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DEC 20 2004
DEPARTMENT OF
WATER RESOURCES

SPECK & AANESTAD

A PROFESSIONAL CORPORATION
ATTORNEYS

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jimspeck@cox-internet.com
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aanestad@cox-internet.com

TELEPHONE
(208) 726-4421
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December 15, 2004

RECEIVED
JAN 11 2005
Department of Water Resources
Southern Region

Mr. Shelley W. Keen
Idaho Department of Water Resources
322 E. Front St.
Boise, Idaho 83720-0098

**Re: Blaine County School District No. 61/Water Right No. 37-21114
Our File No. 1159/970422**

Dear Shelly:

I have now gone through my files relating to the acquisition by the Blaine County School District No. 61 (the "District") in 1994 of the above-referenced Big Wood River Water Right from Marathon Partners. As you know, this water right was then dedicated to mitigation for the purpose of approving the permit for Water Right No. 37-8821. At the time, the issue of forfeiture of the Big Wood River Water Right was examined as thoroughly as any water right I have ever been involved with! In response to the preliminary claim verification report prepared by Steve Clelland in 1993, I entered into negotiations and discussions with the Department through first, Clive Strong, then Nick Spencer and finally Glen Saxton. I have enclosed copies of all of this correspondence for your review. There is no written correspondence or other written communication with the Department after the December 21, 1994 letter from Glen Saxton to Lee Peterson. My notes, however, indicate I spoke to Glen Saxton on two different occasions in February, 1995, and that I was told the application was being processed and reviewed for approval. I also spoke with Jim Johnson on March 14, 1995 and was told the application was on his desk for approval. I then received the Permit for 37-8821 a few days later.

The only conclusion that is possible from this extensive correspondence is that the Department determined the Big Wood River Water Right had not been forfeited. Furthermore, at the time the only five-year period in question was 1987 through 1991. Since the claim for this water right was filed in October, 1988, the running of the forfeiture time period was tolled at the time of the claim filing pursuant to the SRBA court ruling which we did not have the benefit of in 1993 - 1994.

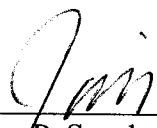
Permit 37-8821 was issued to the District on reliance on this background correspondence and an understanding that the Department had determined the mitigation water right was valid. The water right has been used for that purpose every year since 1995. Arguably this constitutes resumption of use of the water right which is a recognized defense to forfeiture.

Mr. Shelley W. Keen
December 16, 2004
Page 2

I believe it is appropriate for the Department to acknowledge the past review and provide the District and me with assurance that it is not going to recommend this water right for disallowal on the basis of forfeiture. Please call me to discuss this matter as soon as you have had an opportunity to review these materials. Thank you.

Sincerely yours,

SPECK & AANESTAD
A Professional Corporation

By: 
James P. Speck

JPS/jef

Enclosures

cc: John Gaeddert w/encl.
Terry Scanlan w/encl.
Christian Petrich w/encl.
Ed Dumke, Jr. w/encl.

F:\WPDATA\JIM\BCSD\LETTERS\Keen.12-15



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

RECEIVED

DEC 20 2004

DEPARTMENT OF
WATER RESOURCESCECIL D. ANDRUS
GOVERNORR. KEITH HIGGINSON
DIRECTOR

December 21, 1994

Lee Peterson
Water District 37
P.O. Box T
Shoshone, ID 83352RE: APPLICATION FOR TRANSFER NOS. 37-00577 AND A37-12818 -
MARATHON BROTHERS

Dear Lee:

In 1993, Marathon Brothers, through Jim Speck of Ketchum filed the above referenced application for transfer with the department offering 0.11 cfs of the above referenced surface water rights as mitigation for four (4) pending applications for permit which propose a groundwater diversion. The question before the department is whether there has been a five year consecutive period of non-use associated with the surface water right.

On September 28, 1993 you submitted the "Recommendation of Watermaster" form to the department in connection with the proposed transfer. With respect to watermaaster billing for use of water, your records apparently show the following:

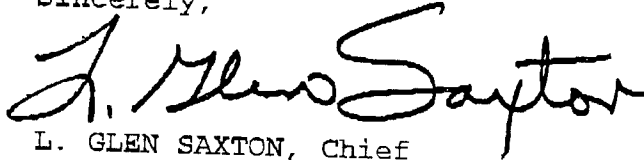
- 1987 - no billing
- 1988 - no billing
- 1989 - no billing
- 1990 - billed
- 1991 - billed

The critical 5-year period appears to be from 1987 through 1991. Since there is conflicting information on the use of water, I need to know whether your records show that water was or was not delivered (not just billed) during the period in question.

Lee Peterson
Page 2
December 21, 1994

Please provide the information at your earliest convenience.

Sincerely,

A handwritten signature in cursive script, reading "L. Glen Saxton". The signature is written in dark ink and is positioned above the typed name and title.

L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR - S. Region

HOGUE, SPECK & AANESTAD
A PROFESSIONAL ASSOCIATION
Attorneys at Law
120 East Avenue
Post Office Box 987
Ketchum, Idaho 83340
Phone: (208) 726-4421
FAX: (208) 726-0752

FAX MEMO/COVER SHEET

To: Glen Saxton		From : James P. Speck	
Fax Number : 1-208-327-7866		Number of Pages: 2 (including cover page)	
Date : 12/30/94	Time : 16:55:20	For Information Call: 1-208-726-4421	
Subject : Marathon Partners - Portion of 37-00577		Fax Number : 1-208-726-0752	

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HOGUE, SPECK & AANESTAD
A PROFESSIONAL ASSOCIATION OF
ATTORNEYS

TERRY G. HOGUE
JAMES P. SPECK
DOUGLAS J. AANESTAD
TRACY DUNLAP

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FAX (208) 788-4230

December 30, 1994

VIA FACSIMILE - 1-208-327-7866

Mr. L. Glen Saxton
Idaho Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720-9000

Re: Marathon Partners - Portion of Water Right No. 37-00577 (SRBA Claim No. A37-12828) - Applications for Permit No. 37-08587, 37-08819, 37-08820 and 37-08821 and Application for Transfer No. 4205

Dear Glen:

Please call or write and inform me of the status of these matters. Thank you.

Sincerely yours,

HOGUE, SPECK & AANESTAD



James P. Speck

JPS/j

cc: client

HOGUE, SPECK & AANESTAD

A PROFESSIONAL ASSOCIATION
ATTORNEYS

TERRY G. HOGUE
JAMES P. SPECK
DOUGLAS J. AANESTAD
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November 30, 1994

VIA FACSIMILE - 1-208-327-7866
ORIGINAL TO FOLLOW BY MAIL

Mr. L. Glen Saxton
Idaho Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720-9000

Re: Marathon Partners - Portion of Water Right No. 37-00577 (SRBA Claim No. A37-12828) - Applications for Permit No. 37-08587, 37-08819, 37-08820 and 37-08821 and Application for Transfer No. 4205

Dear Glen:

Enclosed please find the originals of the Affidavit of Edmund E. Dumke, Jr. and the Supplemental Affidavit of Gregory A. Mann which I am submitting in support of the above-referenced Applications. Please call me if you have any further questions or desire any additional information. Thank you.

Sincerely yours,

HOGUE, SPECK & AANESTAD



James P. Speck

JPS/j
(enclosures)
cc: Ed Dumke (w/ enclosures)

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO**

**IN THE MATTER OF A PORTION OF
WATER RIGHT NO. 37-00577 - SRBA
CLAIM NO. A37-12818**

)
) **SUPPLEMENTAL AFFIDAVIT OF**
) **GREGORY A. MANN**
)

STATE OF IDAHO)
) ss.
County of Blaine)

I, GREGORY A. MANN, being first duly sworn under oath, depose and state as follows:

1. Attached hereto as Exhibit A is a copy of the October 1, 1993 Affidavit I previously submitted in this matter. I reaffirm and incorporate into this Affidavit all of my statements made in the October 1, 1993 Affidavit.

2. On July 15, 1991, I made arrangements with Dale Mizer, ditch rider for the Hiawatha Canal Association, to have the entire amount of the Pacesetter 1883 water right delivered from the Hiawatha Canal to the northeast corner of Pacesetter's Deerfield Property, which is outlined in red and identified by the letter "D" on the aerial photograph copy attached hereto as Exhibit B.

3. On July 16, 1991, Mr. Mizer diverted 136 inches of water from the Hiawatha Canal at point "1" shown on Exhibit C into the ditch running along the base of the hill to a culvert crossing under Quigley Road. The path of delivery of the water from the Canal to the Deerfield Property is marked in red on Exhibit C. I cleaned out these ditches and the culvert so that as much

of the 136 inches as possible reached the Deerfield Property.

4. I did not measure the water at the point where it entered the Deerfield Property. I ran the water out onto as much of the Deerfield Property as possible using the field ditches. It covered that portion of the Deerfield Property marked with red cross-hatching on Exhibit B. The water ran continuously from July 16, 1991 through July 30, 1991. The purpose was to irrigate as much of the Deerfield Property as possible, starting the growth of pasture grass so that cattle could be grazed on the property when the pasture was adequate, hopefully by the following summer.

5. From August 1, 1991 through August 30, 1991, the entire 136 inches of the Pacesetter 1883 water right was diverted from the Hiawatha Canal and delivered to the northwest corner of the Hidden Meadows Property (outlined in blue and identified by the letters "HM" on Exhibit B) where it ran in field ditches to flood irrigate that parcel. The purpose was the same as for the Deerfield Property. I then contacted the manager of the property immediately north of the Hidden Meadows Property, Mr. Greg Smith, who expressed a desire to use the Pacesetter lands for irrigated pasture for his cattle as soon as the pasture was adequate.

Dated this 29 day of November, 1994.

Gregory A. Mann
GREGORY A. MANN

SUBSCRIBED AND SWORN TO before me this 29th day of November, 1994.

Susan A. Roth
Notary Public for Idaho
Residing at Moskone, Idaho
My commission expires 10/06/2000

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO**

IN THE MATTER OF A PORTION OF	)	
WATER RIGHT NO. 37-00577 - SRBA	)	AFFIDAVIT OF EDMUND E.
CLAIM NO. A37-12818	)	DUMKE, JR.
	)	

STATE OF IDAHO	)	
	)	ss.
County of Blaine	)	

I, EDMUND E. DUMKE, JR., being first duly sworn under oath, depose and state as follows:

1. I am 38 years old and have been a resident of Blaine County, Idaho for 27 years.
2. I am the managing general partner of Marathon Partners, an Idaho general partnership ("Marathon"). On June 24, 1992 Earl Engelmann entered into an agreement to purchase from Pacesetter Development Company ("Pacesetter") two (2) parcels of land known as the Hidden Meadows Property and the Deerfield Property, and identified as parcels "HM" and "D", respectively, on the aerial photograph copy attached hereto as Exhibit A. Included in this purchase was the entire amount of Pacesetter's 1883 water right - 136 inches (the "water right"). In mid-July, 1992, Marathon acquired Engelmann's interest in this agreement. The transaction then closed September 10, 1992.

3. The water right had already been cut for priority by the time Marathon acquired its interest in the agreement to purchase the properties from Pacesetter, so Marathon was not able to cause the water right to be used in 1992. However, in the spring of 1993, I made arrangements with Burr Smith to have the entire Hidden Meadows Property flood irrigated that season. This parcel was then fenced with new fencing in the fall of 1993 and leased to our neighbors to the north who run a cutting horse and cattle operation (the "Cutters"). The Cutters ran their cattle on the Hidden Meadows Property in the fall of 1993 once the fencing was completed. The Hidden Meadows Property was again flood irrigated in 1994 and leased to the Cutters who again ran their cattle on the property.

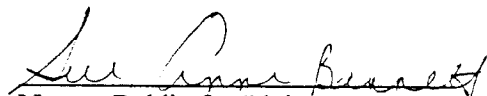
4. Prior to Marathon's purchase, the Deerfield Property and the Hidden Meadows Property had been annexed into the City of Hailey. By the end of 1992, City water had been extended to the Deerfield Property and we were planning to market the residential lots the following year. In early 1993, Marathon reached an agreement with the Blaine County School District ("District") through a non-profit group known as the Wood River High School Baseball and Softball Association ("WRHSBSA") to donate to the District a portion of the water right sufficient to irrigate the existing high school grounds and athletic fields as well as the planned and badly needed new complex for baseball and softball fields, a total of approximately 40 acres. In March, 1993, the District filed its Application for Permit No. 37-08821 proposing to use this portion of the water right in a "mitigation plan". Marathon signed a quitclaim deed transferring all of its interest in that portion of the water right to the District and understood that from that point forward any use of that portion of the water right could only be by the District pursuant to the right it would eventually obtain through its application. therefore, no attempt was made to use that portion of the water right

in 1993 and 1994.

Dated this 15 day of November, 1994.


EDMUND E. DUMKE, JR

SUBSCRIBED AND SWORN TO before me this 15 day of November, 1994.


Notary Public for Idaho
Residing at Idaho Id
My commission expires 7/21/95

1
2 AFFIDAVIT

3 STATE OF IDAHO)
4 County of Blaine) ss.
5)

6 I, GREGORY A. MANN, being first duly sworn upon
7 oath, depose and state as follows:

8 1. I am 47 years old and have been a resident of
9 Blaine County, Idaho for 22 years.

10 2. In the summer of 1991, I was asked by Ned Loomis, a
11 representative of Pacesetter Development Company, to irrigate
12 Pacesetter's undeveloped lands with its 1883 water right. The
13 purpose was to raise pasture grass for cattle grazing.

14 3. From July 16 through July 30, 1991, I flood
15 irrigated the SE 1/4 NW 1/4, Section 10, Township 2 North Range
16 18 East, property commonly known as the Deerfield Subdivisions
17 No. 3, 4 and 5. In order to get the water to this property, it
18 was diverted from the Hiawatha Canal into the Highline Ditch
19 which runs at the base of the hills north of Quigley Road and
20 then through a culvert under Quigley Road to the Northeast corner
21 of the place of use.

22 4. From August 1 through August 30, 1991, I diverted
23 the water for flood irrigation of the entire parcel north of
24 Quigley Road known as the Hidden Meadows Property, consisting of
25 approximately 55 acres. The purpose of the irrigation was to
26 raise pasture grass for grazing.

27
28 **AFFIDAVIT OF GREGORY A. MANN - 1**

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DATED this 1 day of ^{OCT.}~~September~~, 1993.

Gregory A. Mann
Gregory A. Mann

OCTOBER SUBSCRIBED AND SWORN to before me this 1st day
of ~~September~~, 1993.

Dorothy L. Jones
Notary Public for Idaho
Residing at: Relevue, Id 83511
Comm. Expires: 6/99

AFFIDAVIT OF GREGORY A. MANN - 2

EXHIBIT B

HM

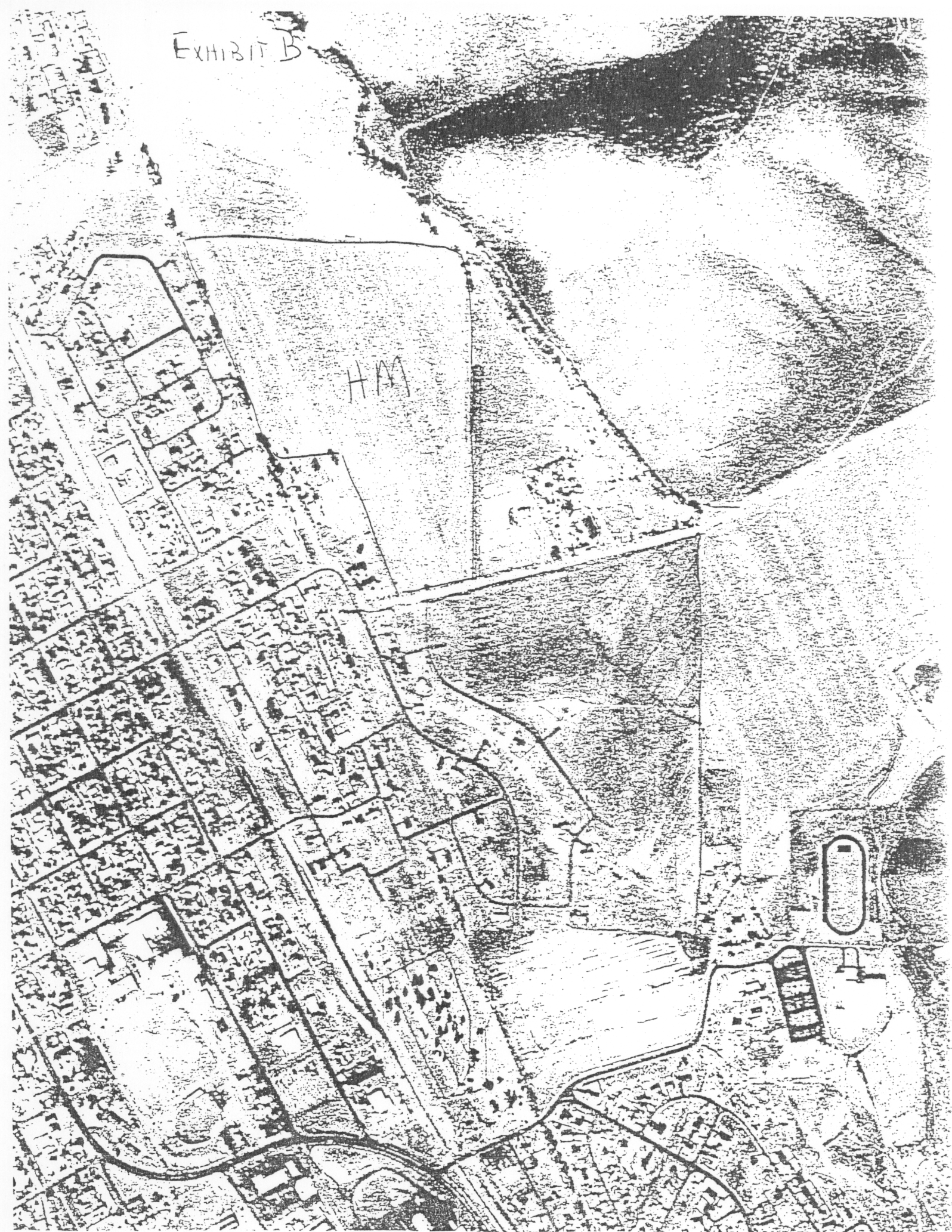
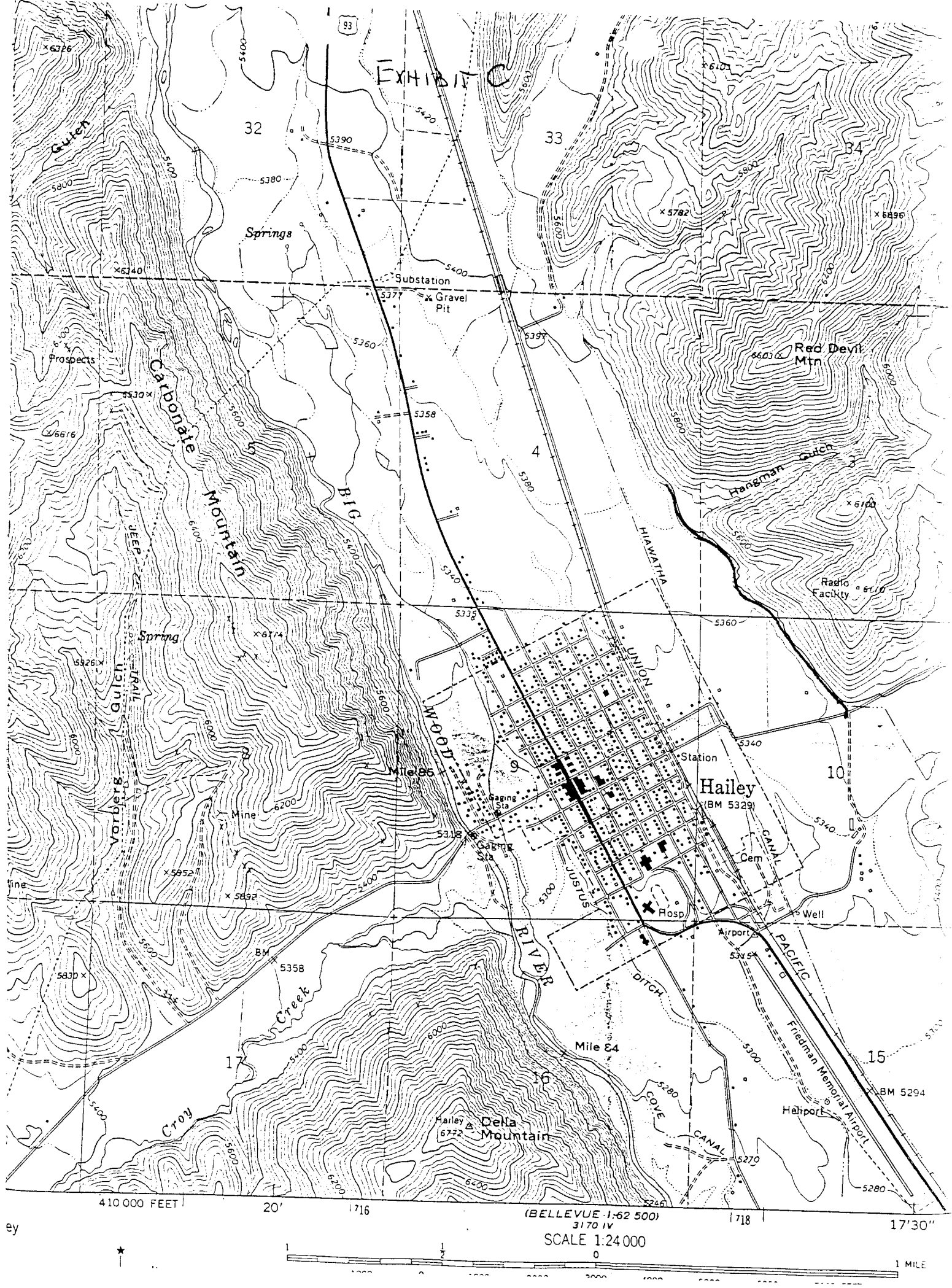
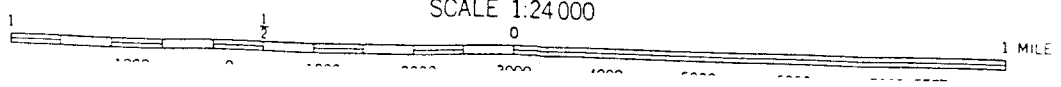


EXHIBIT C



ey



HOGUE, SPECK & AANESTAD
A PROFESSIONAL ASSOCIATION
ATTORNEYS

FAXED
10/18

TERRY G. HOGUE
JAMES P. SPECK
DOUGLAS J. AANESTAD
TRACY DUNLAP
JOHN A. SEILLER

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FAX (208) 788-4230

October 18, 1994

VIA FACSIMILE 208/327-7866

L. Glen Saxton, Chief
Water Allocation Bureau
Idaho Department of Water Resources
1301 North Orchard Street
Boise, Idaho 83720-9000

Re: Marathon Partners - Portion of Water Right No. 37-00577 (SRBA Claim
No. A37-12828) Applications for Permit No. 37-08587, 37-08819, 37-08820,
and 37-08821 and Application for Transfer No. 4205

Dear Mr. Saxton:

Thank you for your letter of October 7, 1994, which we received on October 12, 1994. My clients and I appreciate the Department's interest in completing the processing of the above-referenced Applications. In my June 6, 1994, letter to Nick Spencer I set forth our legal argument on the defense of resumption of use to statutory forfeiture. Mr. Spencer replied by letter of August 10, 1994 wherein he disagrees that the presumption of use defense is available in this case. The unstated result of Mr. Spencer's analysis is that the resumption of use defense is NEVER available to a water user on an over appropriated stream such as the Big Wood River. Carried further, this must mean the Department's position is that once a water right in the Big Wood River drainage is not used for a period of five (5) consecutive years (unless any of the non-use is due to a reason beyond the control of the water user) that water right is lost by forfeiture notwithstanding any resumption of use of that right in the sixth year or any year thereafter. Needless to say, if this approach is consistently applied by the Department in evaluating the SRBA Claims and in future transfer proceedings, the impact on current water uses in the Big Wood River Valley will be tremendous!

Mr. Spencer noted that his letter represents his opinion and not necessarily the position of the Department in this transfer proceeding. Accordingly, I specifically request the resumption of use defense be evaluated in the approval process for the above-referenced Applications.

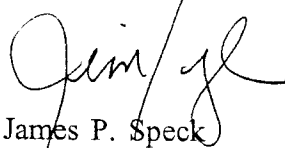
It is my understanding that the sole issue in these proceedings is whether or not Marathon Partners' water right was forfeited as a result of non-use for the period from 1987 through 1991. In 1992, this water right was cut for the rest of the irrigation season on July

L. Glen Saxton, Chief
Water Allocation Bureau
Idaho Department of Water Resources
October 18, 1994
Page 2

14. Therefore, it may not have been an economically viable option to irrigate the land in question that season. In 1993, the year of Marathon Partners first irrigation season, use of the water right was resumed. We have previously submitted affidavits (Gregory Mann and Burr Smith) asserting use of the water on the property in question during this time frame (1987-1991). In particular, Mr. Mann has stated under oath that he used the water right to irrigate on both sides of Quigley Road during the 1991 irrigation season. From prior correspondence and conversations with Mr. Spencer, I understand the Department accepts the statement by Mr. Mann that the water right was used on the lands in 1991, but questions whether or not the use was a "beneficial use" necessary to avoid a claim of non-use. Mr. Spencer sent me a list of questions concerning this issue to be answered by the person involved with the water use in 1991. I will have answers to these questions, in affidavit form, submitted by November 1, 1994. Please let me know immediately if this is not sufficient action to avoid the preliminary order proposed by your October 7, 1994 letter.

Sincerely yours,

HOGUE, SPECK & AANESTAD, P.A.



James P. Speck

JPS:jl

cc: Ed Dumke (w/ enclosure)
Gregg Sturtevant (w/ enclosure)
Rod Thornton (w/ enclosure)
Keith Friedly (w/ enclosure)
Dr. Peter Fitzpatrick (w/ enclosure)
Larry Lloyd (w/ enclosure)



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

October 7, 1994

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

RECEIVED

OCT 12 1994

Hogue, Speck & Associates

James P. Speck
Hogue, Speck & Aanestad
120 E. Avenue
P.O. Box 987
Ketchum, ID 83340

RE: APPLICATION FOR PERMIT NO. 37-08587 IN THE NAME OF GREGG T. STURTEVANT, APPLICATION FOR PERMIT NO. 37-08819 IN THE NAME OF KEITH FRIEDLY, APPLICATION FOR PERMIT NO. 37-08820 IN THE NAME OF ROD THORNTON AND APPLICATION FOR PERMIT NO. 37-08821 IN THE NAME OF BLAINE COUNTY SCHOOL DISTRICT

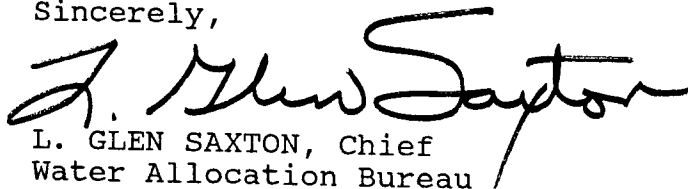
Dear Mr. Speck:

The above referenced applications were filed about a year ago with the department and have been the subject of numerous letters and phone discussions between Nick Spencer of this office and you related to surface water which has been proposed under application for transfer no. 4205 as mitigation for the diversion of ground water under the applications for permit.

The problem that needed to be resolved was whether and how to determine the validity of surface water right 37-00577(part)/A37-12818 which upon investigation by SRBA field staff appears to have been lost through five (5) years non-use. At one time, the SRBA court appeared to be the logical entity to deal with the validity of the offered mitigation right. Since the court has stayed action in the SRBA, however, the department's position is that there is authority as expressed in Jenkins, 103 Idaho 384, 389, 647 P.2d 1256 (1982) for the department to consider the validity of a right as an application for transfer is processed.

In order to get this matter moving again, I propose that the department issue a Preliminary Order denying the four (4) pending applications for permit and denying the transfer unless you have a different suggested solution which will allow this matter to proceed to a conclusion rather than languish in department files. If I do not hear from you within twenty (20) days, the department will issue such an order.

Sincerely,



L. GLEN SAXTON, Chief
Water Allocation Bureau

c: IDWR S. Region

08/10/94

13:30

31 327 7866

ID WATER RESOURCES

001



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

TRANSMITTAL COVER SHEET

FAX NUMBER: (208) 327-7866

DATE: 8/10/94

TO: James Spack

FROM: Dick Spack

DOCUMENT DESCRIPTION: _____

COVER SHEET + 9 PAGES

CONTACT: Spack IF YOU DO NOT RECEIVE ALL THE PAGES



State of Idaho
DEPARTMENT OF WATER RESOURCES

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Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

August 10, 1994

VIA FACSIMILE TRANSMISSION

James P. Speck, Esq.
HOGUE, SPECK & AANESTAD
120 East Avenue
Ketchum, Idaho
FAX NO. (208) 726-0752

Re: Applications for Permit and Application for Transfer
regarding Water Right No. 37-12818

Dear Jim:

This letter is in response to your prior letter detailing your interpretation of Jenkins v. State Department of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982), and Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952). I have pondered your letter at length, discussed it with other attorneys here, re-read the cases in question, and gone back to look at the department's transfer application file in the Boyer case. I find after all of this that I cannot agree with your analysis. My areas of disagreement are as follows:

1. Your definition of injury resulting from resumption of use is unworkable because in certain circumstances its application would make water rights non-forfeitable no matter how long the period of non-use.

First, I do not agree with the narrow definition that you glean from the Boyer decision as to what constitutes injury to junior rights sufficient to negate resumption of the use as a defense to forfeiture. You suggest in essence that the only water right holders who can be injured by a resumption of use are (1) those who have adversely possessed the senior right during its period of non-use, or (2) those who have made a new appropriation of the water in question during the period of non-use. If your analysis is correct, then the resumption of use exception has swallowed the forfeiture rule. Water rights within a water district cannot be adversely possessed. See Idaho Code §42-607. Moreover, when a senior right on an overappropriated stream is not used, that water goes to fill junior rights that otherwise would not be filled. Accordingly, in such a case the

James P. Speck, Esq.
August 10, 1994
Page 2

forfeiture does not produce unappropriated water available to a new appropriator. In the case of the Big Wood River, the department has not been taking applications for new permits for surface water diversions since 1977.¹

Consequently, if your interpretation of the resumption of use defense is correct, a senior right in the Big Wood River in practical effect could never be forfeited: its use could be resumed at any time because under your definition there could be no classes of water users (adverse possessors or new appropriators of the forfeited water) entitled to assert injury resulting from the resumption of use. This analysis flies in the face of "use it or lose it" philosophy underpinning the prior appropriation doctrine. I don't believe it is correct.

2. IDWR is required to determine questions of forfeiture as part of its injury analysis in transfer proceedings irrespective of whether forfeiture has been asserted by a third party.

I also cannot agree with your contention that there must be an assertion of forfeiture prior to the resumption of use in order for the department to address the issue of whether that resumption injures other water rights. Because the department is required by Idaho Code § 42-222 to undertake an injury analysis as part of its review of every transfer application and is required to examine all evidence in its possession regarding whether the transfer would injure other water rights, the department takes the position that, even if the question of forfeiture has not been raised by protest, with regard to every right sought to be transferred it must determine (1) whether the right has been forfeited, and, if so, (2) whether resumption of its use would cause injury to other rights.

In addition your assertion that in order to negate the resumption defense a third party must come forward to assert injury prior to the resumption of use of the forfeited right is unsound and unrealistic. When a junior appropriation is filled by water that is not being used by a senior appropriator it is very unlikely that the junior appropriator would be aware that

¹ I also disagree with your contention that the Big Lost River was a fully appropriated stream at the time of the Boyer decision and hence was essentially similar to the Big Wood River today. There is no indication of this in the Boyer decision. Rather, I do note that the appellate court did state that part of the conflicting testimony before the trial court concerned whether the water being used by Mr. Boyer in the 1940's was surplus water. See 73 Idaho at 159.

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that is the source of his water. That is especially so in an overappropriated stream such as the Big Wood River where there are junior rights that are filled at some times and unfilled at other times depending upon stream conditions and the pattern of upstream senior uses; such a junior appropriator is not going to know that his right is being filled at a particular time because of the nonuse of the senior right in question. He will not be injured (and hence will have no notice of that injury) until he stops receiving water because use of the senior right has been resumed. (Indeed, this is the very essence of the "priority ladder" injury delineated by the Idaho Supreme Court in the Jenkins case.) Therefore, under your analysis, this junior could not assert that the right had been forfeited, and that its resumption would cause injury until the forfeiture had already been cured by resumption of use.

3. Application of Boyer does not address the issue of how IDWR is to treat forfeiture in a transfer proceeding.

I cannot agree with your suggestion that the Boyer case is the controlling authority in the present situation. The Boyer case does not address the question of how the department is to treat the resumption of use defense to forfeiture in its injury analysis in a transfer proceeding. At the time of the Boyer decision the department interpreted the law to preclude it from addressing forfeiture issues in a transfer proceeding. Indeed, the department's decision in the Boyer case reveals that the director expressly declined to consider whether the water rights in question had been forfeited.² Therefore, in Boyer the question of how the department was to deal with allegations of forfeiture and resumption of use in its injury analysis in a transfer proceeding was not an issue before either the trial court or the appellate court.

4. Application of Boyer is not persuasive authority regarding the resumption of use defense.

Since forfeiture was not an issue in the transfer proceeding before the department, the defense of resumption of use presumably was first raised in the trial de novo before the

² Presumably the department's position in this regard was based on the apparent rule of Twin Falls Canal Co. v. Shippen, 46 Idaho 787, 271 P. 578 (1928), and later cases, to the effect that questions of abandonment could not be determined in a transfer proceeding. For all practical intents and purposes this rule was discarded by the Idaho Supreme Court in the Boyer case. See 73 Idaho at 158. See also discussion in the Jenkins case, 103 Idaho at 386-7.

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district court. I say "presumably" because neither the administrative record, the trial court decision, nor the appellate opinion provides any clear description of the factual particulars of the resumed use. The decree entered by the trial court does not even state that use of the right was abandoned or forfeited and subsequently resumed; rather, the trial court decreed only

[t]hat the Respondent and Applicant [Boyer] is, and has been at all times mentioned in these proceedings the owner of the rights to the use of the waters hereinbefore described, with said dates of priorities, and has not abandoned the same or any part or portion thereof.

Decree, entered December 28, 1950, In the Matter of the Application of Boyer, Custer County Case No. 1502, at 5 (emphasis added).³ Arguably, the trial court's reference to Mr. Boyer's apparently uninterrupted ownership could be construed as meaning that there had been no forfeiture and subsequent resumption of use, since during the period between forfeiture and resumption of use the water right would have reverted to the state. Mr. Boyer would not have "owned" it during that period.

Since there is no reference to resumption of use in the trial court's decree, the Idaho Supreme Court's treatment of the resumption of use defense in the Boyer case is especially opaque. First, the supreme court did note that evidence was introduced which showed that for 30 or 40 years no water had been used on the parcel from which the water right was proposed to be transferred (the "Leslie parcel"). See 73 Idaho at 158. However, the supreme court did not address whether the water rights in question had been used on some other parcel prior to the 1940's. The supreme court then went on to detail some of the conflicting evidence regarding use of the water during the 1940's on the parcel to which the water rights were proposed to be transferred (the "Butte City parcel"). It then stated as follows:

Aside from nonuse in Section 30, [the Leslie parcel] there was no evidence of intent to abandon, and the evidence is clearly to the contrary.

³ The trial court may, however, have addressed the resumption of use defense in its findings of fact and conclusions of law. The decree recites that findings and conclusions were entered by the court, but the department's transfer file does not contain a copy of them.

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Boyer, 73 Idaho at 159. The supreme court then went on to recite the general rule from Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944), and Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400 (1945) regarding resumption of use, and concluded the point as follows:

The trial court was justified in holding that water had been so used by respondent that he had not abandoned or forfeited his water rights, correctly applying the principles announced in the Carrington and Wagoner cases, *supra*.

Boyer, 73 Idaho at 160. Thus the reader has to infer from the supreme court's reference to the Carrington and Wagoner cases that the resumption of use defense was raised and was the basis for the trial court's finding that the water rights had not been forfeited. Moreover, the reader is left to infer that the "resumed" use was the use of the right on the Butte City parcel during the 1940's. But nowhere in the appellate court opinion is there any clear statement that this was in fact the use the court was referring to.

In sum, the Boyer decision raises more questions than it answers: Were the water rights in question used on some other parcel prior to the 1940's or were they indeed abandoned or forfeited? Is the supreme court saying that resumption of use of a water right upon a different place of use is a sufficiently valid use to prevent forfeiture? Was the use of the water right on the Butte City parcel in the 1940's only a partial resumption of use? If so, is the supreme court actually saying that a partial resumption is sufficient to prevent forfeiture of the entire right? And if that is the case, can there even be such a thing as a partial forfeiture? The Boyer decision's murky discussion of the facts underpinning its conclusions gives rise to these questions, but it certainly doesn't answer them.

I believe that about the only conclusions that one can safely draw from the Boyer decision is that (1) the department approved the transfer on the basis that there would be no injury to other water rights; (2) the trial court affirmed the department, in part upon the court's finding that the water rights in question had not been abandoned; and (3) the trial court's determination that the rights had not been abandoned was affirmed on appeal. Therefore, I do not find the case to be persuasive authority with regard to the present situation.

5. The Jenkins case is the controlling authority.

In contrast to the Boyer decision, the case of Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 647 P.2d 1256

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(1982), is very much on point. First, it clearly provides that the department has the authority to determine forfeiture issues in a transfer proceeding. Second, it speaks specifically to what constitutes injury to other water rights caused by resumption of use of a forfeited water right, which injury the department by statute is required to analyze in acting upon any transfer application.

I think you are splitting hairs when you assert that because the resumption of use defense had not been raised by Mr. Jenkins the case is not authority for the question of how the department is to determine whether resumption of the use would injure other rights. While it is true that Mr. Jenkins did not assert the resumption of use defense, this was because he contended that he had never ceased using the water in question, and that, therefore, the rights in question had not been forfeited. See 103 Idaho at 386, 389 and 390. However, the department did determine that the right had been forfeited; it further determined that resumption of its use pursuant to transfer would injure other rights; and this determination was affirmed on appeal. See 103 Idaho at 386 and 390.

I believe that the flaw in your interpretation of both the Boyer and the Jenkins cases can be demonstrated by analyzing the following question: applying your interpretation, what would have happened if Mr. Jenkins had asserted the resumption of use defense? Per your reading of the Boyer decision the only other water users who could have opposed the asserted resumption of use would have been (1) users who had appropriated the water in question during the period between the end of the five year forfeiture period and the beginning of the resumption in use, or (2) users who had adversely possessed the water during that period. Since the director found that the creeks in question were overappropriated (see 103 Idaho at 386) there could have been no new appropriators who could have asserted injury from the resumption of use. Moreover, since there is no indication in the text of the Jenkins decision that any protestors came forward to assert adverse possession, one must assume that there were no adverse possessors. Accordingly, under your interpretation of Boyer, as I understand it, there could have been no users entitled to assert injury arising from the resumption of use. Presumably, therefore, the asserted resumption of use would have precluded the department from finding forfeiture and going forward to determine injury arising from the resumption.

In other words, Mr. Jenkins' transfer application was denied because, although he contended that he had never ceased using the water, the department determined that he had forfeited the water right and that his resumption of use would cause injury. Yet, per your interpretation of the Boyer case, had Mr. Jenkins instead

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admitted that he had forfeited the right but established that he had resumed its use prior to applying for transfer, that use could not have been found to cause injury. This distinction makes no sense to me. The resumed use would cause a "priority ladder" injury to juniors irrespective of whether Mr. Jenkins had resumed the use prior to seeking transfer, or whether, instead, the resumption would have occurred by virtue of the transfer. I see no principled basis for the supreme court to direct the department to consider the "priority ladder" injury where a forfeited right is proposed to be resumed pursuant to a transfer; yet for the department to be precluded from considering the identical type of injury in a transfer proceeding simply because the use had been resumed before the transfer application was filed.

I do not believe that the Idaho Supreme Court intended the Jenkins case to be read so narrowly as to lead to such an anomolous distinction. Rather, I think the supreme court's direction to the department is clear:

[W]e conclude that the director of the Department of Water Resources has jurisdiction to determine the question of abandonment and forfeiture and such is required as a preliminary step to performance of his statutory duty in determining whether or not the proposed transfer would injure other water rights. While ordinarily abandonment and forfeiture are to be determined in a separate proceeding, it is clear that when a water right is sought to be transferred and protestors allege that it has been abandoned or forfeited, and that resumption of that right would cause some injury, a determination of abandonment or forfeiture is necessary for the performance of his powers of determining injury. The director is statutorily required to examine all evidence of whether the proposed transfer will injure other water rights or constitute an enlargement of the original right, and evidence which demonstrates that the right sought to be transferred has been abandoned or forfeited, is probative as to whether that transfer would injure other water rights.

Jenkins, 103 Idaho at 387 (emphasis added). The supreme court then goes on to clearly explain the type of injury to other rights that can result from resumption of use.

If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost, . . . and the junior appropriators move up the ladder of priority. If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior

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appropriators. Priority in time is an essential part of western water law and to diminish one's priority works an undeniable injury to that water right holder.

Jenkins, 103 Idaho at 388 (emphasis added; citations omitted).

I think the supreme court's direction to the department is clear. Moreover, to the extent that the Jenkins definition of injury may be broader in scope than that which may be suggested in the Boyer decision, Jenkins is the later case, and therefore is controlling.

Thus, while I very much appreciate the obviously careful study and thoughtful analysis you applied to the cases in question, I disagree with your conclusion. The better position is that the use which you say Marathon Partners has now resumed does not necessarily cure the prior forfeiture, if in fact the right has been forfeited; nor, if the right has previously been forfeited, does that resumption obviate the need for the department to determine whether approval of the transfer and applications for permit would result in injury to other rights.

All that having been said, I need to emphasize at this juncture that the analysis I have detailed above is my own interpretation of the position the department likely would take. It is not the department's formal ruling on your resumption of use defense to forfeiture.

The transfer application and the four applications for permit--all four of which propose using the water right in question for mitigation--presently are before the department for consideration; but, per Glen Saxton's letter of November 3, 1993, the department has been holding them in abeyance pending your being afforded full opportunity to submit additional information in response to the forfeiture concerns the department has raised.

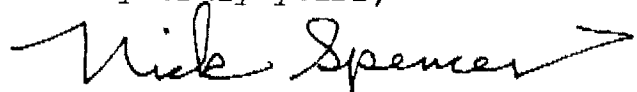
Generally the department does not rule on individual factual or legal issues piecemeal. Rather, it prefers to address all concerns at one time in deciding whether to approve or deny any given application. Thereby, if an application is denied, all concerns raised by the applicant are preserved for review and reconsideration at the same time during the course of any subsequent administrative review proceeding that the applicant might seek. Therefore, I have not shared this letter, or discussed its substance, with the administrators who ultimately will render either the initial determination on the applications in question, or who will render the decision in any subsequent formal administrative review proceedings, should such be undertaken.

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In conclusion, I believe that where we presently are in this process is still at the question of whether there has been a forfeiture. This implicates both the other defenses to forfeiture as to which I have previously requested information from you, as well as the additional factual information--previously detailed by Messrs. Schulte and Clelland--that the department has requested concerning the diversion of water in 1991. I think it now is appropriate for you to submit this information to the department so that it can go forward with its determination of the pending applications.

Since all SRBA proceedings have been stayed, this matter has become purely one for the allocations side of the department to address. I have responded to your resumption of use inquiry because you initiated it prior to the entry of the stay order, it is clearly relevant to the pending determinations by the allocations staff, and the allocation functions have not been stayed. However, since my duties with the department primarily concern the SRBA, I think it is appropriate that I now return this matter to allocations and cease my involvement with it. Legal counsel for the allocations side are Phil Rassier and John Homan. Both of them, but especially Phil Rassier, are generally familiar with the factual and procedural background of the applications.

Very truly yours,

A handwritten signature in black ink that reads "Nick Spencer". The signature is written in a cursive, flowing style. The first name "Nick" is written with a large, prominent "N". The last name "Spencer" is written with a large, prominent "S" and a long, sweeping horizontal stroke that extends to the right, ending in a small arrowhead.

NICHOLAS B. SPENCER
Deputy Attorney General

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June 6, 1994

VIA FACSIMILE - 1-208-327-7866

Mr. Nicholas B. Spencer
Idaho Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720-9000

Re: SRBA Claim No. A37-12818 - Blaine County School District (the "District"),
et al.

Dear Nick:

Thank you for your letter of May 25, 1994. This correspondence is directed at the pending Applications for Permit Nos. 37-08587 (Gregg Sturtevant), 37-08819 (Keith Friedly), 37-08820 (Rod Thornton), and 37-08821 (the District) and Application for Transfer No. 4205 (Fitzpatrick), each of which involves a portion of the water right claimed in the SRBA by Marathon Partners as A37-12818.

I must respectfully disagree with your analysis of the defense of resumption of use to an action for statutory forfeiture of a water right pursuant to I.C. § 42-222. Although this defense was described and discussed in several other cases (e.g. Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937); Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009 (1944); Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400 (1945)), Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952), is the controlling decision for the present case. In Boyer, Boyer sought to transfer the point of diversion approximately 18 to 20 miles downstream and to change the place of use from lands within the Big Lost River Irrigation District to lands outside the Irrigation District's boundaries of 10.88 cfs of decreed water rights from the Big Lost River with priority dates from June 1, 1888 to May 10, 1897. Protests were filed by the Big Lost River Irrigation District and the Three-In-One Ditch Company asserting, among other grounds, that Boyer had forfeited these water rights by non-use for more than five years under I.C. § 42-222. The State Reclamation Engineer granted the change finding, in part, that the transfer will not result in any injury whatsoever to any water right claimed or owned by any other person. The evidence showed non-use for a period of 30 or 40 years, but a resumption of use (on lands other than the decreed place of use!) prior to the assertion of any claim of forfeiture. The Idaho Supreme Court held Boyer's water rights had not been forfeited, stating as follows:

Forfeitures are abhorrent and all intendments are to be indulged

against forfeiture. Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50; Idaho Farms Co. v. Northside Canal Co., D.C., 24 F.Supp. 189.

The correct rule was thus, in essence, announced in Carrington v. Crandall, 65 Idaho 525, 147 P.2d 1009:

'Although statutory abandonment of a water right has occurred, forfeiture is not effective if, after five-year period original owner or appropriator resumes the use of the water prior to claim of right by a third party. (I.C.A., sec. 41-216)' now Section 42-222, I.C.

and similarly in Wagoner v. Jeffery, 66 Idaho 455, 162 P.2d 400.

No one claims this particular decreed water by adverse possession and clearly, so far as this proceeding is concerned, it was in part at least used by respondent on some of his Arco lands before it was claimed it had been forfeited. (emphasis added).

73 Idaho at 159-60. Therefore, if after five or more consecutive years of non-use, a water right holder resumes use of all or even just a portion of his water right before a third party claims that water right by adverse possession or asserts a claim that it has been forfeited, statutory forfeiture of the water right pursuant to I.C. § 42-222 is avoided.

Boyer is very similar to the present case. In 1946, when Boyer filed his application for transfer, there were rights on the Big Lost River with priority dates junior to all or at least some of the rights owned by Boyer. In all likelihood, the Big Lost River was then fully appropriated. Thus, these junior priority rights would have "moved up the ladder of priority" if the Court had determined that Boyer's senior rights were forfeited. Nonetheless, the Supreme Court upheld the resumption of use defense and held Boyer's water rights had not been lost through statutory forfeiture.

Jenkins v. State Department of Water Resources, 103 Idaho 384, 647 P.2d 1256 (1982), is NOT a resumption of use defense case! The Court specifically noted that Jenkins had not raised this defense. Moreover, there was NO evidence of resumption of use of Jenkins Cottonwood Creek water right.¹ The Court stated the resumption of use defense as follows:

¹ After the hearing, the Director had found that Jenkins' Cottonwood Creek water right had not been used for "the previous 18 years". 103 Idaho at 386. The Supreme Court noted that "the record is devoid of any evidence to indicate that any of the established defenses would be applicable even if argued." Id. at 389. Specifically, the Court noted that clear and convincing evidence indicated Jenkins had not used the Cottonwood Creek right between 1961 and 1979, and protests to his application for transfer asserting forfeiture were filed in 1978.

[I]f use of the water right is resumed after the five year period, but before any third parties make a claim in the water, then the courts will decline to declare a forfeiture. Application of Boyer, 73 Idaho 152, 248 P.2d 540 (1952) (other cites omitted) (emphasis added).

Id. at 389. Under Jenkins, the Department is required to determine whether or not a water right which is the subject of an application for transfer has been forfeited. This is a "preliminary step" in the determination of whether or not other water rights will be injured by the proposed transfer. Id. at 387. In other words, the question of forfeiture is first resolved. If five or more consecutive years of non-use are established, available defenses must be examined. Injury to other users is NOT a factor in evaluating the defense of resumption of use to a forfeiture challenge. The analysis of the impact of a proposed resumption of use pursuant to the transfer on junior appropriators is only performed IF the water right is found to have been forfeited. Thus, the Court in Jenkins noted that ordinarily forfeiture is determined in a separate proceeding, but where protesters to a proposed transfer allege the water right has been forfeited, the Department must first determine if that is the case. Then,

If a water right has indeed been lost through abandonment or forfeiture, the right to use that water reverts to the state and is subject to further appropriation. (cites omitted). Other parties may then perfect a water right in those waters. (cites omitted). Hence a person making a subsequent appropriation will be injured by resumption of the abandoned or forfeited water right. If a senior right has been abandoned or forfeited, the priority of the original appropriator is lost (cites omitted) and the junior appropriators move up the ladder of priority. If a senior right which had been forfeited or abandoned were allowed to be reinstated through a transfer proceeding, clearly injury would result to otherwise junior appropriators. (emphasis added).

Id. at 387-88. The issue of junior water rights "moving up the ladder of priority" is only reached if the senior water right is first found to have been forfeited.

In virtually every Idaho water right forfeiture case, there is a statement to the effect that forfeitures are "abhorred by the courts" or "not favored". Therefore, forfeiture of a water right must be established by clear and convincing evidence. The law of forfeiture of water rights in Idaho does not preclude the use of the defense of resumption of use on fully appropriated streams. There must be some intervening claim to the water right in question by a third party such as adverse possession or the assertion of forfeiture prior to the resumption of use of all or some portion of the water right. The mere fact that junior water rights exist on the same stream (even a fully appropriated one such as the Big Lost River in Boyer) does not constitute the "claim of right by a third party" necessary to defeat the defense of resumption of use.

Mr. Nicholas B. Spencer
June 6, 1994
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In the present case, assuming arguendo no use from 1987 through 1992, Marathon Partners resumed use of all of its water right in 1993. No third party has made a claim of adverse possession to this water right, nor did anyone assert the right had been forfeited prior to this resumption of use. The defense of resumption of use applies to this case and the water right has NOT been forfeited. In the absence of forfeiture, there is no injury to other water rights nor is there an enlargement in use of this water right by the use of portions of the water right in the mitigation plans proposed by the District, Sturtevant, Thornton and Friedly or the transfer of place of use of a portion of the water right requested by Fitzpatrick. The District and my other clients are entitled to the approval of their respective applications.

Sincerely yours,

HOGUE, SPECK & AANESTAD

A handwritten signature in black ink, appearing to read "Jim", written over the printed name James P. Speck.

James P. Speck

JPS/j

cc: clients



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

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CECIL D. ANDRUS
GOVERNORR. KEITH HIGGINSON
DIRECTOR

May 25, 1994

VIA FACSIMILE TRANSMISSION

James P. Speck, Esq.
HOGUE, SPECK & AANESTAD
120 East Avenue
Ketchum, Idaho
FAX NO. (208) 726-0752

Re: SRBA Claim No. A37-12818/ Transfer Application No.
4205, et al.

Dear Jim:

This letter will follow up on our prior letters and telephone conversations, addressing in particular the issue of whether the doctrine of resumption of use is available as a defense against forfeiture.

First, it does not appear likely that on the factual record as presently developed IDWR would determine that the water right in question, if forfeited, has been revived by resumption in use. Resumption in use only revives the original water right if the right can be revived without injury to intervening junior appropriators. In Jenkins v. State Dept. of Water Resources, 103 Idaho 384, 388, 647 P.2d 1256 (1982) the Idaho Supreme Court expansively defined the term "injury". The Court pointed out that when the senior right is forfeited, all junior rights move up one place in the order of priority; and that if the senior right is subsequently revived, the resulting displacement of the juniors one place back down the priority order in and of itself constitutes injury. Therefore, on an overtaxed stream such as the Big Wood River, it would be virtually impossible for a senior right to be revived without a resulting injury to juniors. If IDWR were to recognize the revival, it would have to do so only in a manner to prevent that injury. Such prevention likely would be accomplished by treating the right as being in effect a new appropriation with a priority date as of the date the use was resumed. Such a junior priority date would be of little use to your clients.

Therefore I assess the situation with this water right as follows. I presume that the additional affidavits you have discussed with me--once submitted--will establish that water was diverted onto both the upper and lower parcels during July and

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August, 1991. The issue thereby becomes a question of what beneficial use, if any, was made of the water that was diverted. IDWR's two water agents who each independently field examined the property will testify that they observed no evidence of beneficial use. The aerial photography and the agents' own observations do, in my estimation, establish a prima facie case of five years non-use or lack of beneficial use. My reading of the case law is that, while the showing of beneficial use necessary to rebut a prima facie showing of forfeiture necessarily is minimal since forfeiture must be proved by clear and convincing evidence, the beneficial use must at least be more than simply diverting some water onto the ground for purpose of avoiding forfeiture.

Thus I think the question that still needs to be answered before IDWR can approve this transfer is what beneficial use was made of the water that was diverted.

However, there are also two defenses to forfeiture that may come into play. To make an informed decision regarding this transfer application IDWR would be very much interested in learning what the facts are regarding the following:

1. You stated to me in one of our telephone conversations that the watermaster would swear out an affidavit to the effect that he delivered the water right in question into the Hiawatha Canal during the 1991 irrigation season, and if I remember correctly, also during the 1990 irrigation season. If the watermaster delivered the right into the canal, and if in fact the right were not actually diverted onto the property and used during any time that it was being delivered into the canal, the question that naturally arises is what happened to the water? Did somebody else use it, and if so, under what circumstances? I ask these questions because the five year forfeiture clock does not run while the water right is being beneficially used by a third party with the permission of the water right owner. See Zezi v. Lightfoot, 57 Idaho 707, 68 P.2d 50 (1937). The permission given to the third party by the water right owner can be verbal. Reynolds Irrigation District v. Sproat, 70 Idaho 217, 214 P.2d 880 (1950). IDWR takes the position that the permissive use doctrine articulated in Zezi v. Lightfoot requires an identifiable third party to whom the water right owner gives express permission; it is not good enough to merely leave the water in the ditch and presume that somebody else thereby is using it. (If that were sufficient by itself, such a rule would in effect abolish the doctrine of forfeiture. However, the courts have to my knowledge never addressed the issue of whether there are circumstances in which implied consent by the water right owner is sufficient to establish permissive use by a third party sufficient to avoid forfeiture.) If your inquiries reveal

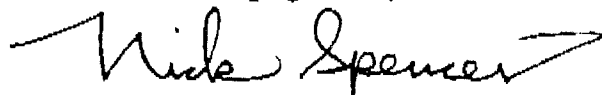
James P. Speck, Esq.
May 25, 1994
Page 3

that at any time during the period 1987-1991 this water right was being used by somebody else with the permission of the water right owner, such use would eliminate the five years continuous non-use necessary for forfeiture.

2. A second concern about which IDWR would like additional information is why the water right apparently was not used from at least 1987 forward. One item of evidence that lends support to a finding of forfeiture is that at some point in the past the properties downstream from the two parcels in question were subdivided and the ditch apparently was filled in. As a result the water right at issue here became the last right on the ditch. Because the downstream rights were no longer being delivered, less water would have been turned into the ditch. With less head coming down the ditch it presumably would have been more difficult to divert the entire right out onto the two parcels. While this situation augments a finding of forfeiture, it also raises a question as to whether the doctrine of impossibility may be raised as a defense to forfeiture. If it were physically impossible to divert the entire quantity of the right out of the ditch, then this might be a defense to forfeiture of at least that portion of the right that could not be diverted. However, this in turn raises the question of whether the water right owner would thereby be under a duty to use due diligence in modifying his diversion works to permit delivery of the entire right. In any event this is an avenue that I believe merits further exploration by you or your clients.

I raise these two additional areas of concern because IDWR does not wish to act upon an incomplete factual record. While IDWR has statutory duties to perform, and cannot approve a transfer of all or any part of a right that has been forfeited, it certainly does not want deny a transfer on the basis of an erroneous determination of forfeiture. Therefore I would be very much interested in hearing what additional information you might have on the points addressed above.

Very truly yours,



NICHOLAS B. SPENCER
Deputy Attorney General

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VIA FACSIMILE TRANSMISSION

May 19, 1994

CECIL D. ANDRUS
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120 East Avenue
Ketchum, Idaho 83340
FAX NO. (208) 726-0752

Re: Snake River Basin Adjudication claims

Dear Jim:

At the May 17th status conference Judge Hurlbutt in his verbal comments from the bench clarified certain aspects of his gag order on the department: it now is reasonably clear that IDWR is free to discuss with you both the factual and legal parameters of the Fitzpatrick transfer application, including concerns that may shade over into the SRBA, because at this juncture the transfer is the overriding matter between IDWR and your client, and Judge Hurlbutt has made it clear that he did not intend his order to limit IDWR's ability to perform its non-SRBA statutory duties.

It is not yet clear, however, whether IDWR will be permitted to discuss any aspect of the Acequia claims, because for them SRBA considerations predominate. At the status conference IDWR submitted a lengthy memorandum detailing the many concerns it had about the scope of the gag order. The judge gave other status conference participants a week to review the memorandum and submit written comments. He indicated that after reviewing those comments he will provide appropriate clarification regarding his order.

I will be meeting with department managers this coming Monday to address various forfeiture/resumption of use issues that have arisen both within and without of the SRBA. I would hope and trust that the outcome of this meeting will be a uniform policy and legal interpretation regarding the circumstances under which IDWR will recognize a resumption of use as not causing injury to other rights. I will contact you after that meeting to advise you on its outcome.

Very truly yours,

NICHOLAS B. SPENCER
Deputy Attorney General

HOGUE, SPECK & AANESTAD
A PROFESSIONAL ASSOCIATION
Attorneys at Law
120 East Avenue
Post Office Box 987
Ketchum, Idaho 83340
Phone: (208) 726-4421
FAX: (208) 726-0752

FAX MEMO/COVER SHEET

To: Nick Spencer		From : James P. Speck
Fax Number : 1-208-327-7866		Number of Pages: 3 (including cover page)
Date : 5/16/94	Time : 16:30:00	For Information Call: 1-208-726-4421
Subject : Blaine County School District - Claim A37-12818		Fax Number : 1-208-726-0752

*cc son
Copy + mail
to
Ed Dunkle, Jr.
Gregg Skunkert
Larry Lloyd
Peter Fitzpatrick
Red Thompson
Keith Fredley*

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HOGUE, SPECK & AANESTAD
A PROFESSIONAL ASSOCIATION OF
ATTORNEYS

TERRY G. HOGUE
JAMES P. SPECK
DOUGLAS J. AANESTAD
TRACY DUNLAP
JOHN A. SEILER

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16 WEST CROY STREET
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POST OFFICE BOX 460
HAILEY, IDAHO 83333
(208) 788-3567
FAX (208) 788-4230

May 16, 1994

VIA FACSIMILE - 1-208-327-7866

Mr. Nicholas B. Spencer
Idaho Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720-9000

Re: SRBA Claim No. A37-12818 - Blaine County School District (the "District"),
et al.

Dear Nick:

Thank you for your letter of May 13, 1994. I am aware of the "gag order" entered by Judge Hurlbutt. If broadly construed, the order appears to prohibit the processing of any transfer application which raises an issue concerning any element of a water right for which a Notice of Claim has been filed in the SRBA. I agree it certainly restricts the ability of an applicant and IDWR to resolve the question of forfeiture which is to be investigated by IDWR for all transfer applications.

In light of this potential significant delay in processing the District's application for permit using the claimed water right for mitigation, I offer the following suggestion. Those transfers of water rights recently approved by IDWR with which I am familiar include a condition stating that approval of the transfer does not preclude review of the validity of the water right in the SRBA. If a similar condition is added to the approval of the District's application for permit, the issues we are currently struggling with can be left for resolution in the SRBA.

The future of the popular Wood River Sports complex is yet another project now bogged down in the seemingly endless complexities of the SRBA. Blaine County is now considering assisting in the funding of the project, but is naturally concerned about the availability of proper water rights to complete it. I hope IDWR will do what it can to expedite the resolution of the many issues involved in this application and work with us to continue its processing.

Please call me after the hearing on the "gag order" tomorrow so that I can advise my client how next to proceed. Thank you.

Mr. Nicholas B. Spencer
May 16, 1994
Page 2

Sincerely yours,

HOGUE, SPECK & AANESTAD

A handwritten signature in black ink, appearing to read "JPS", written in a cursive style.

James P. Speck

JPS/j

cc: client



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNORR. KEITH HIGGINSON
DIRECTORTRANSMITTAL COVER SHEET

FAX NUMBER: (208) 327-7866

DATE: 5-13-94TO: JIM SPECK
(208) 726-0752FROM: NICK SPENCERDOCUMENT DESCRIPTION: LETTERCOVER SHEET + 4 PAGES

CONTACT: _____ IF YOU DO NOT RECEIVE ALL THE PAGES

PLEASE REMIT \$ _____ (4 (# pages) x .25 ea) TO THE ADDRESS LISTED BELOW.~~DEPARTMENT OF WATER RESOURCES
PO BOX 83720
BOISE ID 83720-0098~~

THANK YOU!



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866CECIL D. ANDRUS
GOVERNORR. KEITH HIGGINSON
DIRECTOR

May 13, 1994

VIA FACSIMILE TRANSMISSION

James P. Speck, Esq.
HOGUE, SPECK & AANESTAD
120 East Avenue
Ketchum, Idaho 83340
FAX NO. (208) 726-0752

Re: Snake River Basin Adjudication claims

Dear Jim:

I have not yet responded to your inquiry regarding IDWR's position as to resumption of use as a defense to forfeiture because the SRBA Court has imposed a gag order on the department. A copy of the order is attached.

I think the order clearly prohibits any substantive discussion regarding the Acequia claims. Though I think it less clear, the order also appears to prohibit substantive discussion regarding the notice of claim A37-12818, because although the claim hasn't yet been recommended, paragraph 2 of the order prohibits contact with any claimants, especially contact of a nature that might be viewed as settlement discussion or negotiation. The only exception is in the final paragraph of the order, but it limits communication to the "purely mechanical exchange of information."

We have requested clarification from Judge Hurlbutt, and have a hearing before him set for this coming Tuesday, May 17th, to address the limitations the order is imposing upon the routine functioning of the department.

Very truly yours,

NICHOLAS B. SPENCER
Deputy Attorney General

Enclosure

RECEIVED

MAY - 6 1994

OFFICE OF THE
ATTORNEY GENERAL

1994 MAY -5 PM 1:19

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO

FILED

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

) INTERIM ORDER PROHIBITING
) COMMUNICATION BETWEEN THE
) DIRECTOR OF THE IDAHO DEPARTMENT
) OF WATER RESOURCES, THE IDAHO
) DEPARTMENT OF WATER RESOURCES
) AND ALL CLAIMANTS IN THE SNAKE
) RIVER BASIN ADJUDICATION
)

This Order memorializes the ruling entered orally at the April 26, 1994 Status Conference in the Snake River Basin Adjudication (SRBA). It is entered temporarily due to statutory changes to the role of the director and the Department of Water Resources (IDWR) enacted in the 1994 Legislative session. The Order shall stay in effect until legal issues surrounding this role can be fully decided and guidelines adopted for communications between IDWR and parties to this case.

IT IS ORDERED that both the director and IDWR, its agents and employees shall have no contact with any party to the SRBA about this case. This prohibition applies to the parties in the three test basins (Reporting Areas 1, 2 and 3) and all people or entities who have filed claims with IDWR as part of the SRBA case. This prohibition includes the Idaho Water Resources Board and all Idaho executive agencies made parties to the SRBA under the new legislation. Further, the director and IDWR are prohibited from participating in any settlement discussions or negotiations about any water right or element thereof for which a notice of claim has been filed in the SRBA as well as any issue raised for judicial resolution in the SRBA.

The director and IDWR are prohibited from conducting any discovery or further investigation of any water right reported in the director's reports for the three test basins (Reporting Areas 1, 2 and 3).

The director and IDWR may respond to purely mechanical requests for information relating to the department's duty to accept claims or amended claims in the SRBA and to allow claimant's access to investigative files and records of the department. IDWR may conduct fact finding investigations of water rights for which notices of claims have been filed and will be recommended in future director's reports. These investigations must be limited to fact finding only and contacts or communications must be limited to purely mechanical exchange of information.

IT IS SO ORDERED.

DATED May 5, 1994.


DANIEL C. HURLBUTT, JR.
Presiding Judge
Snake River Basin Adjudication

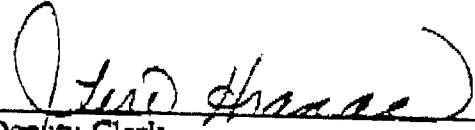
CERTIFICATE OF MAILING

I certify that a true and correct copy of the INTERIM ORDER PROHIBITING COMMUNICATION BETWEEN THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES, THE IDAHO DEPARTMENT OF WATER RESOURCES AND ALL CLAIMANTS IN THE SNAKE RIVER BASIN ADJUDICATION was mailed on May 11, 1994, with sufficient first-class postage to the following:

Chief, Natural Resources Division
Office of the Attorney General
State of Idaho
P. O. Box 44449
Boise, ID 83711-4449

The United States Department of Justice
Environment and Natural Resources Division
550 West Fort Street, Box 33
Boise, ID 83724

Court Certificate of Mailing


Deputy Clerk

HOGUE, SPECK & AANESTAD
A PROFESSIONAL ASSOCIATION
Attorneys at Law
120 East Avenue
Post Office Box 987
Ketchum, Idaho 83340
Phone: (208) 726-4421
FAX: (208) 726-0752

FAX MEMO/COVER SHEET

To: Nick Spencer

From : James P. Speck

Fax Number : 1-208-327-7866

Number of Pages: 3 (including cover page)

Date : 4/8/94

Time : 14:38:32

For Information Call: 1-208-726-4421

Subject : SRBA Claim A37-12818

Fax Number : 1-208-726-0752

4.15.94 JPC: Nck
mtg next week re. resumption of use.

THE INFORMATION CONTAINED IN THIS FAX TRANSMISSION IS CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE ABOVE-NAMED RECIPIENT AND MAY BE THE SUBJECT OF ATTORNEY/CLIENT PRIVILEGE. IF THE READER OF THIS MESSAGE IS NOT THE ABOVE-NAMED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISTRIBUTION, DISSEMINATION, COPYING OR OTHER USE OF THIS COMMUNICATION IS STRICTLY PROHIBITED AND NO PRIVILEGE IS WAIVED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE. THANK YOU.

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FAX (208) 788-4230

April 8, 1994

VIA FACSIMILE - 1-208-327-7866

Mr. Nicholas B. Spencer
Idaho Department of Water Resources
1301 North Orchard Street
Statehouse Mail
Boise, Idaho 83720-9000

Re: SRBA Claim No. A37-12818 - Blaine County School District, et al.

Dear Nick:

I have again met with Greg Mann to discuss the irrigation use of the water right in 1991. However, I have not yet been able to meet with Burr Smith or others who may have run horses and/or cattle on either or both of the two (2) parcels. In the meantime, I would like to address the Department's philosophy and focus on the issue of forfeiture in this case.

First, it is my understanding the Department is only concerned with the non-use of the water right from 1987 through 1992, a period of only six (6) consecutive years. I do not believe there is an issue of forfeiture during any other time frame. Second, Marathon Partners purchased the property and water right in September, 1992. The prior owner, Pacesetter Development Company, had been attempting to sell the property during 1992, a very poor water year for this area. I believe the watermaster records will show this right was cut for priority on July 14, 1992 and not turned on again during that season. Thus, there were good reasons for Pacesetter to not use the right in 1992.

Third, upon purchasing the property, Marathon Partners, knowing of the proposal for new athletic fields for the Blaine County School District ("District"), approached the non-profit organization (the Wood River High School Baseball and Softball Association) charged with raising the funds and overseeing the construction of the fields and offered to donate a portion of the water right (from the southern parcel) as long as the transfer to the new use was accomplished as quickly as possible. Marathon fully intended to resume actual use of the water for irrigation of the southern parcel in 1993 if an agreement could not be reached on transferring that portion to the District. After corresponding with Norm Young about whether to file an application for transfer or new permit with a "mitigation plan", the District elected to do the latter and Application for Permit No. 37-08821 was filed at the end of March, 1993. We believe that proceeding promptly through the administrative process to obtain approval of the

Mr. Nicholas B. Spencer
April 8, 1994
Page 2

new use should constitute a "resumption of use" of this portion of the water right (from the southern parcel). It is only fair to make the "use" retroactive to the date of filing the application (similar to the priority date for new permit applications) and suspend the ticking of the forfeiture clock during the pendency of the application approval process, since the applicant has no control over the time it takes for the application to make its way through the necessary administrative channels.

In 1993, Marathon Partners irrigated the entire northern parcel known as Hidden Meadows and cattle were run on this land through an agreement with the owners of lands to the north of Hidden Meadows. Burr Smith did the irrigating. Marathon intends to irrigate and run cattle on the Hidden Meadows property again in 1994. This is certainly a resumption of a valid beneficial use.

Thus, we have resumption of use of the water right after six (6) years of non-use (for the sake of this discussion only - we are not conceding non-use in 1991!) The sixth year (1992) was such a low water year it arguably should not even be counted against us. As you know, forfeiture is generally "abhorred" by the courts and proof of forfeiture by clear and convincing evidence is required. I do not know of a reported case declaring forfeiture of a water right after only five or six consecutive years of non-use. Is the Department, in this and other cases in the SRBA, going to take the position that water rights are to be forfeited when the non-use extends for only five or six years? Shouldn't the defense of resumption of use be recognized in this case?

Please call me at your earliest convenience. It is important for the District to know where it stands by this summer season. Thank you.

Sincerely yours,

HOGUE, SPECK & AANESTAD

A handwritten signature in black ink, appearing to read "Jim", written over the printed name James P. Speck.

James P. Speck

JPS/j
cc: client



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNORR. KEITH HIGGINSON
DIRECTORTRANSMITTAL COVER SHEET

FAX NUMBER: (208) 327-7866

DATE: 2-25-94

TO: JIM SPECK FROM: NICK SPENCER
FAX # (208) 726-0752

DOCUMENT DESCRIPTION: LETTER AND ATTACHMENT

COVER SHEET + 4 PAGES

CONTACT: _____ IF YOU DO NOT RECEIVE ALL THE PAGES



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DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

February 25, 1994

VIA FACSIMILE TRANSMISSION

James P. Speck, Esq.
HOGUE, SPECK & AANESTAD, P.A.
120 East Avenue
Ketchum, Idaho
FAX NO. (208) 726-0752

Re: Notice of Claim A37-12818

Dear Jim:

To follow up on our conversation of yesterday afternoon please find attached the list of questions prepared by Steve Clelland and Mel Schulte regarding your clients' irrigation practices with regard to the above referenced claim.

As I have previously mentioned to you it now is appearing to me very likely that your clients will be able to provide sufficient factual information through affidavits regarding past irrigation practices as to obviate the need for depositions or a fact finding hearing. However, I also suspect that the real focus of concern regarding this water right will not turn out to be a factual issue of whether the subject property was irrigated in 1991, but rather the legal issue of whether the irrigation actually undertaken constitutes a beneficial use of the water.

In order for you to begin considering how we ought to address that legal issue I recommend that you review the following cases: McAtee v. Faulkner Land & Livestock, Inc., 113 Idaho 393, 744 P.2d 121 (Ct. App. 1987), Rudge v. Simmons, 39 Idaho 22, 226 Pac. 170 (1924), Pyke v. Burnside, 8 Idaho 487, 69 Pac. 477 (1902), and Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co., 245 Fed. 9, 21-22 (9th Cir. 1917).

If you do not have a set of the old Federal Reporters readily available in your library please let me know and I will attempt to fax to you the pertinent language from my photocopy of the Vineyard case.

Very truly yours,

A handwritten signature in cursive script that reads "Nick Spencer".

NICHOLAS B. SPENCER
Deputy Attorney General

TO: STATE OFFICE

FEB-23-'94 WED 15:53 ID:IDWR SOUTHERN

TEL NO:1-208-736-3037

#657 P01

IDWR MEMO

TO: NICK SPENCER
FROM: STEVE CLELLAND &
MEL SCHULTE
DATE: FEB. 23, 1993

RE: QUESTIONS ON BENEFICIAL USE/IRRIGATION OF LANDS:

1. WHAT TYPE IRRIGATION SYSTEM WAS USED? (FLOOD, FURROW, SPRINKLER)
2. WHAT WAS THE NUMBER OF DAYS ROTATION TO COVER THE IRRIGATED LANDS?
3. WHAT WERE THE SET TIMES USED?
4. WHAT CROPS WERE RAISED?
 - A. IF CROPPED, SHOW SALES RECEIPTS FOR CROPS SOLD.
 - B. IF PASTURE, SHOW NUMBER OF HEAD, TYPE OF STOCK, HOW LONG.
5. COMPLETE THE "IRRIGATION FLOW RATE QUESTIONNAIRE".
6. HOW MUCH WATER WAS USED TO IRRIGATE? HOW WAS IT MEASURED?
7. MAP OUT HOW THE WATER WAS DELIVERED TO THE FIELD?
8. HOW MANY ACRES WERE ACTUALLY IRRIGATED?
9. WHEN, AND HOW MANY TIMES, WAS THE FIELD BURNED OFF? (SINCE 1989)
10. WHY WERE THE FIELDS BURNED OFF?
11. WERE THE FIELDS PLOWED OR DISCED SINCE 1990?
12. WHO IRRIGATED THE FIELD ON A REGULAR BASIS IN 1991?
13. HOW WAS THE WATER CONTROLLED IN THE EARTH DITCHES?
14. WHERE AND HOW WAS THE WASTE WATER RUNOFF CONTROLLED AND DIRECTED?
15. WHY HAVEN'T THE FIELDS BEEN IRRIGATED ON A REGULAR BASIS PRIOR TO 1991 AND SINCE 1991.

COMPLETE THIS QUESTIONNAIRE FOR EACH OF THE PARCELS SEPARATELY. ONE NORTH OF QUIGLEY ROAD AND ONE FOR THE PARCEL SOUTH OF QUIGLEY ROAD.

(NICK... ANSWERS TO THESE QUESTIONS COULD RAISE OTHER QUESTIONS. THESE ARE VERY SIMILAR TO THE APPROACHES WE TAKE TO REVIEW ANY OTHER CLAIMED RIGHT.)

TO: STATE OFFICE

FEB-23-'94 WED 15:53 ID: IDWR SOUTHERN

TEL NO: 1-208-736-3037

#657 P02

IRRIGATION FLOW RATE QUESTIONNAIRE

THIS INFORMATION IS REQUIRED FOR ANY ADJUDICATION CLAIM(S) FOR WHICH THE IRRIGATION FLOW RATE CLAIMED IS MORE THAN 0.02 CFS PER ACRE (ONE EXCEPTION IS THAT 0.03 CFS PER ACRE MAY BE ALLOWED FOR IRRIGATION OF UP TO 5 ACRES).

CLAIM NO (S) _____

NAME _____

ADDRESS _____

PHONE _____

1 TOTAL IRRIGATED ACRES SHOWN ON CLAIM(S) REFERENCED ABOVE _____ ACRES

2

TYPICAL CROPS GROWN

CROP	PERCENT OF TOTAL ACRES	CROP	PERCENT OF TOTAL ACRES
Alfalfa		Pasture	
Alfalfa Seed		Peas/Lentils	
Beans		Melons	
Field Corn		Potatoes	
Silage		Sugar Beets	
Sweet Corn		Tomatoes	
Spring Grain		Lettuce/Radishes	
Winter Wheat		Cabbage/Broccoli	
Hops		Carrots/Turnips	
Orchard		Other ()	

3.

IRRIGATION SYSTEM TYPE

TYPE	PERCENT OF TOTAL ACRES	
Graded Border		PLEASE COMPLETE ITEM 4.
Level Border		PLEASE COMPLETE ITEM 4.
Furrow		PLEASE COMPLETE ITEM 5.
Corrugation		PLEASE COMPLETE ITEM 6.
Sprinkler		PLEASE COMPLETE ITEM 7.
Contour Drain		PLEASE COMPLETE ITEM 8.
Trickle or Drip		
Sub-Irrigation		

4.

BORDER (COMPLETE BELOW BASED ON PEAK USE)

Inflow (cfs) _____

width (feet) _____

average length (feet) _____

slope (%) _____

set time (hours) _____

number of borders per set _____

frequency (days) _____

5.

FURROW (COMPLETE BELOW BASED ON PEAK USE)

Inflow (gallons per minute) _____

spacing (inches) _____

average length (feet) _____

slope (%) _____

set time (hours) _____

number of furrows per set _____

frequency (days) _____

TO: STATE OFFICE

FEB-23-'94 WED 15:54 ID:IDWR SOUTHERN

TEL NO:1-208-736-3037

#657 P03

6.

CORRUGATION (COMPLETE BELOW BASED ON PEAK USE)

inflow (gallons per minute) _____ spacing (inches) _____ average length (feet) _____
 slope (%) _____ set time (hours) _____ number of corrugations per set _____
 frequency (days) _____

7.

SPRINKLER (COMPLETE BELOW BASED ON PEAK USE)

TYPE center pivot _____ solid set _____
 lateral move _____ gun/boom _____
 average nozzle flow (gallons per minute) _____ nozzle spacing (feet) _____
 average lateral length (feet) _____ lateral spacing (feet) _____
 Number of laterals _____ circle length (feet) _____
 Number of impact heads _____ number of spray heads _____
 set time (hours) _____ frequency (days) _____

8.

CONTOUR DITCH (COMPLETE BELOW BASED ON PEAK USE)

inflow (cfs) _____ field slope (%) _____
 ditch length (feet) _____ distance between ditches (feet) _____
 application depth (inches) _____ set time (hours) _____
 frequency (days) _____

9.

CONVEYANCE FROM SOURCE TO FARM

UNLINED DITCH

length (feet) _____ average depth (inches) _____ average width (inches) _____
 UNLINED DITCH

length (feet) _____ average depth (inches) _____ average width (inches) _____
 PIPELINE

length (feet) _____ diameter (inches) _____

10.

ON-FARM DISTRIBUTION

UNLINED DITCH

length (feet) _____ average depth (inches) _____ average width (inches) _____
 UNLINED DITCH

length (feet) _____ average depth (inches) _____ average width (inches) _____
 PIPELINE

length (feet) _____ diameter (inches) _____

11. HAVE YOU CHANGED YOUR IRRIGATION SYSTEM FROM THE ONE HISTORICALLY USED? (FOR EXAMPLE, LAND LEVELING, CHANGING LENGTH OF RUNS, CHANGE FROM FURROW TO SPRINKLER, ETC.)
 IF YES, PLEASE DESCRIBE _____

12. HAVE YOU HAD ANY IRRIGATION SYSTEM DESIGN/EVALUATIONS OR FARM SOIL SURVEYS COMPLETED BY THE SOIL CONSERVATION SERVICE, PRIVATE CONSULTANTS, OR IRRIGATION EQUIPMENT DEALERS?
 IF YES, PLEASE DESCRIBE OR ATTACH COPIES _____



TERRY G. HOGUE
JAMES P. SPECK
DOUGLAS J. AANESTAD
J. STEPHEN CRABTREE
TRACY DUNLAP
JOHN A. SEILER

■ Å

**HOGUE, SPECK &
AANESTAD**

**A PROFESSIONAL ASSOCIATION OF
ATTORNEYS**

**120 EAST AVENUE
P. O. BOX 987
KETCHUM, IDAHO 83340
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FAX (208) 726-0752**

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16 WEST CROY STREET
SUITE K
POST OFFICE BOX 460
HAILEY, IDAHO 83333
(208) 788-3567
FAX (208) 788-4230

January 19, 1994

VIA FACSIMILE - 1-327-7866

Mr. Nick Spencer
Idaho Department of Water Resources
1301 North Orchard
Boise, ID 83720-9000

Re: SRBA Notice of Claim A37-12818

Å
Dear Nick:

Due to various scheduling conflicts, my witnesses and I will not be available until February 28 - March 4, 1994. Please select a date during that time frame and let me know. I would like to use the conference room at my Ketchum office. I may also provide one or two additional witnesses to bolster our claims that the lands were irrigated during the 1991 season.

I would also like to confirm that the only issue is whether or not there were five consecutive years of non-use, commencing with 1987, and that the Department is not asserting there was a sufficient period of non-use prior to 1987 to invoke the forfeiture statute.

Please call at your earliest convenience to discuss these matters. Thank you.

Sincerely yours,

HOGUE, SPECK & AANESTAD

James P. Speck

JPS/j



State of Idaho
DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000
Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

January 13, 1994

VIA FACSIMILE TRANSMISSION

James P. Speck, Esq.
HOGUE, SPECK & AANESTAD
120 East Avenue
Ketchum, Idaho 83340
FAX NO. (208) 726-0752

Re: Snake River Basin Adjudication
Notice of Claim A37-12818

Dear Jim:

To reiterate my telephone proposal of earlier this afternoon, I suggest that in lieu of an adjudication fact finding hearing pursuant to Idaho Code §42-1410(1) we instead do mutual depositions to flesh out the facts regarding the whether water right number 37-12818 has been forfeited. I propose that I take the depositions of Messrs. Mann and Smith. I presume that you in turn will want to explore the facts underlying the conclusion of water agents Steve Clelland and Mel Schulte that the right has been forfeited for nonuse. To that end I will make Messrs. Clelland and Schulte available for deposition at the same time we depose Messrs. Mann and Smith.

I think that we can probably take all four depositions in half a day, but I am completely willing to set aside as much time as you think appropriate. If four or five hours seems sufficient to you I would propose that I bring my people up from Twin Falls in the morning and that we begin right after lunch. For the convenience of your clients, as well as Messrs. Mann and Smith, I suggest that we take the depositions in either your Ketchum or Hailey office--whichever works better for you.

The available dates of Messrs. Clelland, Schulte and myself are as follows:

~~January 25 through January 28~~

~~February 2 through February 4~~

February 7

February 28 through March 4

March 7 through March 11

March 14

March 16 through March 18

March 21 through March 25

25
26
27

copies

Phillips -
helped Greg

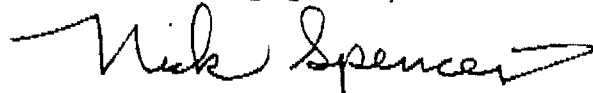
Dale Mizer
788-2603

James P. Speck, Esq.
January 13, 1993
Page 2

I understand that you will need to discuss this proposal with your clients and then get back with me about it.

Thank you for your consideration. I look forward to hearing back from you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Nick Spencer", with a long horizontal flourish extending to the right.

NICHOLAS B. SPENCER
Deputy Attorney General



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720-9000

Phone: (208) 327-7900 FAX: (208) 327-7866

CECIL D. ANDRUS
GOVERNORR. KEITH HIGGINSON
DIRECTORTRANSMITTAL COVER SHEET

FAX NUMBER: (208) 327-7866

DATE: 1-13-94

TO:

JIM SPECK

FROM:

NICK SPENCERHOGUE, SPECK & AANESTADFAX # 726-0752DOCUMENT DESCRIPTION: LETTERCOVER SHEET + 2 PAGES

CONTACT: _____ IF YOU DO NOT RECEIVE ALL THE PAGES

HOGUE, SPECK & AANESTAD

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November 11, 1993

VIA FAX NO. (208) 334-2690
ORIGINAL TO FOLLOW BY REGULAR MAIL

Mr. Clive Strong
Attorney General's Office
210 Statehouse
Boise, Idaho 83720

Re: Application for Permit Nos. 37-08587 (Sturtevant):
37-08819 (Friedly); 37-08820 (Thornton); 37-08821
(Blaine County School District); Application for
Transfer No. 4205/37-00577 Part, A37-12818 Part
(J. Peter &/or Claire B. Fitzpatrick)

Dear Clive:

I represent the applicants for each of the above-referenced Applications for Permit and Application for Transfer. Marathon Partners, who's managing general partner is Mr. Ed Dumke, Jr., represented by Mr. Gary Slette, is the owner of a portion of the old W. T. Riley water right claimed in the SRBA as A37-12818. Mr. Dumke has very generously offered to donate a large portion of this water right to the Blaine County School District to be used as a part of a mitigation plan for a new groundwater irrigation right under the guidelines and restrictions of the Big Wood River Groundwater Management area. My other clients have arranged to purchase portions of the same water right from Marathon Partners. Although the Applications for Permit were protested, those protests have now been resolved.

The use of the Big Wood River water right was originally questioned by Mel Shulte and Steve Clelland at the Southern Regional office solely for the period from 1987 through the present. Their on-site investigations and review of aerial photographs and other data indicated to them that the water had not been used during that period. However, Mr. Slette and I investigated this issue and contacted persons who had used the water with the permission or for the benefit of the prior owner of the property, Pacesetter Development Company. I arranged for Mr. Gregory A. Mann, who had been retained by Pacesetter to irrigate the property in the summer of 1991, to execute an Affidavit. Due to a typographical error by my staff, the Affidavit had to be corrected in one paragraph. It is this error

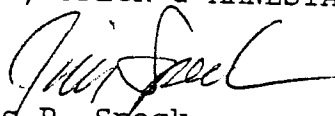
Mr. Clive Strong
November 11, 1993
Page 2

which Mr. Clelland chooses to focus on as raising the validity of a sworn statement by Affidavit! Mr. Mann, a long time resident of Blaine County whose wife is currently the Chairman of the Blaine County Planning and Zoning Commission, will be rather shocked and incensed when he learns he has essentially been accused of lying by a representative of the Department. This is not quite the role we had envisioned the Department to play in these matters.

Please call me immediately so that we might discuss whether or not these matters can be resolved short of my client's appealing the Department's decision and Mr. Dumke pursuing the challenge to his valid water right. Thank you.

Sincerely yours,

HOGUE, SPECK & AANESTAD



James P. Speck

JPS/vl

cc: Gary D. Slette, Esq.
Mr. Ed Dumke, Jr.
Mr. Larry Lloyd
Mr. Gregg Sturtevant
Mr. Rod Thornton
Mr. Keith Friedly
Mr. J. Peter Fitzpatrick