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RECEIVED
AUG 22 2007
DEPARTMENT OF
WATER RESOURCES

August 20, 2007

Gary Spackman
Idaho Department of Water Resources
322 E. Front Street
P.O. Box 83720
Boise, Idaho 83720-0098

Re: Application for Transfer of Water Right No. 34-618

Dear Mr. Spackman:

Mr. Dave Carlson at Eastern Region suggested we contact you on this matter. You will recall the somewhat complex transfer for Mickelsen Properties, LLC (71254) which was completed in July, a year ago. We had found some transport agreements between Cannons (Mickelsen Properties' predecessors) and Big Lost River Irrigation District, revised in 1999 which helped resolve the protest filed by the District.

Among those transport agreements is one for water right number 34-618, a natural flow right for Big Lost River. And, to the best of our knowledge, whatever water has been available under right number 34-618, has been transported through the Moore Canal, the Crossover Ditch and the Timerdome Canal system out to the lands on Era Flat. However, the place of use described in the SRBA partial decree for this right shows only the 139 acres we referred to as "Dad's Place", near Moore, Idaho. I seem to recall having a discussion with you about this circumstance, and I thought we agreed it would be well to initiate a transfer proceeding to include in the place of use for 34-618 the land out on Era Flat where it appears to have been used for many years. I do not know why this proposal was not included as part of transfer number 71254, but it appears not to have been, for whatever reason.

So, we prepared an application for this purpose, which was filed last January 3, 2007. We then filed another application for transfer for Mickelsen Properties, LLC on February 21, 2007, (number 73367) which was approved by you on May 30, only 99 days later. Shortly after receiving that approval, I realized we had never heard anything about the application filed in January so I inquired of Dave Carlson why the one filed in February had already been approved, but we had never heard anything about the one filed in January. His response was that he thought the application for 34-618 had been precluded by language in your approval of 71254. When I expressed surprise, he pointed out to me some of your language in paragraph number 17 of the Findings of Fact in the "Preliminary Order" of May 31, 2006, which says "As a result, water right number 34-618 cannot be appurtenant to the larger place of use listed by the other water rights". I told him I didn't think that meant we couldn't process an application to make 34-618 appurtenant on the records to the land where it has been used for so many years. He then responded that you had said a similar thing when he inquired of you.

I guess I then assumed that processing of the application for transfer would resume. Some time in July, I again asked Dave about the status. This time he said the Department couldn't proceed because it would be an enlargement. His explanation was that 34-7179 is supplemental to 34-618 and therefore changing the place of use for 34-618 is prohibited. I told him the best information we could ever find was that Acors began to use the surface water under 34-618 out on Era Flat right after they drilled the well under 34-7179 and that the surface water under 34-618 had been used out on the flat and the groundwater on Dad's Place (the 139 acres) ever since. Therefore, even though the transfer does not appear to have ever made the subject of a proper proceeding, I was somewhat skeptical of the primary/supplemental analysis, but couldn't see it's relevance to this application anyway. The diversion and use of water under both rights are tied to the diversion and use of a whole bunch of other rights and, their combined diversion and place of use have rate, volume and acreage limitations. I asked why, so long as such limitations are not exceeded when the rights are used in combination, it would make any difference whether 34-618 has a permissible place of use of the same acres out on the flat as the other rights with which it is combined?

Dave did not articulate a response I could understand, so I requested he write me a letter. He did so. A copy of his letter of August 2, 2007, is enclosed. I responded on August 8th. A copy of that letter is also enclosed. After we sent our last letter, Dave called me and said our proposal still wouldn't fly. When I told him I would like that response in writing, he suggested I contact you.

We don't see how any other water rights can be injured by documenting a practice that has been in effect for many years. And, we are unable to understand how such documentation could constitute an enlargement of right number 34-618 in any manner which would contravene the statutory injunction. So long as the rate, volume and acreage limitations on the use of all the rights, in whatever combination are not violated, it appears to us there is no harm and, hence no fowl.

If the Department officials are convinced we are just too stupid or too obtuse to understand, and if there is no way to structure this proposal in a manner acceptable to the Department for further processing, please reject the application in writing.

Thank you for your kind attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kent W. Foster".

Kent W. Foster
Attorney at Law