒ Other _____ charles.g.brockway@brockwayeng.com


ROBERT E. WILLIAMS