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WATER RESOURCES

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RE: Companion Applications to Lease Water Right Nos. 34-2459 and 34-2460 to the Water Supply Bank and to Rent the Same From the Water Supply Bank.

Dear Monica:

Enclosed for processing are companion lease/rental applications for Water Right Nos. 34-2459 and 34-2460, both of which are filed in the name of Telford Lands LLC. They are companion documents, and if they are approved, need to be approved as a package.

The lease/rental application is necessary on a temporary basis because of a recent ruling from the SRBA court holding that the partial decrees for these rights could not be set aside under Rule 60(a) of the Idaho Rules of Civil Procedure to correct an error in the partial decrees. These water rights were not correctly decreed because one of the former owners of the water right, Willard Bell of Crater Farms, Inc., failed to object to the omission of the "Island Wells" (described below) in the SRBA recommendations for Water Right Nos. 34-2459 and 34-2460¹ on the basis of an accomplished transfer pursuant to Idaho Code § 42-1425.

The special master assigned to these subcases determined that there was a basis to set aside the decrees 11 years after they were originally decreed because the claim documents were not consistent. After investigation by IDWR, they also determined that there was sufficient evidence to demonstrate Mr. Bell's use of the Island Wells for Water Right Nos. 34-2459, 34-2460, 34-2461, and 34-2462, and therefore, the Island Wells should have an additional 12.5 cfs of water authorized to be diverted from them (Water Right No. 34-7037 is the water right that was originally developed at the Island Wells, and is a right for 12.0 cfs, which means that the

¹The accomplished transfer for these rights also originally included 34-2461 and 34-2462, but for purposes of this water bank lease application, only the 8.34 cfs from 34-2459 and 34-2460 is needed.

combined amount that could be diverted at the Island Wells is 24.5 cfs). This is set forth in the attached *Amended Director's Reports* for Subcase Nos. 34-2459 and 34-2460. Nick Spencer and Carter Fritschle are familiar with these subcases, and it may be a good idea to visit with them, but here is some brief background.

Water Right Nos. 34-2459, 34-2460, 34-2461, and 34-2462 are commonly referred to as the "Airport Water Rights."² Originally, these water rights were licensed in the 1960s with four points of diversion which are commonly referred to as the "Airport Wells." Over time, two of the wells became unusable. There are now currently only two operating Airport Wells, which are located in the SWSE and the SENESW, both in Section 2, Township 3N., Range 26E. The two unusable "lost" Airport Wells were essentially replaced by the two Island Wells (described in the next paragraph) in order to fully irrigate Crater Farms' 1,980 acres.

Water Right No. 34-7037, which is also appurtenant to the same place of use as the Airport Water Rights, was licensed in 1990. The license was based on a 1985 field exam, which licensed the diversion of water through the "Island Wells". Based upon a review of IDWR well driller's logs, the first of these wells was drilled in August of 1976 and the second was drilled in May of 1982. They are commonly referred to as the "Island Wells" because these wells divert into the Island Canal (located east of the Big Lost River), which then empties into the Big Lost River (for a very brief time) before the heading of another canal known as the Munsey Canal.

The initial SRBA claims for the Airport Water Rights were filed on February 28, 1989. There was initially no SRBA claim filed for Water Right No. 34-7037, probably because this water right had not yet been licensed. The original claims for the Airport Water Rights included the original four points of diversion contained in the Airport Water Right licenses. None of these original claims contained express references or information supportive of an accomplished transfer for use of the Island Wells for diversion of the Airport Water Rights.

Approximately one and a half years later, on October 30, 1990, amended claims for Water Right Nos. 34-2459, 34-2460, 34-2461, and 34-2462 were filed by Mr. Bell. Importantly, each of the amended claims contained two maps: one map of the water right place of use (near the Arco Airport) and three claimed points of diversion (the Airport Wells), and a separate second map depicting the location of the Island Wells. This second map depicting the Island Wells was not included in the original claims filed by Mr. Bell.

Further, in the claims documents at item 14 (the "Remarks Section"), it stated the following:

Rediversion from Munsey Ditch: NW SE SE, (2 points), Section 2; SW SW NW, (2 points) Section 13.; SE SE NE Section 15; SE NE NE Section 22; SE NW SW Section 23; Township 3 North, Range 26 East."

²The "airport" reference is a shorthand way of referring to the water rights and the original wells that diverted them because the wells are located near the Arco Airport.

However, the Airport Wells do not divert into the Munsey Canal, but divert through a private system to the place of use. Any use of the Munsey Canal is from water diverted upgradient from the Airport Wells, and in this case, must be from the Island Wells. Reference to the Munsey canal was not contained anywhere in the original claim documents.

The submission of this second map and the statement in the remarks section provided evidence Mr. Bell intended to claim an accomplished transfer to include the Island Wells as authorized points of diversion under the Airport Water Rights to effectively replace the two unusable Airport Wells. Unfortunately, the legal descriptions for the Island Wells were not included on the first page of the amended claim (where the written legal descriptions are to be listed) as they apparently should have been based upon the included maps. The claims therefore suffered from an internal inconsistency with regards to the claimed points of diversion.

At the time Isom Acres Ltd. Partnership purchased Mr. Bell's farm, Mr. Bell informed Charles Isom of his practice of using the Island Wells when the Airport Wells did not produce sufficient amounts of water, which Isom continued. Mr. Bell's historical irrigation practices were confirmed with an official field examination performed by IDWR personnel in August of 1985, which demonstrated that the Island Wells had the physical capacity and ability to divert 24.66 cfs, which is more than the entirety of the Airport Water Rights and Water Right No. 34-7037 (a total of 24.5 cfs). (*See, e.g.*, the license for Water Right 34-7037 stating expressly that the Island Wells have the capacity to divert 24.66 cfs).

Obviously, if these wells did not have the capacity to divert the entirety of the Airport Water Rights and Water Right No. 34-7037, then there would have been no basis upon which to claim an accomplished transfer.³ Neither would it have made sense for Mr. Bell to construct the wells and pumps with double the capacity to divert Water Right No. 34-7037 if he did not intend to move water rights to the Island Wells.

In further support of Charles Isom's testimony, during the time period just prior to when Mr. Bell sold his farm to Isom, Mr. Bell, in 1995, entered into a *Water Pumping and Transport Agreement* with the Big Lost River Irrigation District for use of the Island Canal for an amount of 1000 inches (20 cfs) after the original 600 inches (12 cfs) amount was lined out and initialed. Thus, at the time his rights were going through the adjudication process, he was diverting more than the 12 cfs allowed from the Island Wells under Water Right No. 34-7037. Mr. Bell sold his farm in January of 1998 just after issuance of the original and incorrect partial decrees for the Airport Water Rights on December 16, 1997, and after he entered into the *Water Pumping and Transport Agreement* with the Big Lost River Irrigation District in 1995. All of this evidence, however, cannot be considered in the adjudication of these rights because of the Presiding Judge's ruling.

The position Telford now finds itself in is that its farm has been irrigated for approximately 25 years with the ability to divert at least 20 cfs (or more depending on the

³The field exam was performed in order to license Water Right No. 34-7037, and is found in the water right back file of this water right, and is part of the public record already examined and relied upon by IDWR. The field exam confirms what is listed on the license for this water right.

condition of the pumps, bowls, and the underlying water table) from the Island Wells to make the farm fully viable for producing crops. At this point, Telford intends to either file a second motion with the SRBA court asking the decrees to be corrected under Rule 60(b) of the Idaho Rules of Civil Procedure, and at the same time, will likely file a transfer application in the event the Rule 60(b) motion is not successful. It is for this reason that the lease/rental request is only for two irrigation seasons to ensure there is sufficient time to pursue these alternatives. However, at the present time, Telford finds itself without at least 8 cfs that it has relied upon for many years, and could result in significant impacts to the farm's operations. The issue is not so much the volume of water that is needed, but the higher peak rate that is needed during the summer months.

Because of this situation, the enclosed water bank lease applications seek the ability to divert up to 8.36 additional cfs (the total of Water Right Nos. 34-2459 and 34-2460) at the Island Wells for irrigation of the same acres that are already authorized under these water rights. As you know, there has been concerns raised in the Big Lost River Valley over the potential for injury caused by movement of water, and this issue came up in the SRBA proceedings. After both sides presented hydrogeologic arguments over whether there would be any injury, the Department reviewed that information, and determined that there was no injury because the revised partial decrees included a subordination clause for use of the Airport Water Rights from the Island Wells and because of the protection afforded ground water users under the provisions of Idaho Code § 42-226 and 42-237a(g). This is explained in the attached *Supplemental Director's Report Regarding Subcase Nos. 34-2459, 34-2460, 34-2461, and 34-2462*. Because of injury concerns, we are only proposing to move 8.34 cfs of the 12.5 cfs of the originally recommended amount to the Island Wells, or 2/3 of the total amount. Therefore, consistent with the *Supplemental Director's Report*, and in order to further protect any water user from injury, we propose that the following conditions be added to the water bank lease/rental approval while the Rule 60(b) motion/transfer application process is pending:

1. Pursuant to a call, in times of scarcity, the diversion of water under this right from the two wells in T05N R26E S34 SENWSW and T04N R26E S3 NESENW has a priority date of May 18, 1982.
2. The rights listed below are limited to a total combined diversion rate of 20.34cfs at the two wells located in T05N R26E S34 SENWSW and T04N R26E S3 NESENW: Combined Right Nos.: 34-2459, 34-2460, and 34-7037.
3. The rights listed below are limited to a total combined annual diversion volume from the two wells located in T05N R26E S34 SENWSW and T04N R26E S3 NESENW of 5000AF. Combined Right Nos.: 34-2459, 34-2460, and 34-7037.⁴

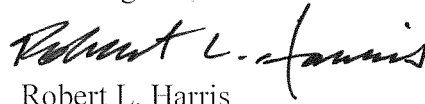
⁴The volume of water that could be diverted under Water Right No. 34-7037 alone during the irrigation season is 23.802 AF/day (12 cfs. X 1.9835 AF/cfs/day), and over the course of the 214 day irrigation season, would calculate to be 5093.63 AF. The proposed amount of 4000 AF in this condition is less than this amount, and even includes the volume diverted from Water Right Nos. 34-2459 and 34-2460. This condition is included as an additional protection against injury.

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4. The water right holder shall make full use of available surface water rights and divert ground water from the wells located at T03N R26E S2 SWSEW and T03N R26E S2 SENESW (the "Airport Wells") prior to diversion of ground water under this right from the two wells located in T05N R26E S34 SENWSW and T04N R26E S3 NESEW (the Island Wells"). This limitation shall not apply to the diversion of ground water under Water Right No. 34-7037.

We hope the applications are clear with this explanation, but if you have any questions or concerns regarding these applications, please do not hesitate to contact us. We appreciate your attention to this matter, and hope it can be approved before the beginning of the coming irrigation season (April 1st).

Best Regards,



Robert L. Harris

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

Enclosures