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Attorneys for Bob and Kathleen Krucker

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

IN THE MATTER OF DISTRIBUTION OF) WATER TO WATER RIGHTS NOS. 36-04013A,) 36-04013B, AND 36-07148 (SNAKE RIVER) FARM)))))	PETITION FOR RECONSIDERATION WATER RIGHT NO. 36-16185 (Snake River Farm Delivery Call)
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I. INTRODUCTION

Long View Dairy (“Long View”), owned by Bob and Kathleen Krucker, hereby petitions the Director of the Idaho Department of Water Resources (“IDWR”) for reconsideration of his June 15, 2007 Order Curtailing Junior Priority Ground Water Rights in the Snake River Farm Delivery Call (“Order”) to the extent that the Order requires curtailment of water right number 36-16185 (the “Water Right”). Long View’s requests in this Petition are in addition to any mitigation or replacement water plans submitted on Long View’s behalf that the Director deems acceptable for water right number 36-16185.¹ If this request for reconsideration is approved, those mitigation and replacement water plans presumably will be mooted.

¹ Long View submitted an Individual Replacement Water Plan contemporaneously with this Petition. Long View also understands that mitigation plans will be submitted on its behalf by Idaho Dairywomen’s Association and Idaho Ground Water Appropriators.

The subject Water Right should have a priority date earlier than February 13, 1977 and therefore should not be subject to curtailment under the Order. In a separate filing, Long View has petitioned IDWR to reinstate Long View's water right permit with the pre-February 13, 1977 priority date and requests that the Director remove the Water Right from the list of water rights subject to curtailment.

II. ARGUMENT

A. The Water Right Should Have An October 25, 1974 Priority Date.

The Water Right is currently licensed with a June 30, 1983 priority date. It was split from water right number 36-8295 (the "Parent").² The Water Right has the same priority date and is diverted from the same well (the "Long View Well") as the Parent. However, another water right permit to divert water from the Long View Well preceded the Parent. This earlier water right permit (number 36-7505) had a priority date of October 25, 1974 (the "1974 Water Right"). IDWR did not issue a license for the 1974 Water Right because the water right holder—Long View's predecessor in interest—did not timely submit proof of beneficial use.

Long View has filed with IDWR a Petition for Reinstatement of the 1974 Water Right with the October 25, 1974 priority date (the "Petition"). In the Petition, a copy of which is attached hereto as Exhibit A, Long View argues that, pursuant to Idaho Code Section 42-218a, the Director should reinstate the 1974 Water Right with the 1974 priority date because (1) there is sufficient evidence of beneficial use made during the time authorized by the permit, (2) there is reasonable cause for filing a late proof of beneficial use, and (3) the lapse was due to an error or mistake of IDWR.

² The other water right resulting from the split of water right number 36-8295 is numbered 36-16184. Water right number 36-16184 is for domestic and stockwater uses. Based on conversations with IDWR representatives, it was not included in the Director's list of rights curtailed by the Order because of its de minimus and non-consumptive nature.

The Order requires curtailment of water rights with priority dates later than February 13, 1977. In light of Long View's Petition, and because the priority date for the water right appurtenant to the Long View Well should be October 25, 1974, Long View requests the Director remove water right number 36-16185 from the list of water rights ordered for curtailment.

B. The Federal Clean Water Act Prohibits IDWR's Curtailment Of Water Rights Required To Implement Nutrient Management Plans.

The Water Right is necessary to implement Long View's Nutrient Management Plan required by the Federal Clean Water Act. Long View has agreed to and is now committed to implement the Nutrient Management Plan as a matter of federal law. Thus, Long View does not have an option simply to dry up the acres irrigated with the subject Water Right. Rather, it is affirmatively obligated, as a matter of federal law, to use this water right for irrigation and dilution purposes. This irrigation use for which the subject Water Right is used is part and parcel of the federally mandated Nutrient Management Plan, and cannot be curtailed.³

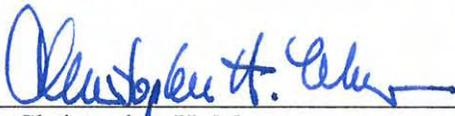
In a separate filing, Long View has submitted an Individual Replacement Water Plan for Curtailed Water Right No. 36-16185. The water right employed in that plan is used for irrigation of pasture and can be curtailed without violation of the Nutrient Management Plan. In contrast, the subject Water Right cannot be curtailed without violation of the Plan.

³ Under Article VI, Clause 2 of the United States Constitution (the Supremacy Clause) the requirements of this federal law are the "supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Any action by the Director to curtail this water right, which is mandated by Long View's Nutrient Management Plan, would be in violation of the Supremacy Clause.

DATED this 29th day of June 2007.

Respectfully submitted,

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

By 
Michael P. Lawrence

I HEREBY CERTIFY that on this 29th of June 2007, the above and foregoing was served as follows:

ORIGINAL FILED

David R. Tuthill, Jr.
Idaho Department of Water Resources
322 East Front Street
P.O. Box 83720
Boise, ID 83720-0098

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

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General Office
1500 East 4424 North
P.O. Box 712
Buhl, ID 83316

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

North Snake Ground Water District
152 E. Main Street
Jerome, ID 83338

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Magic Valley Ground Water District
809 East 1000 North
Rupert, ID 83350

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Frank C. Erwin
Watermaster
Water District 36
2628 S. 975 E.
Hagerman, ID 83332

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Allen D. Merritt
Cindy Yenter
Southern Regional Office
Idaho Department of Water Resources
1341 Fillmore St., Ste. 200
Twin Falls, ID 83301-3033

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail



Michael P. Lawrence

1974 and installed a pump in April 1975. IDWR received proof of the well construction in 1974, as is shown in the well driller's report included in Exhibit A. The Joneses did not, however, formally remit additional proof of beneficial use to IDWR by the November 1, 1979 deadline. IDWR attempted to notify the Joneses that the permit lapsed for failure to submit proof of beneficial use, but IDWR's notice was returned by the postal service as "not deliverable as addressed." See copy of envelope included in Exhibit A. Other correspondence from IDWR to the Joneses in 1979 appears to have been successfully delivered at the same address and there is no evidence in IDWR's records as to why the lapse notice was "not deliverable." In addition, there is no evidence that IDWR made any further attempt to deliver the lapse notice to the Joneses or to contact them by other means.

The Joneses later sold their farm with appurtenances, including water rights and irrigation equipment. Long View owns the farm and the well originally permitted under the Water Right.

II. ARGUMENT

A. **There Is Evidence Of Beneficial Use Made During The Time Authorized By The Permit.**

Evidence shows that the Joneses drilled a well to divert groundwater under the Water Right and used water from that well for irrigation. A well driller's report shows that a new well was constructed for Loel Jones and work was completed in November 21, 1974—the same date as IDWR approved the Water Right permit.¹ In April of 1975, the Joneses had a 125 horsepower pump installed. Later, in 1980, the Joneses sold the property to which the Water Right was appurtenant, including all "appurtenances" as well as irrigation equipment such as "1 vertical electric motor," "7 Alumax wheel lines – 1/4 mile each," and "7 gasoline motors for wheel

¹ All evidence suggests that this well was constructed to divert water under the Water Right: it was constructed in the same quarter-quarter Section as the Water Right's permitted point of diversion; it was constructed with a 16-inch diameter hole as stated in the Water Right permit, and it had a well depth of 245 feet, which is nearly identical to the Water Right permit's 250 foot figure.

lines.” A Trust Water Information Questionnaire signed by the Joneses’ successor in 1990 declares that the “well was put in in [the] 1970’s (mid) and used.” This evidence shows that the Joneses applied the Water Right to beneficial use.

B. There Is Reasonable Cause For Filing A Late Proof Of Beneficial Use.

There is evidence that IDWR had notice that the Joneses applied the Water Right to beneficial use. The well driller’s report for the Joneses well was stamped as received by IDWR on January 20, 1975. In 1979, IDWR requested formal proof of beneficial use, but the Joneses did not submit any. The 1975 well driller’s report, however, provided IDWR with notice that the Joneses would apply the Water Right to beneficial use. This notice of beneficial use was arguably enough for a reasonable person in the Joneses situation to conclude that they had already submitted proof of beneficial use. Accordingly, the Joneses had reasonable cause for not formally filing proof of beneficial use in 1979.

C. The Lapse Was Due To An Error Or Mistake Of IDWR.

IDWR deemed the Water Right permit lapsed but, as evidenced by the returned envelope marked “not deliverable,” apparently did not successfully notify the Joneses of the lapse. There is no evidence that IDWR made any further attempts to notify the Joneses of the lapse, even though other letters sent to the Joneses from IDWR earlier in the year were not returned. This lack of action by IDWR is particularly troubling in light of the evidence of use already in IDWR’s possession (i.e., the well driller’s report) and the dire consequences of not receiving notice of a permit lapse (i.e., the water right is invalid and the rights of the permit holder under I.C. § 42-218a diminish as time passes). Indeed, IDWR arguably has a duty to make reasonable efforts to notify a permit holder when IDWR deems a permit lapsed. Moreover, where one letter is returned as “not deliverable” when other letters sent to the same address that same year were

apparently successfully delivered, reasonable efforts must include at least one additional effort to notify the permit holder. There is no evidence that IDWR made any such effort in this case. IDWR's error in failing to make reasonable efforts to notify the Joneses warrants reinstatement of the Water Right with the original priority date of October 25, 1974.

III. CONCLUSION

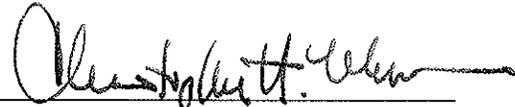
Pursuant to I.C. § 42-218a, the Director should reinstate water right permit number 36-7505 with the original priority date of October 25, 1974 because there is sufficient evidence of beneficial use made during the time authorized by the permit, there is reasonable cause for filing a late proof of beneficial use, and the lapse was due to an error or mistake of IDWR.

DATED this 29th day of June 2007.

Respectfully submitted,

GIVENS PURSLEY LLP

By



Christopher H. Meyer

By



Michael P. Lawrence

I HEREBY CERTIFY that on this 29th of June 2007, the above and foregoing was served as follows:

ORIGINAL FILED

David R. Tuthill, Jr.
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P.O. Box 83720
Boise, ID 83720-0098

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Buhl, ID 83316

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 Facsimile
 E-mail

North Snake Ground Water District
152 E. Main Street
Jerome, ID 83338

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail

Magic Valley Ground Water District
809 East 1000 North
Rupert, ID 83350

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1341 Fillmore St., Ste. 200
Twin Falls, ID 83301-3033

U. S. Mail
 Hand Delivered
 Overnight Mail
 Facsimile
 E-mail



Michael P. Lawrence

USE TYPEWRITER OR BALL POINT PEN

RECEIVED

WELL DRILLER'S REPORT

State law requires that this report be filed with the Director, Department of Water Resources within 30 days after the completion or abandonment of the well. JAN 20 1975

1. WELL OWNER
Name Loel Jones
Address Idaho
Owner's Permit No. _____

2. NATURE OF WORK
 New well Deepened Replacement
 Abandoned (describe method of abandoning)

3. PROPOSED USE
 Domestic Irrigation Test Other (specify type)
 Municipal Industrial Stock Waste Disposal or Injection

4. METHOD DRILLED
 Cable Rotary Dug Other

5. WELL CONSTRUCTION
Diameter of hole 16 inches Total depth 245 feet
Casing schedule: Steel Concrete
Thickness 1/4 inches Diameter 16 inches From 2 feet To 18 feet
_____ inches _____ inches _____ feet _____ feet
Was casing drive shoe used? Yes No
Was a packer or seal used? Yes No
Perforated? Yes No
How perforated? Factory Knife Torch
Size of perforation _____ inches by _____ inches
Number _____ From _____ To _____
_____ perforations _____ feet _____ feet
_____ perforations _____ feet _____ feet
_____ perforations _____ feet _____ feet
Well screen installed? Yes No
Manufacturer's name _____
Type _____ Model No. _____
Diameter _____ Slot size _____ Set from _____ feet to _____ feet
Diameter _____ Slot size _____ Set from _____ feet to _____ feet
Gravel packed? Yes No Size of gravel _____
Placed from _____ feet to _____ feet
Surface seal depth 18' Material used in seal Cement grout
 Pudding clay Well cuttings
Sealing procedure used Shurry pit Temporary surface casing
 Overbore to seal depth

7. WATER LEVEL Department of Water Resources
Southern District Office
Static water level 150 feet below land surface
Flowing? Yes No G.P.M. flow _____
Temperature _____ ° F. Quality _____
Artesian closed-in pressure _____ p.s.i.
Controlled by Valve Cap Plug

8. WELL TEST DATA

Discharge G.P.M.	Draw Down	Hours Pumped

9. LITHOLOGIC LOG

Hole Diam.	Depth		Material	Water	
	From	To		Yes	No
16"	0	6	Top Soil		X
	6	8	Hard P.A.D.		
	8	12	Sandy CLAY		
	12	17	BROKEN LAVA BLACK		
	17	53	Solid GRAY LAVA		
	53	74	BROKEN LAVA Lost cutting		
	74	148	BLACK LAVA		
	148	154	red LAVA Solid	X	
	154	198	BROKEN LAVA GROUND CUTTING		
	198	204	red LAVA cinders		
	204	215	reddish gray LAVA Solid		
	215	230	reddish LAVA BROKEN CUTTING		
	230	245	Solid GRAY LAVA		X

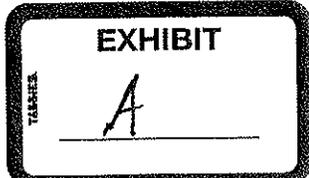
6. LOCATION OF WELL
Sketch map location must agree with written location. 26

Subdivision Name _____
Lot No. _____ Block No. _____

10. Work started Oct. 30, 1974 finished Nov. 21, 1974

11. DRILLERS CERTIFICATION
Firm Name Elking Well Drilling Firm No. 21
Address P.O. Box 919 Tulo 700 Date 1/2/75
_____ by (Firm Official)

29 8 S 16 E



SALES ORDER and INVOICE



PUMPS, Inc.

P. O. BOX 640 - TELEPHONE 733-3284 TWIN FALLS, IDAHO

SINGER

No. 1191

Date April 25, 1975

For G. T. Newcomb, Inc

Date Desired

Address 729 Commercial Ave.

Invoice 4-25-P-7092

Route Twin Falls, Idaho 83301

For: Lowell Jones

Customer Order No. 1298

Table with columns: NO., DESCRIPTION, UNIT PRICE, AMOUNT. Contains detailed equipment specifications including HP MOTOR, HP STARTER, AMP SAFETY SWITCH, GEAR DRIVE, SPICER SHAFT, DRIVE FLANGE, ENGINE FLANGE, HEAD, OILER, DISCHARGE NIPPLE, SETTING OF 8, BOWLS, SUCTION, and STRAINER.

TERMS: NET 30 DAYS. INTEREST WILL BE CHARGED MONTHLY AT THE RATE OF 12 PER CENT PER ANNUM ON ALL SUMS NOT PAID WHEN DUE. SHOULD THAT RATE EXCEED MAXIMUM PERMISSIBLE UNDER APPLICABLE STATE LAW, INTEREST AT HIGHEST LEGAL RATE SHALL BE PAID.

RECEIVED

MAR 1 1990

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
TRUST WATER INFORMATION QUESTIONNAIRE

Department of Water Resources

Application No. 36-8295

INSTRUCTIONS: IF YOU ARE NOT INTERESTED IN HAVING THE APPLICATION PROCESSED, PLEASE COMPLETE AND RETURN THE ENCLOSED WITHDRAWAL FORM.

IF YOU WISH TO HAVE THE APPLICATION PROCESSED, PLEASE ANSWER THE FOLLOWING QUESTIONS AS THOROUGHLY AS POSSIBLE. FAILURE TO RETURN EITHER THE WITHDRAWAL FORM OR QUESTIONNAIRE IS CAUSE FOR THE DEPARTMENT TO VOID THE APPLICATION.

1a. Are you the current owner of the land or place of use described under this application? Yes No

b. If you are not the property owner, please describe the arrangement enabling you to develop the proposed project.

2a. Has the source of water listed on this application been used to irrigate any of the land described under this same application prior to October 1, 1984? Yes No

b. If yes, please describe the extent of development and number of acres irrigated. (Note: Uses developed after October, 1984 are considered trust water diversions and may be subject to certain restrictions and/or conditions. You may be asked to verify uses established prior to October, 1984.)

*WELL WAS PUT IN IN 1970's (mid) and used original Application filed 36-7505
I know that entire AREA has been irrigated since my purchase in 1980. 160 ACRES*

3. Please state the number of acres you have irrigated under this application since October 1, 1984. 160

4. If you have not irrigated lands under this application, please state the number of acres you plan to complete. N/A

5. If the permit is a supplemental filing please identify other water rights which are used on the same land.

N/A

Use the reverse side of this form if you wish to add any comments. You may mark changes on the enclosed application to designate any proposed amendments. (Note: Proposed changes which result in an expansion of use will not be considered by the department.)

I hereby assert that the responses provided above are true to the best of my knowledge. I understand that any willful misrepresentations may result in voiding of the application.

Applicant Zipporah Stahl

Date 2-22-90

MICROFILMED

JUL 27 1990

*9-17-80 DWR File TWISSARD Photo
Shows SE 1/4 IRRIg.*

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
Sachse
Boon, Idaho 83720

Department of Water Resources

NOV 19 1979

RECEIVED

NOT DELIVERABLE
AS ADDRESSED
UNABLE TO FORWARD

Loel E. and Mary Jones
Route 2, Box 2373
Nampa, ID 83651



RESOLVED
FIRST CLASS



WARNING

CANCELLED OR LAPSED

This permit has been officially CANCELLED or LAPSED.

Ninety days following the date of official action this file will be DESTROYED.