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February 14, 2012

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Idaho Department of Water Resources  
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**RE: *Response to Letter Dated February 6, 2012 Regarding Water Supply Bank Applications to Lease and Rent Water Right Nos. 34-7052 and 34-7110.***

Dear Monica:

Thank you for your letter dated February 6, 2012 regarding the joint lease/rental applications for Water Right Nos. 34-7052 and 34-7110 filed by Mitchell Sorensen. Your letter indicates that there are four matters that need to be addressed before the Department can process the applications. We have categorized these matters as set forth below and respond accordingly.

**1) Potter's Alleged Non-action to Avoid Forfeiture**

Item No. 1 in your letter requests information in order to "understand[] why Mr. Potter did not take other action to protect the water rights from forfeiture[,] and outlines alternative methods available to Mr. Potter to protect his water rights such as "applying for an extension of time, applying for a Water Supply Bank lease earlier, applying to transfer the water right to an alternative well."

From a legal perspective, we are not exactly sure why this question is relevant or how exactly to respond to it. We agree that with the benefit of hindsight, the methods you outlined in your letter were options to protect these rights from a potential claim of forfeiture. However, the plain language of Idaho Code § 42-223 does not describe a hierarchy or preference of these statutory defenses to forfeiture. Stated another way, there is no indication in Idaho Code § 42-223 that one exception or defense carries more or less weight than any of the others. Nor does the statute indicate that multiple defenses must be provided. In our view, we have provided an adequate defense against forfeiture of these water rights.

Furthermore, we should point out that Mr. Potter's use of any of the other defenses you provided would assume the fact that he was aware that his water rights were in any danger of

forfeiture. In his view, which he communicated to us, he had two significant issues that he could not overcome, the first of which was his dispute with the property owner upon which his well was located. The second major issue was the then non-existent regulation and measurement of water supplies carried within the Big Lost River Irrigation District ("BLRID") system, as well as the difficulties associated with BLRID's transport agreements at that time. Because Mr. Potter received his water from the Arco Canal which is part of the BLRID facilities, and these water supplies are appurtenant to lands outside of the irrigation district's boundaries, a transport agreement allowing for the use of these irrigation district facilities was required. These external factors, which he perceived to be outside his control, were not voluntary, and therefore, he would not have presumed that he was risking relinquishment of his rights that he had recently had decreed in the SRBA.

Regarding the difficulties regarding water measurement and regulation, both within BLRID and Water District 34, our firm has been involved in water matters in Basin 34 for many decades, and it is difficult to explain in a few sentences the frustrations of many water users, including Mr. Potter, regarding these issues. Perhaps the best explanation of these difficult issues is a lengthy quotation from a recent brief we filed requesting summary judgment in a civil lawsuit involving the condemnation of a \$27.00 easement across a 100-foot wide former railroad right-of-way. In order to fully understand this quotation, we need to explain how BLRID calculates conveyance loss, and three lawsuits that were filed where concern over conveyance loss calculations was at issue.

Before getting into this background, we wish to emphasize that this information presented here is intended to convey the type of management regime that existed **at the time Mr. Potter would have had problems with BLRID**. Because we presume this letter will be a public document, we are concerned that the below discussion will be interpreted to be how matters are currently managed with the BLRID. This is not the case. After the disputes our clients have had with BLRID as outlined below, they have modified their transport agreements, improved their monitoring of diversions, and overall we have seen an improvement in the operation of their system. Our clients generally now enjoy a good working relationship with them. However, we believe the information presented below accurately demonstrates where Mr. Potter's frustrations between 2000 to 2008 stemmed from.

As we understand it, BLRID historically utilized (and still utilizes, although now much better monitored) a measurement methodology we have referred to as "reverse math." The idea is that BLRID first measures the amount of water diverted into the system. They then rely on ditch riders to measure diversions from the system. They then subtract the measured diversions from the system from the amount of water diverted into the system, and the difference is determined to be conveyance loss, or "shrink." For example, if there are 10,000 inches of water going into the system, and the ditch riders determine that there are 4,000 inches being delivered to field headgates, the remaining 6,000 inches is presumed to be conveyance loss, and therefore,

there is 60% shrink. The problematic part of this methodology is that this calculation is that it does not account for stolen water, mis-measured water, inadequate measuring devices, or those diversions that have no measuring device. Using my above example, there could be 3,000 inches stolen in the system, and it would simply be accounted as shrink. Thus, where the actual conveyance loss (lost in the ground and evaporated) is 30%, BLRID would still calculate shrink as 60%.

With the above explanation of how BLRID calculates shrink in mind, the first lawsuit that needs explanation was filed by our clients Mitchell Sorensen, Leon Folkman, and Isom Acres Limited Partnership against BLRID. After installing equipment that we believe allowed their diversions to be measured adequately (both with a sonic meter and a weir), the BLRID manager nevertheless determined that the equipment was not sufficient, and after back and forth between the parties, the BLRID board unilaterally terminated the transport agreements of our clients, leaving them with the possibility of having no transportation system to convey their water, which would have destroyed their farms.

Part of the lawsuit sought to address our clients concerns about receiving insufficient water supplies and insufficient explanations of how conveyance losses (shrink) were calculated by BLRID. Our clients employed Ronald Sorensen to inspect the Eastside-Island canal system operated by the BLRID. Mr. Sorensen discovered a lack of measuring devices and properly maintained diversions, and took photographs to document these deficiencies. This lawsuit was eventually settled, but the deposition testimony from this lawsuit was used in the third lawsuit when it was asserted that the BLRID system was comparable to a private pipeline system. But in order to understand the third lawsuit, we first must explain the second lawsuit.

The second lawsuit stemmed from an effort to avoid the inefficient BLRID system where Michael Telford, Mitchell Sorensen, and PU Ranch jointly constructed a pipeline project to avoid the Moore Canal (another canal in BLRID's system). Before doing so, our clients secured necessary easements, and visited with a landowner of the old railroad right-of-way that extends to Mackay from Arco to secure an easement. Our clients' version of this conversation was that authorization was given to place the pipeline just north of where the Moore Canal already crossed the property, and when asked to sign an easement, the landowner said it was not necessary. These facts are now disputed. For purposes of this letter, however, the important part is that once that authorization was received, our clients also obtained a permit from the Idaho Transportation Department to clean out a fully plugged culvert next to the Moore Canal culvert that goes under Highway 93. Our clients cleaned out the culvert and installed the pipeline. Once the pipeline was in place, our clients received a demand letter from the BLRID to immediately remove the pipeline because BLRID asserted ownership of the culvert. When our clients refused, the pipeline was forcibly removed by cutting the pipe with a torch. Our clients then sued.

Shortly after this lawsuit was filed, the parties agreed to mediate the matter, and successfully did so. Our clients agreed to not reinstall the pipeline in the culvert and further agreed to bore underneath the highway at a cost of around \$40,000.00, which they did. In exchange, BLRID granted an easement to use the UC Canal to convey their ground water to the Timberdome System. In addition, the transport agreements for the ground water rights were not to be renewed at the end of 2010, a matter specifically set forth in the settlement agreement. After the construction work was finished in June and the entire system was operational and functioning quite well, our clients thereafter received a demand letter from the railroad right-of-way landowner in September of 2009 demanding payment of \$150,000.00 for the right to cross the railroad right-of-way. The parties attempted to negotiate for many months, but ultimately in the spring of 2010, the railroad right-of-way owner dug up the pipeline and punched a hole in it.

These actions led to the third lawsuit, which was an eminent domain action against the railroad right-of-way owner for the pipeline easement. One of the elements that must be established in order to succeed in an eminent domain action is to prove necessity. One of our arguments was that the BLRID system was not only inefficient, but also that many times the timing of when our clients received their water in a commingled surface-ground water system was flashy and difficult to manage. We also explained that the very nature of BLRID's transport agreements were adhesion-like, with no ability for us to negotiate their terms, and permissive because they could be revoked at any time by BLRID.

With all of this in mind, the following is an excerpt from our reply brief after we filed for summary judgment in the third lawsuit (the eminent domain lawsuit). Again, we wish to emphasize that this information is intended to convey what we believe to be Mr. Potter's viewpoint of the type of management regime that existed **at the time Mr. Potter would have had problems with BLRID based upon his statements to us:**

Simply put, it is not reasonable for Plaintiffs to rely upon the transport agreement option, which is clearly demonstrated through events mere months subsequent to execution of the Settlement Agreement with BLRID. In October of 2009, BLRID unilaterally terminated two transport agreements held by two other landowners, Leon Folkman and Isom Acres Ltd. Partnership, whose land was leased at the time by Mitchell Sorensen. Reference to termination of these agreements is made in the Rindfleisch Affidavit ¶ 5. There is much more to the story of these transport agreements than is contained in the Rindfleisch Affidavit.

The termination of the Folkman and Isom transport agreements is the subject of another Butte County lawsuit before this court, Case No. CV-2009-94. Interestingly, the termination of these transport agreements happened mere months after the Settlement Agreement relative to the pipeline was entered into

between BLRID and the Plaintiffs. The notices of termination were sent to the parties on October 1, 2009. Second Harris Affidavit at Exhibit B.

The parties have entered into a one year agreement for 2010 due to the pending commencement of the irrigation season, and to permit Mr. Folkman and Isom to determine if BLRID was going to make improvements relative to its delivery practices and management operations to reduce “shrink” in the canals. The parties to the litigation agreed to a stay while the 2010 season ran its course. While some effort has been made by BLRID to improve measuring and accounting, such efforts have not been made to the satisfaction of Folkman, and the litigation is likely to continue moving forward as there remain issues that BLRID has failed to address. For purposes of the pipeline dispute currently before the court, however, documents from the Folkman dispute demonstrate the oppressive nature of the BLRID’s latest incarnation of its permissive transport agreements. These documents demonstrate the evolution of this document into what appears to now be an adhesion contract that remains freely revocable at the whim of the BLRID.

For purposes of this discussion, it is important to recognize that Plaintiffs must demonstrate “reasonable” necessity, not absolute necessity, in order to meet this element of their condemnation case. BLRID’s transport agreements—which grant permission only—for use of their distribution systems, along with their other oppressive terms, and whether they qualify as an adhesion contract, is not at issue. What is at issue is whether these transport agreements are so oppressive and one-sided in their terms—i.e., that they are “adhesion-like”—such that Plaintiffs can demonstrate reasonable necessity to condemn a pipeline easement for an alternative conveyance system.

Contracts offered on take-it-or-leave-it basis are closely scrutinized by Idaho courts. *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 43, 72 P.3d 877, 883 (2003). These contracts—known as adhesion contracts—are suspect because they are “an agreement between two parties of unequal bargaining strength . . . written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a ‘take-it-or-leave-it basis.’” *Id.* Nevertheless, an adhesion contract is not *per se* invalid. “[A]n adhesion contract cannot be held procedurally unconscionable solely because there was no bargaining over the terms. *Id.* Courts will not interfere with contracts merely because “the contractual provisions appear unwise or their enforcement may seem harsh.” *Id.* at 42, 72 P.3d at 882. In *Lovey*, the court upheld that the adhesion contract before it because “[i]t is neither one-sided nor oppressive.” 139 Idaho at 45, 72 P.3d at 885. However, the Idaho Court of Appeals did invalidate a contract which contained terms which were “unreasonable,” “unduly harsh,” and “oppressive” to one of the contracting parties. *Pinnacle Performance, Inc. v. Hessing*, 135 Idaho 364, 369, 17 P.3d 308, 313 (Ct. App. 2001) (invalidating a contract which contained terms

which were “unreasonable,” “unduly harsh,” and “oppressive” to one of the contracting parties).

Adhesion contracts remain a “serious challenge to much of contract theory” because there is no chance for the weaker party to participate creating the terms of the deal. *ToivoPottala Logging, Inc. v. Boise Cascade Corp.*, 112 Idaho 489, 498-99, 733 P.2d 710, 719-20 (1987) (Bistline, J., dissenting). In other words, an adhesion contract may be unconscionable in certain circumstances. Contracts which are procedurally unconscionable and substantively unconscionable are void.

Procedural unconscionability in an adhesion contract can occur as a result of “great imbalance on the parties’ bargaining power with the stronger party’s terms being nonnegotiable and the weaker party being prevented by market factors, timing, or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.” *Lovey*, 139 Idaho at 42, 72 P.3d at 882. Substantive unconscionability can occur where “the contract or provision is one-sided or oppressive.” *Id.* To determine substantive unconscionability, courts consider “the purpose and effect of the terms at issue, the needs of both parties and the commercial setting in which the agreement was executed, and the reasonableness of the terms at the time of contracting.” *Id.* at 43, 72 P.3d at 883.

The take-it-or-leave-it basis of BLRID’s transport agreements do not make them a viable alternative to Plaintiff’s pipeline. Attached to the Second Harris Affidavit at Exhibits C and D are the Folkman and Isom Transport Agreements that were terminated. Attached at Exhibit E to the Second Harris Affidavit are portions of deposition transcripts of Manager James Rindfleisch relative to the pending dispute on the Folkman transport agreements.

The terms of the BLRID transport agreements are non-negotiable and they are for a set term of years. Expiration of these transport agreements allows BLRID to impose new conditions on landowners based on matters they determine need to be changed. The transport agreements are also not assignable, and require execution of the newest transport agreement incarnation if a new person purchases the property subject to the transport Agreement.

Attached at Exhibit C to the Second Harris Affidavit is the Leon Folkman transport agreement, which was terminated. Paragraph 1 of this agreement states that Folkman’s ground water will be transported based on calculations of the amount diverted, “less losses for seepage and evaporation.” Paragraph 4 of this agreement states that measuring devices must “meet the standards and be in compliance with the established policies and guidelines of the District.” Paragraph 5 also states that the landowner must “maintain an adequate measuring device at the point of delivery for said water supplies at all times for the duration of this agreement.” Paragraph 11 does not provide for a period to cure a default,

and instead states that “[a]ny breach of any of the covenants and conditions contained herein shall constitute a material breach of this agreement and may be deemed a default hereunder.”

The Folkman diversion was substantially reworked in 2008 and 2009 to allow for a use of the most sophisticated type of measuring device, a polysonicflow meter. Second Harris Affidavit at Exhibit F (photograph of diversion system with polysonic meter attached). Later, at the insistence of BLRID, a micrometer gauge was also installed. Yet this was not good enough for BLRID. Stating this and other one-sided allegations, they unilaterally terminated the Folkman transport agreements.

At the deposition of Mr. Rindlflesch, he admitted that BLRID was delivering water to diversions that did not have any measuring device. Folkman presented a series of photographs of diversions on some of the canals operated by BLRID, and Mr. Rindfleisch either did not recognize them, or could not identify a measuring device:

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- 3 I want you to turn to photograph number  
4 eleven, and they're all labeled, and I'm not going  
5 to go through each of them, but we're going to go  
6 through a number of them.  
7 A. Okay.  
8 Q. Photograph eleven appears to be a pump  
9 to a McDonald field. Can you show me where the  
10 measuring device control structure are on that  
11 pump?  
12 A. I don't even know where this is at.  
13 Q. You don't know where the McDonald pump  
14 is?  
15 A. The pump or well?  
16 Q. Well, this is a pump out of the canal.  
17 A. I don't know where this location is  
18 at.  
19 Q. Okay.  
20 A. I don't recognize it.  
21 Q. Is it on -- Is it on your ditch rider  
22 logs anywhere, to your knowledge?  
23 A. I don't know because I don't know where  
24 this is at. I don't know where the heading is.  
25 MR. FLETCHER: I'm going to object to

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1 this for lack of foundation. If he doesn't know  
2 what the picture depicts, you're telling him what it  
3 shows, but he doesn't know what it is.

4 Q. (BY MR. HARRIS:) Okay. If you don't  
5 know where that's at, it's fine.

6 On photograph eleven, I'm sorry,  
7 photograph number twelve --

8 A. Uh-huh.

9 Q. -- you talked about vegetation growth --

10 A. Uh-huh.

11 Q. -- causing shrink.

12 Is the amount of growth that's shown on  
13 that photograph acceptable to the district?

14 A. Not normally, no.

15 Q. Okay. Is that diversion structure  
16 that's depicted, is that in accordance with the  
17 district standards?

18 A. I can't tell. Looks like it. If it's  
19 concrete, it isn't cracked, yeah, it probably is,  
20 that one.

21 Q. Do you think that one's okay?

22 A. Uh-huh.

23 Q. Can you identify a measuring device?

24 A. I don't know if this is a just a check  
25 in the middle of the canal, or if it's something

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1 that's delivering water. And if it's not delivering  
2 water, there won't be a measuring device there.

3 Q. Okay. Where are the measuring devices  
4 typically located, then?

5 A. On the outlets where water is taken out  
6 of the canal.

7 Q. Okay.

8 A. And then where it's put into the  
9 canals.

10 Q. Okay. Let's look at photograph number  
11 thirteen. It's The Hendricks/Felton well.

12 A. Uh-huh.

13 Q. Do you know where that's located?

- 14 A. Uh-huh.  
15 Q. Okay. Can you point out to me on that  
16 photograph where the measuring device is located?  
17 A. On that particular one, yes. There's  
18 a -- I'm not sure the exact name of it, but right  
19 there by the willows there's a -- you've got a  
20 device that measures the differential pressure that  
21 you pull up and look underneath that tells what the  
22 flow is.  
23 Q. And does that type of a device have a  
24 name?  
25 A. That's what I can't recall.

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- 1 Q. Is that listed on the department's set  
2 of that acceptable measuring devices?  
3 A. I don't know. I'm not sure what the  
4 name is, but we've been using that to get the  
5 flow.  
6 Q. So you haven't verified whether or not  
7 that meets the district's standards?  
8 A. Nope.  
9 Q. Okay. Let's look at photograph number  
10 fourteen, you've mentioned before that you've  
11 removed some willows and other vegetation on other  
12 canals.  
13 Is this the type of vegetation that  
14 would typically be removed?  
15 A. Yes.  
16 Q. Do you think that's overgrown at that  
17 point?  
18 A. We have identified that to be removed.  
19 Q. This year it's going to be removed?  
20 A. Uh-huh.  
21 Q. Okay. In the springtime do you know  
22 generally -- or, strike that. I'm sorry. I'm  
23 getting -- I'm going too fast. I apologize.  
24 This spring sometime in April it's going  
25 to be removed?

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- 1 A. If we get to it, yes.  
2 Q. Okay. Let's take it -- take a look at  
3 photograph number thirty-eight.  
4 A. When were these pictures taken?  
5 Q. There's a date November 19th, 2009.  
6 A. After the irrigation season.  
7 Q. That's correct.  
8 A. Okay.  
9 Q. Let's look at photograph number  
10 thirty-eight.  
11 Do you recognize that location, the  
12 Wheeler flume?  
13 A. The Wheeler flume?  
14 Q. Uh-huh.  
15 A. No. I don't know where that's at.  
16 Q. You don't know where that one's at?  
17 A. I don't recognize that.  
18 Q. Do you see a measuring device or a  
19 control structure?  
20 A. I can't tell.  
21 Q. Okay. Let's look at photograph forty,  
22 there's some additional willows and tree overgrowth.  
23 Is that scheduled also for maintenance?  
24 A. I don't know. I don't know where that's  
25 at.

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- 1 Q. Okay.  
2 MR. FLETCHER: For the record, I'm  
3 just -- I don't mind asking the witness about the  
4 pictures, but I'm going to object to the extent that  
5 no foundation is being laid that the witness knows  
6 most of what these pictures are.  
7 And I also want, for the record, to  
8 state that there are characterizations and labels  
9 placed on all of these pictures and this witness did  
10 not place those characterizations or labels on those  
11 pictures.  
12 MR. HARRIS: That's correct. They were  
13 placed by us.

14 I'll ask him if he recognizes the  
15 photograph and move on.  
16 Q. (BY MR. HARRIS:) Let's look at  
17 photograph number forty-seven.  
18 Do you recognize the diversion heading  
19 in that photograph?  
20 A. No.  
21 Q. Okay. Don't recognize that one?  
22 A. Huh-uh.  
23 Q. How about photograph forty-eight?  
24 A. I can't tell where these things are  
25 at.

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1 Q. Okay.  
2 A. No idea.  
3 Q. Do you know who L. Jensen is?  
4 A. Yup, Larry Jensen.  
5 Q. Do you know generally where he diverts  
6 from?  
7 A. Yeah.  
8 Q. Okay. Is he listed on the -- It appears  
9 that he's listed on your ditch rider logs.  
10 A. He is.  
11 Q. But you don't recognize --  
12 A. It could be a ditch that's not being  
13 used. I don't know.  
14 Q. Okay. Let's take a look --  
15 A. If somebody would show me these, I would  
16 have an idea.  
17 MR. FLETCHER: Just answer the  
18 questions.  
19 Q. (BY MR. HARRIS:) Okay. Let's look at  
20 number fifty-two, photo fifty-two.  
21 A. Okay.  
22 Q. Do you recognize that diversion  
23 heading?  
24 A. No, I don't.  
25 Q. Okay. Does that appear to have a

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- 1 measuring device or a control structure?  
2 A. I have no idea by looking at them.  
3 Q. You can't see it from looking at it?  
4 A. (Shakes head.)  
5 Q. Okay. Let's look at -- I'll jump up to  
6 number sixty-four labeled an orifice box.  
7 A. I am familiar with that one.  
8 Q. Okay. And can you show me where the  
9 measuring device or control structure is on that?  
10 A. Upside the box, head gate at the front.  
11 There's an orifice that goes in that box and it  
12 would measure the difference.  
13 Q. So if we turn the page, there's  
14 photograph sixty-five, it looks like -- is that --  
15 A. Same box.  
16 Q. Is that where the measuring takes place  
17 is inside?  
18 A. Uh-huh.  
19 Q. Okay. And on this type of a diversion,  
20 is it verified every three or four years to  
21 determine that it's still measuring accurately?  
22 A. Unless the orifice has changed, we look  
23 at the orifice and see if that's changed.  
24 Historically, it doesn't change.  
25 Q. Okay. Let's look at photograph number

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- 1 sixty-seven.  
2 Do you recognize that diversion  
3 heading?  
4 A. No.  
5 Q. Okay. Let's look at photograph number  
6 seventy-nine.  
7 Do you recognize that diversion  
8 heading?  
9 A. I have no idea where that's at.  
10 Q. Okay. Would your ditch rider probably  
11 better know where they are located?  
12 A. I don't know.  
13 Q. Okay. Let's look at photograph number

14 eighty-three.  
15 Do you recognize that --  
16 A. Nope.  
17 Q. -- diversion?  
18 A. No.  
19 Q. Don't recognize that one either?  
20 A. (Shakes head.)

Second Harris Affidavit at Exhibit E (Rindfleisch Deposition at p. 95 LL.3 through p. 103 LL. 20).

Further, Mr. Rindfleisch explained what "shrink" is, which is more than conveyance losses and evaporation as set forth in the Folkman transport agreement. Shrink essentially amounts to anything BLRID determines it is. After a series of questions, counsel for Folkman summarized BLRID's shrink calculation methodology with a spreadsheet, and walked Mr. Rindfleisch through it. Here is that deposition testimony:

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24 Q. Okay. I want you to take a look now at  
25 Exhibit Number 8. This is a spread sheet that I

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1 prepared, so I claim ownership of it for all of its  
2 good and bad points.  
3 I'm just trying to understand your  
4 shrink calculation, so what I've done is I've --  
5 what I believe the policy of the district is is that  
6 shrink is inputs minus outputs and what's left over  
7 is the shrink.  
8 Is that a fair statement?  
9 A. You're close.  
10 Q. Okay. So in scenario number one that's  
11 identified in that spread sheet, if there's ten  
12 thousand miner's inches being diverted into the  
13 canal, two thousand miner's inches diverted from  
14 ground water, there's a total input of twelve  
15 thousand minors inches; is that correct?  
16 A. Correct.  
17 Q. Okay. And if there are eight thousand  
18 miner's inches that are legally diverted from the  
19 system, then that would be the measured output; is  
20 that correct?

21 A. That would be part of it, yeah.  
22 Q. Okay. I have in there what's been  
23 shaded as illegal diversions, mismeasured,  
24 unmeasured, and wastewater, a total of thousand  
25 inches.

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1 A. Okay.  
2 Q. And so if those were actually considered  
3 as outputs, then the total outputs from the system  
4 would be nine thousand inches.  
5 Would that be -- Is that a fair  
6 statement?  
7 A. That's okay.  
8 Q. Okay. So if that nine thousand inches  
9 was taken out of the system, your input is twelve  
10 thousand inches, that means that three thousand  
11 inches would have been lost to what you described as  
12 seepage or evaporation?  
13 A. Or unaccounted for water.  
14 Q. Okay. Well, if that's the only thing  
15 that happened was seepage and evaporation --  
16 A. I said unaccounted for water.  
17 Q. Let me ask my question.  
18 A. Okay.  
19 Q. The unaccounted for water, I'm saying in  
20 scenario number one, that the illegal diversions,  
21 mismeasured, unmeasured, and wastewater would be  
22 accounted for.  
23 A. Okay.  
24 Q. So if they were actually accounted for,  
25 you would have nine thousand inches that would have

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1 been actually diverted out from the canal?  
2 A. If you knew that these numbers were  
3 correct, yes.  
4 Q. That's correct. And if you knew that  
5 then you'd have a conveyance loss of three thousand  
6 inches or twenty-five percent.  
7 A. Okay. The concept's --

8 Q. Okay.  
9 A. The concept's correct.  
10 Q. The concept's correct.  
11 A. (Nods head.)  
12 Q. Okay. So now if we look at scenario  
13 number two, same numbers, the only difference is in  
14 terms of illegal diversions, mismeasured diversions,  
15 unmeasured diversions, and wastewater, if those are  
16 not considered, then isn't it presumed that that  
17 amount of water sinks in the ground or evaporates  
18 under your shrink methodology?  
19 A. If there's water going out the end of  
20 the canal, like you say, wastewater from the  
21 system --  
22 Q. Uh-huh.  
23 A. -- Okay? That is considered.  
24 Q. Right. Well, it's considered in your  
25 shrink calculation though, right?

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1 A. If it -- right.  
2 Q. So here, though, if -- if we know that  
3 the actual amount that's seeped into the ground was  
4 three thousand inches --  
5 A. Uh-huh.  
6 Q. -- but because there's illegal,  
7 mismeasured, unmeasured, and waste water diversions,  
8 doesn't that make the conveyance loss artificially  
9 high?  
10 A. (No audible response.)  
11 Q. And in my scenario it raises it up to  
12 thirty-three percent shrink.  
13 A. Right. If you didn't consider those,  
14 that's exactly what would happen.  
15 Q. Okay. And it's my understanding that  
16 scenario two more accurately describes how you  
17 calculate shrink in the district; is that correct?  
18 A. If we don't know water is being  
19 diverted, then it would be part of the shrink.  
20 Q. Okay. So let me ask my question again.  
21 A. Okay.

22 Q. Does scenario two, then -- Well, strike  
23 that. Let me ask the question.  
24 Do you know people that are illegally  
25 diverting from the system?

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1 A. I do not.  
2 Q. Okay. Do you know if they are  
3 measuring -- if there are places that are  
4 mismeasured?  
5 A. Not to my knowledge.  
6 Q. Okay. What about unmeasured  
7 diversions?  
8 A. I don't know.  
9 Q. Okay. What about wastewater, water that  
10 just runs out the tail end of the canal?  
11 A. Okay.  
12 Q. If you don't know that those are being  
13 lost to the system, you assume that that's  
14 conveyance loss?  
15 A. That's right.  
16 Q. And that makes the shrink higher?  
17 A. Exactly.

Second Harris Affidavit at Exhibit E (Rindfleisch Deposition at p. 74 LL.24 through p. 79 LL. 17).

Thus, the testimony of Mr. Rindfleisch demonstrates that “shrink” is much more than conveyance losses and evaporation. It includes unmeasured and mismeasured diversion amounts, effectively allowing other water users to steal Plaintiffs’ water, but have it allocated as shrink. The spreadsheet referred to in Mr. Rindfleisch’s testimony is attached as Exhibit G to the Second Harris Affidavit, and as the court can see in this example, accurate accounting and measurement is essential in order to convey Plaintiffs ground water, minus conveyance losses and evaporation.

When faced with this evidence and language of the Folkman transport agreement, the BLRID simply changed its methodology permitted under the transport agreement, to now state that it includes that “[t]he parties covenant and agree that the loss of water supplies conveyed pursuant to this agreement will be determined by the District by using reasonable calculations of evaporation, operational losses and conveyance losses as they are similarly applied to other water supplies co-mingle in the same common canal(s). . . .District’s

methodology of calculating losses, now existing or as hereafter modified, shall be used to calculate the distribution of water.” Second Harris Affidavit at Exhibit H p. 3 (§5). In other words, this now expressly gives the BLRID the ability to unaccount for water and charge it as conveyance losses to the ground water user. Stated another way, there is no requirement in the new transport agreement to actually enforce its policy of requiring measuring devices to accurately measure water. It is done entirely at BLRID’s discretion, even though it has real and significant impacts on the ground water user.

But the agreements get better. Paragraph 11.2 provides that breaches of the agreement are determined by BLRID alone, and if it determines in its exclusive discretion that a breach has occurred, only ten (10) days notice of the termination is provided, allowing mere days for a farmer who has invested millions of dollars to figure out another way to get water to his farm. Again, at its core, this document is permissive. It grants no property rights to the landowner, and even expressly states so at Paragraph 9 (which is also included in prior versions of the transport agreements).

Finally, paragraph 16 provides the following: “In the event District is required to obtain legal counsel to enforce this agreement or file or defend a suit alleging a breach of this agreement or seeking to terminate this agreement. Landowner agrees to pay the attorney’s fees and costs incurred by the District.” Thus, if the ground water user sues BLRID, and is even found to be right, he must still pay BLRID’s attorneys fees.

In short, the current transport agreement grants permissive use of the canal to the ground water user, permits BLRID to calculate “shrink” in any manner it chooses (and includes stolen water as a component of that shrink), provides BLRID to unilaterally determine if a measuring device is adequate, does not require BLRID to enforce its measuring devices which would decrease shrink determinations, permits BLRID to terminate the agreement upon ten (10) days notice after it determines a breach in its sole discretion, and requires payment of their attorney’s fees if there is a need to obtain legal counsel, **even if the ground water user proves to be right**. These are elements of an adhesion contract, as they are clearly “unreasonable,” “unduly harsh,” and “oppressive” to one of the contracting parties. Allowing ground water back into the Moore Canal allows other water users to steal it as they once did. Of course it would be welcomed back.

Furthermore, the termination of the Folkman and Isom transport agreements was made without input from the ditch rider Kiley Smith, who operated the system day to day and reported back to Manager Rindfliesch. During his deposition, after installation of the micrometers, Mr. Smith testified he had no problem with the system:

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- 9 Okay. And in terms of the micrometers,  
10 have you personally seen the micrometers that are  
11 now installed there?  
12 A. Oh, yeah.  
13 Q. Do you know when they were installed?  
14 A. I want to say August, September. I'm  
15 not -- I'm not totally sure when.  
16 Q. And is that an acceptable measuring  
17 device?  
18 A. As far as I'm aware, yes.  
19 Q. So after those devices went in, were  
20 there any problems you had with the upper Isom  
21 station?  
22 A. Me personally?  
23 Q. Sure.  
24 A. No.  
25 Q. So you didn't have any problem with

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- 1 it?  
2 A. (Shakes head.)  
3 Q. Did your manager have a problem with  
4 it?  
5 A. Yes.  
6 Q. Okay. Did he communicate to you what he  
7 thought the problem was?  
8 A. No control device.  
9 Q. Okay. Your impression was it could be  
10 controlled from the lower control structure,  
11 correct?  
12 A. Correct.

Second Harris Affidavit at Exhibit I (Kiley Smith Deposition at p.84 LL.9 through p. 85 LL.12). Yet even with Mr. Smith's position that the Isom and Folkman irrigation system did meet BLRID's standards, the transport agreements were still terminated. The decision therefore appears to have been made by Manager Rindfleisch because he was upset, rather than based on logic or coordination with his ditch rider.

Therefore, the unilateral termination of the Folkman transport agreement at the whim of the BLRID is further evidence that permission only cannot be

relied upon by ground water users that use the Moore canal. It can be revoked at any time, leaving significant investments of time and money at serious risk. At its core, the transport agreement is permission only. BLRID is aware of this, and prior to the cancellation of the Folkman and Isom transport agreements, threatened Mr. Sorensen with cancellation as well. Sorensen Affidavit at Exhibit C (“Reporting discrepancies such as this could jeopardize your transport agreements with BLRID.”)

For these reasons, the transport agreement is simply permissive use, and given its oppressive terms, it not an alternative that is reasonable. Plaintiffs have therefore demonstrated, as a matter of law, that they possess reasonable necessity to condemn the pipeline easement to allow them to have control over their diversion and delivery of water, and not be subject to the whims, emotions, and changing transport agreements of BLRID. The recent termination of the Folkman and Isom transport agreements, along with the new revisions, have demonstrated the precipitous nature of these agreements and their basis in permissive use.

We hope the above information sufficiently describes the paradigm through which Mr. Potter would have viewed the situation. As an absentee landowner, Mr. Potter simply decided it was not worth the continual fight with BLRID at the time, especially because his property was located outside of the boundaries of the irrigation district served by the Arco Canal. If Mr. Potter could not even address these conveyance issues, it seems rather clear that a water right transfer would likewise not have been a viable option because no matter where the point of diversion was moved to, the water still could not have been delivered in a satisfactory fashion to his property. As we’ve stated above, there have been recent efforts by BLRID to address these issues, and we are encouraged by this improvement. However, at the time of Mr. Potter’s non-use of water because of these difficult issues with BLRID, we represented clients with the exact same frustrations, and the above quotation and deposition testimony gives you more detail regarding these issues than a couple of sentences of explanation. This is why “Mr. Potter did not take other action to protect the water rights from forfeiture.”

## **2) Transport Agreements**

Water Right No. 34-7052 is a ground water right, and because of where it will be pumped from, no transport agreement is necessary. As proposed in Mr. Sorensen’s rental application, this right will be pumped from two wells operated by Mr. Sorensen directly into a pipeline owned in part by Mr. Sorensen, and from there into the Timberdome Canal Company’s system. At no point will any of this water ever enter into the Big Lost River Irrigation District’s system. Thus, a transport agreement is not required for this water right.

Regarding Water Right No. 34-7110, this water right will be conveyed through part of the irrigation district’s system. However, regarding water rights and the property rights (easements)

typically necessary to get them there, the Idaho Supreme Court has been clear: “[a]lthough a ditch easement typically concerns the conveyance of water, it is ‘a property right apart from and independent of questions of water rights. *Beach Lateral Water Users Ass’n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006) (quoting *Savage Lateral Ditch Water Users Assoc. v. Pulley*, 125 Idaho 237, 242, 869 P.2d 554, 559 (1993)). This is generally noted expressly in water right transfer and water bank approvals with a condition that states very clearly that the approval grants no easement or right-of-way across the land of another.

Given this case law, we do not believe it is necessary for us to secure a transport agreement prior to receiving water bank approval. If IDWR does require a transport agreement prior to the water bank approval being issued, then this presents a chicken-or-the-egg problem. Mr. Sorensen has no intention of entering into an agreement with the irrigation district and binding himself financially before he has any assurance that his rental application will be approved by the Department. BLRID charges a substantial fee for entering into these types of agreements.

We can assure you that we will not assert the position with BLRID that they must give us a transport agreement because IDWR approved our water bank lease. In fact, we request that you include the standard condition referenced above that this approval does not grant an easement or right-of-way across the land or in the system of another entity. In short, we believe that easement issues and water rights issues are best addressed as separate matters in accordance with the sound judgment of the Idaho Supreme Court.

### **3) Measuring Devices**

Mr. Sorensen already has the necessary measuring devices and has no problem with this being a condition of approval.

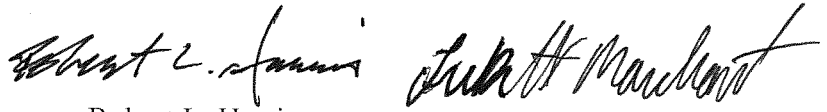
### **4) Impact Assessment**

In anticipation of the Department approving Mr. Sorensen’s rental application, Mr. Sorensen has contacted Dave Shaw, with ERO, who will provide the required assessment of the impact that the proposed pumping will have on all wells within ½ mile of the proposed point of diversion. You can expect a more thorough response to this matter from him.

We appreciate the opportunity given by you to respond to the above matters. We recognize that these can be complicated and difficult issues, but we think the water bank process is one that encourages full utilization of Idaho’s water and hope IDWR continues with the processing of these water bank applications in that spirit. If you have any further questions, please let us know.

Monica Van Bussum  
February 10, 2012  
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Best regards,

Handwritten signatures of Robert L. Harris and Luke H. Marchant in black ink.

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