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RECEIVED

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June 28, 2012

Department of Water Resources
Eastern Region

Idaho Department of Water Resources
Attn: Kerrie Mathews
900 North Skyline Drive, Suite A
Idaho Falls, ID 83402-171

**RE: *Response to Inquiry Regarding Overlapping Water Rights and Forfeiture
Associated with Applications for Transfer filed by Natural Guardian LLC.***

Dear Kerrie:

We recently acquired from the state office several water right back files that were not available online. As we have reviewed this information, it does appear that Water Right No. 31-2471 was likely developed with the same place of use as the other Medicine Lodge Creek water rights that are the subject of these water right transfers. However, for reasons that are not entirely clear, there was no combined place of use or diversion limitations included in the final decree for Water Right No. 31-2471. As you know, the Snake River Basin Adjudication has been ongoing for over twenty-five years, and the resulting decree is a court order judicially confirming the elements of the water right. While it is possible that a mistake was made on this particular water right, the decree, on its face, does not limit the water right to any combined acreage limit with the other Medicine Lodge Creek water rights. Therefore, we request that the transfer application be processed as we have submitted. We believe it is consistent with the SRBA decrees that have been issued by the court, and have not been subsequently challenged by any party. If you wish to discuss this matter any further, please let us know.

In addition, your email dated May 2, 2012 raised some questions regarding known irrigation of acres, which the Department interprets to mean forfeiture. As an initial matter, we must state up front we very much disagree with the Department's interpretation of forfeiture law in this regard. Nevertheless, in this particular instance, forfeiture does not appear to be an issue. The delivery records that you provided to us demonstrate that water has never been historically available for the entire 26.36 cfs that Natural Guardian has a right to. This raises the question as to how Natural Guardian LLC intends to irrigate 934 acres. The answer is with improved delivery systems and pipelines, which will conserve what was previously lost water. In other words, Natural Guardian LLC and its predecessors have diverted every drop of water that was available to them as delivered by the water master. Idaho Code 42-223(6) states that "no portion of any water right shall be lost or forfeited for non-use if the non-use results from circumstances over which the water right owner has no control." In this particular case, the soil type and long

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delivery ditches and the flood irrigation methods simply did not provide, in most years, sufficient water to irrigate the entirety of the 934 acre place of use. We are now taking measures to remedy that problem, and believe that the 934 acres can be irrigated efficiently.

In addition, it is a well recognized defense to forfeiture that water rights are not forfeited if mother-nature does not provide sufficient water to satisfy the entirety of an individual's water rights. In other words, for a number of years, there have not been sufficient supplies to satisfy the entirety of Natural Guardian LLC's water rights, and therefore, the rights cannot be forfeited for that reason. Additionally, the Idaho Supreme Court has states on many occasions that forfeiture is abhorred under Idaho law, and every inference possible will be used to result in a finding of non-forfeiture. See eg., *Hurst v. Idaho-Iowa Lateral and Reservoir Co.*, 42 Idaho 436 and *Application of Boyer*, 73 Idaho 152.

We appreciate your attention to this matter. If you have any questions or concerns regarding the information we have provided, please let us know. Otherwise, we will look forward to the continued processing of these applications.

Best Regards,



Luke H. Marchant
HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.