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DEPARTMENT OF
WATER RESOURCES

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BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR TRANSFER NO. 71132 OF
WATER RIGHTS NOS. 41-0730 AND
41-7034 IN THE NAME OF TIMOTHY
P. DEEG

**MEMORANDUM IN SUPPORT OF
REAPPLICATION FOR TRANSFER**

Tim Deeg ("Deeg"), applicant in the above entitled matter, by and through his counsel of record, Holden, Kidwell, Hahn, & Crapo, P.L.L.C., hereby submits this Memorandum in Support of Reapplication for Transfer ("Memorandum"). This Memorandum summarizes the relevant history of Deeg's owned and leased water rights since 1991 and is intended to provide IDWR with the relevant history of all of these rights. This Memorandum also provides argument that no portion of Deeg's water rights has been lost through forfeiture, abandonment, or any other recognized legal theory.

I. MEMORANDUM IN SUPPORT OF APPLICANT.

A. History of Deeg's owned and leased water rights since 1991.

The following section summarizes the facts and chronology involved with the water rights that Deeg either owns or leases. It is intended to show that no portion of any of these rights has been forfeited or otherwise lost.

To begin, here is a list of Mr. Deeg's water rights that he either owns or leases that are diverted from a single point of diversion:

Water Right No.	Priority Date	Diversion Rate	Diversion Volume	Acreage	Owned or Leased
41-7030	Jan. 2, 1978	1.4 CFS	504 AF	126	Leased
41-7034	April 7, 1978	1.82 CFS	364 AF	91	Leased
41-7071	July 13, 1983	.12 CFS	44 AF	11	Owned
41-7076	Sept. 11, 1985	4.8 CFS	960 AF	240	Owned
41-7081	Feb. 28, 1990	6.95 CFS	1392 AF	348	Owned
	TOTALS	15.09 CFS	3264 AF	816	

The relevant histories of Water Right No. 41-7030, Water Right No. 41-7076, Water Right No. 41-7081, Transfer No. 4268 (Water Right No. 41-7030), Transfer No. 5120 (Water Right No. 41-7034), Reapplication of Water Right Nos. 41-7030 and 41-7034, and the SRBA Proceedings for Water Right Nos. 41-7030 and 41-7034 are discussed below and each entry is labeled in order to clarify exactly which right is being discussed.

January 25, 1991: Water Right No. 41-7076: A Permit to Appropriate Water (No. 41-7076) is issued to Lanny Permann.

June 20, 1991: Water Right No. 41-7081: Permit No. 41-7081 is issued to Tim Deeg.

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November 30, 1993: Water Right No. 41-7030: Deeg enters into a lease with Richard G. Nelson and Arthur Gene Nelson to lease Water Right No. 41-7030. The original lease period lasted from October 1, 1993 until September 30, 1998. The lease period has presently been extended until 2008.

Winter of 1993: Transfer No. 4268 (Water Right No. 41-7030): Mr. Deeg submits an application for transfer to change the place of use for Water Right No. 41-7030.

January 28, 1994: Transfer No. 4268 (Water Right No. 41-7030): IDWR receives a Notice of Protest from Warm Creek Irrigation Co., Harold Isaak, Steve W. Isaak, and Roland Mayer and Sons (all of whom were represented by Roger Ling).

April 4, 1994: Transfer No. 4268 (Water Right No. 41-7030): Notice of Pre-Hearing Conference and Notice of Hearing is sent by IDWR. The Pre-Hearing Conference was scheduled for April 26, 1994 and the Hearing was scheduled for May 3, 1994.

April 27, 1994: Transfer No. 4268 (Water Right No. 41-7030): The Pre-Hearing Conference did not resolve the matter, so an Amended Notice of Hearing was sent to Deeg and the Protestants with the Hearing date set for May 17, 1994.

May 17, 1994: Transfer No. 4268 (Water Right No. 41-7030): A hearing was held in connection with this transfer. During the course of the hearing, the hearing officer continued the hearing.

May 18, 1994: Transfer No. 4268 (Water Right No. 41-7030): Notice of Continuation of Hearing was sent by IDWR. The hearing was to be continued on May 24, 1994.

June 14, 1994: Transfer No. 4268 (Water Right No. 41-7030): The Recommended Order is issued by Glen Saxton recommending approval of the transfer subject to certain conditions:

August 23, 1994: Transfer No. 4268 (Water Right No. 41-7030): The Final Order is issued approving the transfer.

September 6, 1994: Transfer No. 4268 (Water Right No. 41-7030): Deeg submits a Petition for Reconsideration as to one of the conditions to the transfer.

September 9, 1994: Transfer No. 4268 (Water Right No. 41-7030) The Petition for Reconsideration is denied by IDWR.

October 4, 1994: Transfer No. 4268 (Water Right No. 41-7030) Mr. Deeg files a Notice of Appeal with the Power County District Court.

March 21, 1995: Transfer No. 4268 (Water Right No. 41-7030): After a Stipulation and Order of Dismissal is filed, IDWR files an Amended Final Order approving the transfer subject to certain conditions:

March 29, 1995: Transfer No. 4268 (Water Right No. 41-7030): Judge Woodland of the Power County District Court dismisses the appeal by agreeing to the Stipulation and Order for Dismissal.

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September 19, 1995: Water Right No. 41-7076: Lanny Permann assigns to Deeg all right, title, and interest in Permit No. 41-07076.

September 19, 1995: Water Right No. 41-7076: Lanny Permann submits an application for Amendment of Permit with IDWR.

Late 1996 or Early 1997: Transfer No. 5120 (Water Right No. 41-7034): Deeg and his wife, Diane, enter into a lease with Richard G. Nelson, Arthur Gene Nelson, and Lela M. Nelson to lease Water Right No. 41-07034.

Late 1996 or Early 1997: Transfer No. 5120 (Water Right No. 41-7034): Deeg enters into a farm sublease with Steven Deeg and Lynn Deeg for the years 1997, 2000, 2003, and 2006.

September 26, 1997: Water Right No. 41-7076: The Application for Amendment of Permit, now in Deeg's name, is approved by IDWR.

October 1997: Transfer No. 5120 (Water Right No. 41-7034): Warm Creek Irrigation Co., Harold Isaak, and Steve Isaak file a Notice of Protest.

November 24, 1997: Transfer No. 5120 (Water Right No. 41-7034): IDWR issues a Notice of Pre-hearing conference for December 11, 1997.

December 15, 1997: Transfer No. 5120 (Water Right No. 41-7034): Because the Pre-hearing conference did not resolve the protest, IDWR issued a Notice of Hearing for February 3, 1998.

April 15, 1998: Transfer No. 5120 (Water Right No. 41-7034): IDWR issues a Recommended Order approving the transfer.

May 18, 1998: Transfer No. 5120 (Water Right No. 41-7034): IDWR issues a Final Order approving the transfer.

June 11, 1999: SRBA Proceedings for Water Right Nos. 41-7030 and 41-7034: IDWR issues a Preliminary Recommendation for Water Right No. 41-7030 for 1.4 CFS/441 AFY with a limitation that the use of this right with Water Right Nos. 41-7071, 41-7034, 41-7081, and 41-7076 is limited to a total combined diversion rate of 6.68 CFS.

July 7, 1999: SRBA Proceedings for Water Right Nos. 41-7030 and 41-7034: Deeg files two Notices of Error Reply (one each for Water Right Nos. 41-7030 and 41-7034) and an Application for Extension of Time to Avoid Forfeiture.

January 25, 2000: SRBA Proceedings for Water Right Nos. 41-7030 and 41-7034: Deeg's Application for Extension of Time is approved.

June 8, 2001: Reapplication for Transfer of Water Right Nos. 41-7030 and 41-7034: In a letter, Norm Young summarized a meeting between Tim Deeg, Phil Rassier, and Norm Young where they

discussed available administrative steps that could be followed to address the condition in Transfer No. 5120 that “places a portion of the water rights being used by Mr. Deeg at risk of future forfeiture.” According to Young, “the most acceptable vehicle for addressing the transfer condition appears to be a petition filed with the Department. The petition could request that the condition limiting the combined rate of diversion under the rights to 6.68 cfs to be modified in a manner that preserves the separate diversion entitlements under rights 71-07030 and 41-07034 through the termination or expiration of Deeg’s leasehold interest in these water rights. I assume that once the petition is filed, the Department would publish notice of the proposed change to the transfer condition. If a protest is filed in response to the published notice, the Department would conduct a hearing as appropriate before making a decision.”

June 29, 2001: Reapplication for Transfer of Water Right Nos. 41-7030 and 41-7034: A Petition for Modification of Final Order and to Divert Water is filed with IDWR.

July 17, 2001: Reapplication for Transfer of Water Right Nos. 41-7030 and 41-7034: In a letter, Glen Saxton stated that “[a]t the hearing conducted in connection with protested T5120 on February 3, 1998, Deeg testified that he did not intend to increase the rate of diversion from his well in excess of 6.68 cfs. Deeg’s testimony had a direct bearing on the decision to approve T5120. The department should not change Finding of Fact 11 to allow an increase in diversion capacity contrary to Deeg’s testimony presented at the hearing. A change to a finding would have to be accomplished in a separate proceeding than T5120, since the prior action is final.” Furthermore, Saxton stated “[t]o increase well capacity or to add an additional point of diversion, Deeg needs to file an application for transfer with the department. Such changes will have to be accomplished in a separate proceeding than T4268 and T5120, since the prior actions are final.”

However, Saxton also stated the following: “I think, however, that the Department can consider a change to the conditions of approval of T5120 if Deeg is seeking the addition of a condition of approval stating something like the following: ‘Upon termination of Deeg’s lease of water right no. 41-07034 and a change in place of use of water right no 41-07034 back to the licensed place of use through a transfer of water right, the right holder is entitled to divert up to 1.82 cfs of water without regard to Condition of Approval No. 5. in T5120 which limits the diversion rate of 41-07034’. A change to the conditions of approval is the sort of request that could be noticed in terms of readvertisement along the lines of the past discussions between you, Deeg, Norm and Phil.”

November 11, 2002: Reapplication for Transfer of Water Right Nos. 41-7030 and 41-7034: An application for transfer with respect to rights nos. 41-7030, 41-7034, 41-7071, 41-7076, and 41-7081, prepared by Dr. Brockway, is filed with IDWR.

November 19, 2002: Water Right No. 41-7081: A letter from IDWR indicates that IDWR intended to license the permit for 6.68 CFS with a volume limitation of 1350 AF.

November 19, 2002: Water Right No. 41-07076: IDWR sends a letter along with a draft license of 41-7076 that only allows for a diversion rate of 2.02 cfs and 857 acre-feet.

November 26, 2002: Reapplication for Transfer of Water Rights Nos. 41-7030 and 41-7034: In a letter to Glen Saxton, Dr. Brockway informed Saxton that “the transfer of water rights for Timothy Deeg, which was prepared to hopefully clear up the concerns relative to objections to the SRBA

recommendations was rejected by the Southern District office. The basis for the rejection was that the transfer involved two water rights which were in the permit stage and transfers involving permits are not processed or allowed.” The letter asked that processing be suspended until a time when these issues could be resolved.

March 27, 2003: Reapplication for Transfer of Water Rights Nos. 41-7030 and 41-7034: Dr. Brockway files another application for transfer with IDWR (southern office), this time only listing rights nos. 41-7030, 41-7034, and 41-7071.

April 8, 2003: Reapplication for Transfer of Water Rights Nos. 41-7030 and 41-7034: After the transfer application is returned to Dr. Brockway by IDWR for additional information relative to ownership of the land and water rights, Dr. Brockway submits the required information to IDWR.

April 24, 2003: Reapplication for Transfer of Water Right Nos. 41-7030 and 41-7034: All necessary parties sign an Extension of Term Water Rights Lease Agreement extending the lease for Water Right Nos. 41-07030 and 41-07034 for an additional five (5) years.

May 2, 2003: Water Right No. 41-7081: Letter from IDWR to Chuck Brockway indicating that IDWR has withheld processing of Water Right No. 41-07081 (and Water Right No. 41-07076) pursuant to Dr. Brockway’s request made in a letter dated November 26, 2002.

May 2, 2003: Water Right No. 41-07076: Letter from IDWR to Chuck Brockway indicating that IDWR has withheld processing of Water Right No. 41-07076 (and Water Right No. 41-07081) pursuant to Dr. Brockway’s request made in a letter dated November 26, 2002.

December 14, 2004: Reapplication for Transfer of Water Rights Nos. 41-7030 and 41-07034: A Notice of Protest is filed by William Isaak to Deeg’s transfer application.

December 16, 2004: Reapplication for Transfer of Water Rights Nos. 41-7030 and 41-7034: A Notice of Protest is filed by Warm Creek Irrigation Co. to Deeg’s transfer application.

February 23, 2005: Reapplication for Transfer of Water Right Nos. 41-7030 and 41-7034: A Notice of Hearing and Pre-Hearing Order is sent by IDWR setting the hearing on the protests to Deeg’s transfer application for March 31, 2005.

March 31, 2005: Reapplication for Transfer of Water Rights Nos. 41-7030 and 41-7034: Hearing is held in American Falls on the protests to Deeg’s reapplication for transfer and 41-7034.

B. No portion of Deeg’s water rights, Nos. 41-7030 and 41-7034 in particular, have been forfeited or otherwise lost.

1. Deeg’s water rights have not been lost by statutory forfeiture.

Forfeiture, unlike abandonment (a common law doctrine), is an objective statutory rule providing that if a water right is not beneficially used for a period of five years then it is forfeited regardless of the water right owner's intent. Idaho Code § 42-222(2) provides, in pertinent part:

All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to water shall revert to the state and be again subject to appropriation under this chapter.

The Idaho Supreme Court has confirmed that there can be a partial forfeiture of a water right under this statute. See *State v. Hagerman Water Right Owners*, 130 Idaho 727, 947 P.2d 400 (1997).

In addition, Idaho Code § 42-222(3) authorizes IDWR to extend the five-year period for an additional five years if the water right owner shows a "good and sufficient reason for nonapplication." In addition, Idaho Code 42-223(6) provides that no portion of a water right can be lost if the nonuse results from circumstances over which the water right owner has no control. Idaho courts have similarly held that forfeiture does not apply to water rights where the non-use results from circumstances beyond the right holder's control. See *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982).

In Deeg's situation, it is clear that he has not forfeited any portion of his water rights under Idaho Code § 42-222. From the above history, Water Rights Nos. 41-7030 and 41-7034 are the only rights that appear to be potentially subject to a forfeiture argument.

On July 7, 1999, Deeg filed an Application for Extension of Time to Avoid Forfeiture, and that application was granted on January 25, 2000. The approval was subject to a condition that Deeg was required to resume use of his water right on or before July 1, 2004. Eventually, Deeg decided that he would have to file a transfer in order to change the 6.68 cfs provision added by Transfer No. 5120, and Water Rights Nos. 41-7030 and 41-7034 were involved with this transfer. After Deeg's

transfer application was returned for additional information, it was submitted to IDWR on April 8, 2003. While the transfer application was pending, IDWR sent a Notice to Resume Water Use on April 2, 2004 informing Deeg that the July 1, 2004 deadline was approaching.

Under Idaho statutes and case law, it seems clear that Deeg has not forfeited all or any portion of Water Rights Nos. 41-7030 and 41-7034 because from April 8, 2003 until the present, Deeg was and still is prohibited from diverting water under those rights unless and until the pending application for transfer is approved. Deeg has no control over non-use of these rights because he cannot control the transfer processing. As a result, no portion of these rights has been forfeited.

In addition, even though Deeg could not divert more than 6.68 cfs and consequently could not fully divert the additional cfs amounts from Water Rights Nos. 41-7030 and 41-7034, Deeg still did divert the **volume** amounts from these rights to irrigate the 126 acres and the 91 acres authorized under these rights. It appears that a resumption of the use of these rights has occurred because the water volume was diverted and applied even though the diversion rate was not increased. To our knowledge, there is no Idaho case or statute or IDWR rule addressing this issue. However, given the fact that forfeiture is disfavored in Idaho, as indicated by the provisions of Idaho Code § 42-223 and from Idaho cases, it appears that the better approach is that use of either the diversion amount or volume amount is sufficient to avoid forfeiture.

2. Deeg's water rights have not been lost by forfeiture because the forfeiture provisions of Idaho Code § 42-222 has been tolled during the pendency of the SRBA proceedings.

In *In Re SRBA, Case No. 39576, Subcase No. 65-05663B (Wood v. Troutt)* (Idaho Fifth Judicial Dist. - SRBA, May 2002) (Judge Roger S. Burdick), the SRBA court ruled that the forfeiture statute is tolled for water rights once a claim for those rights is filed in the SRBA and the tolling of the statute continues until a partial decree is issued for that right. As IDWR is well aware, the SRBA

proceedings for Water Right Nos. 41-7030 and 41-7034 are presently held up pending completion of the administrative transfer proceeding. Because no partial decree has been entered for these two rights, the statute remains tolled until those partial decrees have been entered. Therefore, the water rights at issue have not been and are not currently subject to forfeiture.

3. Deeg's water rights have not been abandoned.

In Idaho, a water right can be lost by common law abandonment. Abandonment of a water right requires (1) an intent to give up the right, and (2) an actual relinquishment or surrender of the right. See *Jenkins v. State Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982); *Sears v. Berryman*, 101 Idaho 843, 623 P.2d 455 (1981). Furthermore, it appears that both of these elements (act and intent) must be concurrent. In *Gilbert v. Smith*, 97 Idaho 735, 738, 552 P.2d 1220, 1223 (1976), the Idaho Supreme Court stated that intent to abandon “may be evidenced by non-use for a substantial period of time, but mere non-use is not a per se abandonment.” Furthermore, as stated by Samuel Wiel, “[t]o constitute an abandonment of a water-right, there must be a concurrence of the intention to abandon it and the actual failure in its use.” Samuel C. Wiel, 1 Water Rights in the Western States § 567 (1911).

In Idaho, the standard of proof for proving abandonment is high, as explained by the Idaho Supreme Court in *Jenkins*. The court in that case stated that “[i]ntent to abandon must be proved by clear and convincing evidence of unequivocal acts, and mere non-use of a water right, standing alone, is not sufficient for a per se abandonment.” *Jenkins*, 103 Idaho at 388-89, 647 P.2d at 1260-61.

No evidence has ever been presented that indicates Deeg intended to abandon all or any portion of his water rights. It is therefore clear that Deeg has not abandoned any portion of such water rights.

4. Deeg has not waived his water rights.

Waiver is defined in Idaho as “a voluntary, intentional relinquishment of a known right or advantage.” *Cox v. Sandpoint*, 140 Idaho 127, 90 P.3d 352 (2003); see also *Dennett v. Kuenzli*, 130 Idaho 21, 25, 936 P.2d 219, 224 (Ct. App. 1997). Similar to abandonment of a water right, waiver only occurs when the intent to waive a water right is shown. No evidence has been presented that Deeg intended to waive any portion of his water rights. As with abandonment, it is therefore clear that Deeg has not waived all or a portion of his right.

5. No other methods of losing a water right are provided for under Idaho law.

It appears that the only possible legal theories upon which to base the loss of all or a portion of a water right can be based are discussed above. There are no Idaho cases or statutes that provide otherwise. It has been suggested that portions of a water right could be lost by virtue of conditions in transfers. However, there is no Idaho statute, Idaho case, or IDWR rule that provides for such a theory. Indeed, the loss of water rights under this concept would amount to a taking. The United States Supreme Court has clearly stated that “[t]he Fifth Amendment forbids the taking of private property for public use without just compensation.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336, 122 S.Ct. 1465, 1486, 152 L.Ed.2d 517, 549 (2002). In the context of imposing conditions upon permits, the United States Supreme Court has held, and the Idaho Supreme Court has agreed, that “there must be a nexus between a legitimate state

interest and the condition imposed by the governmental entity when approving the development . . . [and] a rough proportionality between the condition imposed and the projected impact of the proposed development. The governmental agency must make an individualized determination that the required dedication of property to public use is related both in nature and extent to the impact of the proposed development.” *KMST, LLC v. Ada County*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (citing to *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987)).

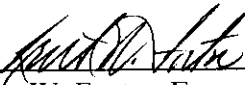
It has been suggested that portions of a water right could be lost by virtue of conditions imposed upon the granting of a transfer. Specifically, in Deeg’s situation, it was suggested that the 6.68 cfs limitation imposed by Transfer No. 5120 meant that the 1.4 and 1.82 cfs amounts provided in Water Rights Nos. 41-7030 and 41-7034 were therefore lost, even though just compensation was not paid. If IDWR chooses to issue such conditions that purport to take away all or a portion of a water right, then IDWR has the burden to show that there is a legitimate state interest for taking the water right and that the dedication of the water right to public use is related both in nature and extent to the impact of the proposed water development. IDWR has not done this in Deeg’s situation. IDWR cannot otherwise simply condition the loss of a water right or portions of a water right in transfer proceedings without paying just compensation . Therefore, if a portion of Deeg’s water rights is found to have been taken by virtue of transfer conditions, he would be entitled to just compensation.

II. CONCLUSION

As set forth above, Deeg has not lost any portion of his water rights through forfeiture, abandonment, or waiver. There are no other recognized legal theories in Idaho that provide for loss

of a water right or a portion of a water right through other means. It has been suggested that portions of a water right could be lost by virtue of conditions attached to a transfer. However, this suggestion is not supported by Idaho law or IDWR rule, and it furthermore appears that use of this theory would amount to a taking. Since there is substantial evidence that no injury will occur, Deeg's transfer application should be approved and Deeg should be entitled to divert the 10.02 cfs that he has requested and to which he is entitled under his water rights.

Submitted this day, the 18th day of April, 2005.



Kent W. Foster, Esq.

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CERTIFICATE OF SERVICE

I hereby certify that I am a duly licensed attorney in the State of Idaho, resident of and with my office in Idaho Falls, Idaho; that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, a true and correct copy thereof.

DOCUMENT SERVED: MEMORANDUM IN SUPPORT OF REAPPLICATION FOR TRANSFER

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Dated: 4/18/05

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