

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

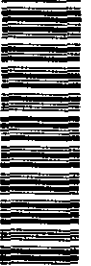
Ident. Number: A29-02283
Date Received: 1/23/1990
Receipt No: E011955
Received By: _____

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name: STATE OF IDAHO
Address: LAVA HOT SPRINGS FOUNDATION
P.O. BOX 430
LAVA HOT SPRINGS, ID 83246

208-776-5221

A2902283



2. Date of Priority: JAN 14, 1949

3. Source: GROUNDWATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of	1/4 of	1/4	Lot	County
09S	38E	22	NE	SW		9	BANNOCK

5. Description of diverting works:
WELL FOR COMMERCIAL USE AT VISITORS AREA

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
COMMERCIAL	01/01	12/31	0.050		

7. Total Quantity Appropriated is:
0.050 C.F.S. (and/or) A.F.A.

8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:
COMMERCIAL USE FOR VISITORS NEEDS AT RECREATION AREA

10. Place of Use:

Township	Range	Section	1/4 of	1/4	Lot	Use	Acres
09S	38E	22	NE	SW	9	COMMER	

11. Place of use in counties: BANNOCK

A29-02283

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Date: 01/23/90

MICROFILMED

NOV 13 1992

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:

A29-10219, A29-02360 AND A29-04178, A29-10213

14. Remarks:

15. Basis of Claim: LICENSE

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not _____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): _____ Date: _____
_____ Date: _____

For Organizations:

I do solemnly swear or affirm that I am EXECUTIVE DIRECTOR of
IDAHO's STATE FOUNDATION, that I have signed the foregoing
Organization Title
document in the space below as Executive Director of
IDAHO's STATE FOUNDATION and that the statements contained in the
Organization Title
foregoing document are true and correct.

ROBERT F. MELINE
Signature of Authorized Agent
EXECUTIVE DIRECTOR
Title and Organization
2 February 1990
Date

State of Idaho)
County of Bannock) ss.

Subscribed and sworn (or affirmed) before me this 2 day
of February 19 90

Cindy Fisher
Notary Public

Seal

Residing at Pocatello Id

My Commission Expires 2-11-91

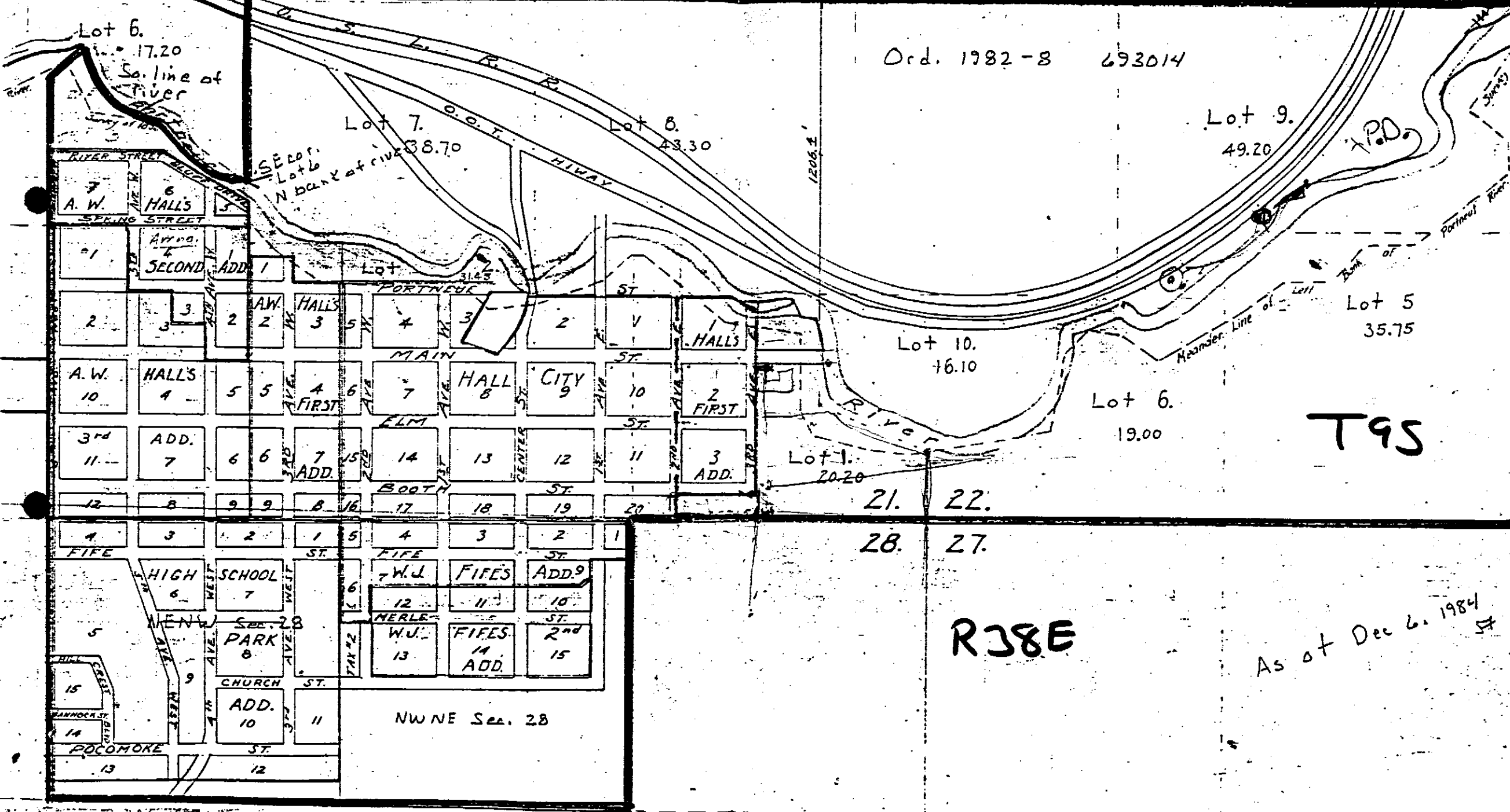
1985-1

761544

Center 1/4 Cor.

A29-02283

Ord. 1982-8 693014



T95

R38E

As of Dec 6, 1984

29-02283

POD: LICONS00 AS SEC. 22 SSSW

CHAINS00 AS SEC. 22 NBSW (L9) Whom ———? why ———?

Purpose or Use:

LICONS00 AS: Trans/Commercial/Domestic @ 0.50

CHAINS Commercial only @ 0.05 (suspect error)

POU: LICONS00 for info in 4-QD's (ACROSS NOT SPECIFIED)

CHAINS Commercial use in SEC. 22 NBSW (L9) 'FOR VISITOR'S
NEEDS AT REC. AREA'

PROBS: CHAINS change to POD and Div. Rate
change to Purpose
change to Place of Use

WR5808NP
(00-26)

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROOF READING REPORT

02/28/01 15:24:42
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Water Right Number - 29-02283

Prefix Translation: WATER RIGHT

Old (D) Number - 20903

+ - - - - Last Name - - - - + + - First Name - - + + - - - - - Address - - - - - +

*** C - CURRENT OWNER ***
LAVA HOT SPRINGS FOUNDATION

1 -
2 -
3 -
City- LAVA HOT SPRINGS State- ID Zip- 83246
Phone -

+ - - Priority Date - - + + - - - Region - - - + + - - - Stage - - - + + - - - Status - - - +
01/14/1949 *OK* 15 EASTERN L - LICENSE

+ - - - - Source - - - - + + - - - - - Tributary - - - - - +
GROUNDWATER

+ - - - - Point of Diversion - - - - - +
TwN Rng Sec Tract Lot RFlg County Diversion Name Diversion Rate Diversion No.

09S 38E 22 SE SW (5) BANNOCK *Claims NE SW - CHANGED when*

+ - - - - Water Use - - - - - +
Code Description Period From Period To Diversion Rate Diversion Volume

01 - IRRIGATION
10 - COMMERCIAL
43 - DOMESTIC

Drops Filing & Domestic

0.500

Claims 0.05 cfs

+ - Total Div. Rate - + + - Total Div. Volume - + + - Total Div. Capacity - + + - Total Consumptive Use - + + - KW Usage - +
0.500 0.0

+ - - - - Place of Use - - - - - +
TwN Rng Sec Tract Lot Acres Code Description County

09S	38E	21	NE SE	8	01	IRRIGATION	(5) BANNOCK
09S	38E	21	NW SE	7	01	IRRIGATION	(5) BANNOCK
09S	38E	22	NE SW	9	01	IRRIGATION	(5) BANNOCK
09S	38E	22		10	01	IRRIGATION	(5) BANNOCK

+ - - Diversion Means -

+ - - Non-Irrigation Use -

+ - - Other Rights for Same Use -

+ - - - - Remarks - - - - - +

GEN P/U INCOMPLETE. SEE FILE.

+ - - - - Old Water Right Numbers - - - - - +
No Old Water Right Numbers found.

No claim to Irrig use

Only Commercial as recorded

WR5808WP
(00-26)

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROOF READING REPORT

02/28/01 15:24:42
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Water right number - 29-02283

Prefix Translation: WATER RIGHT

+ - - - - Conditions of Approval - - - - - +
No Conditions of Approval found.

+ - - - - Decree Plaintiff - - - + + - - - - Decree Defendant - - - + + - Decree Date - +
00/00/0000

+ - - - - Comments - - - - - +
No Comments Found

+ - - Audit Fields - 03/26/85 05/22/88 CONVERT

+ - - - - Water Rights Dates and Flags Area - - - - - +

Proof Due Date	- 00/00/0000	Field Exam Made	- 00/00/0000	Field Exam Fee	-
Approved/Denied	- 00/00/0000	Protested Date	- 00/00/0000	Swan Falls	-
Proof Made Date	- 00/00/0000	Hearing Date	- 00/00/0000	Temporary Right	- P
Exam to S.O. Date	- 00/00/0000	Verified Date	- 03/26/1985	DLE/Carey Act	-
Order Show Cause	- 00/00/0000	Receipt Number	-	Water District	-
Licensed Date	- 08/14/1979	Appl Received	- 00/00/0000	Transfer/Amended	-
Presumption Flag	-	Name Connector	-	POU Ownership Flag	-
SRBA Decreed Flag	-				



D. Tuthill
Adj. file ✓

AG-00000

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
ALAN G. LANCE

ATTORNEY GENERAL OPINION NO. 97-1

RECEIVED
JAN 17 1997

RECEIVED

JAN 13 1997

To: Robert I. Meline, Executive Director
Lava Hot Springs Foundation
P.O. Box 669
Lava Hot Springs, Idaho 83246

Department of Water Resources
Eastern District Office

Department of Water Resources

Per Request for Attorney General's Opinion

QUESTIONS PRESENTED

1. Does the Lava Hot Springs Foundation, under the terms of title 67, chapter 44, Idaho Code, have authority to control the use of hot springs and hot waters located on lands under the control of the Foundation?
2. If the Foundation has the authority to control the use of hot springs and hot waters on lands under the control of the Foundation, is such control exclusive, or is the use of such waters subject to the provisions of title 42, Idaho Code?
3. If the Foundation has authority to control the use of hot springs and hot waters on lands under the control of the Foundation, does such authority extend to authorizing the use of such hot springs and hot waters by private parties on private lands in exchange for an easement across such lands for a pipeline used for the discharge of the Foundation's waste water, or would such a use have to be licensed by the Idaho Department of Water Resources?

CONCLUSION

1. Yes, the Lava Hot Springs Foundation (Foundation) maintains authority to manage and control the use of all hot waters lawfully appropriated under state law that rise and flow on the Foundation's lands.
2. The rights to the use of all hot waters that rise and flow at Lava Hot Springs are water rights that have been appropriated under state law and are subject to regulation by the Idaho Department of Water Resources (Department) under the provisions of title 42 of the Idaho Code.

3. The Foundation has the authority under title 67, chapter 44, Idaho Code, to enter into agreements involving easements with private parties to discharge the Foundation's waste water. However, the Foundation may not authorize the use of any portion of its water in a manner that is inconsistent with its state water right. Other parties seeking to use the Foundation's waste water for new uses or on lands other than the authorized place of use must file for a permit from the Idaho Department of Water Resources.

BACKGROUND

Lava Hot Springs was acquired from the United States under an act of Congress in 1902 which conveyed certain lands to the state of Idaho for public use subject to state regulation. The Act reads as follows:

Chapter 1076. -- An Act to grant certain lands to the State of Idaho. Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That lots seven and eight in section twenty-one, the northwest quarter of the southwest quarter, and lots nine and ten in section twenty-two, all in township nine south, range thirty-eight east, base meridian, in the State of Idaho, are hereby ceded, granted, relinquished, and conveyed unto said State of Idaho for public use under such regulations as said State may prescribe. 32 Stat. 330 (1902)

Seventeen years later, in 1919, the state of Idaho passed Senate Bill No. 9 vesting in the department of welfare the responsibility to manage the lands and property at Lava Hot Springs. 1919 Idaho Sess. Laws 108. The Lava Hot Springs Foundation was created in 1935 and the statutes were amended to make the Foundation responsible for the management and control of the lands and property at Lava Hot Springs. 1935 Idaho Sess. Laws 16. The Foundation, operating as an agency within the department of parks and recreation, continues to manage the lands at Lava Hot Springs today.

ANALYSIS

A. Introduction

The threshold issue raised by the questions presented is whether the unique language in title 67, chapter 44, Idaho Code, creates a special type of water right for the benefit of the Foundation that is different from all other state water rights acquired under the appropriation process. An underlying legal issue is whether it is possible in this state for another type of state water right to exist other than one acquired by appropriation under Idaho law.

Idaho Code § 67-4401 provides: "All rights to the operation, management and control, and to the maintenance and improvement of the lands and property belonging to the state of

Idaho situated within and near the city of Lava Hot Springs, in Bannock County, state of Idaho, hereinafter more particularly described is vested in the Lava Hot Springs Foundation which shall be an agency within the department of parks and recreation"

Idaho Code § 67-4403 describes the lands and property placed under the jurisdiction and control of the Foundation. Idaho Code § 67-4403 provides:

Description of property: The property hereinbefore referred to, and herewith placed under the jurisdiction and control of the said foundation, is described as follows: The northwest quarter (1/4) of the southwest quarter (1/4), and lots nine (9) and ten (10) in section twenty-two (22), and lots seven (7) and eight (8) in section twenty-one (21) in township nine (9), south, range thirty-eight (38) east of the Boise meridian, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the hot springs and hot waters arising and flowing thereon, in Bannock County, state of Idaho.

Upon further analysis of Idaho's Constitution and related water statutes, the language in Idaho Code § 67-4403 placing jurisdiction and control of the hot springs and hot waters under the direction of the Foundation is intended to refer to only those waters lawfully appropriated under state law.

B. The Right to Use Water at Lava Hot Springs is Sanctioned under Water Rights Acquired by Appropriation

All rights to water under state law in Idaho are acquired by appropriation. Article 15, § 3 of the Idaho Constitution provides: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use for power purposes" Idaho Code § 42-101 provides: "All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose" Idaho Code § 42-103, prior to the 1971 amendments, provided: "The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation." Idaho Code § 42-104 provides: "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases." Idaho Code § 42-106 provides: "As between appropriators, the first in time is the first in right."

The consistent thread in Idaho's Constitution and water statutes is that the right to use water must be acquired by appropriation. The Idaho Supreme Court has long held that the method to acquire water in Idaho is by appropriation and that the state may regulate the means of appropriating water within the state. Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909).

Unquestionably, the law of prior appropriation is specified as the method to establish the right to use water in Idaho. Absent a clear statutory expression by the legislature to create an exception to the appropriation statutes, all rights to the use of water in Idaho must be acquired by appropriation. The language in Idaho Code §§ 67-4401 and 67-4403 is not a clear expression that the legislature intended to create an exception from the appropriation process for the waters at Lava Hot Springs. The most reasonable interpretation of this language is that the Foundation's jurisdiction and control over waters at Lava Hot Springs refers to those waters that have already been appropriated or that will be appropriated in the future. The legislature has had several opportunities over the years to pass laws regarding the use of water by the state acting through the governor or a state board for a special purpose. In every instance there is a clear expression in the statutes that the water for the special purpose should be appropriated in trust for the people of the state of Idaho.¹ Additionally, Idaho Code § 42-1503 requires that an application to appropriate water be filed by the Idaho Water Resource Board before a minimum stream flow can be established under Idaho law.

Other statutory authority as well as past actions on the part of the Foundation and the Department indicate that the use of the water at Lava Hot Springs was based upon appropriative water rights developed under state law. Perhaps most instructive on the nature of the Foundation's water rights is the language contained in Idaho Code §§ 58-703 and 58-704, passed in 1931, which addressed cessions to the United States for the construction of a national veterans' sanatorium or hospital at Lava Hot Springs. Idaho Code § 58-703 provides: "The state board of land commissioners, acting for and on behalf of the state of Idaho, is hereby authorized, empowered and directed to cede, grant, relinquish and convey to the government of the United States, . . . such portion of the hot mineral and cold water and water rights appurtenant to said lands as may be necessary and convenient [for the operation of a national veterans' sanatorium or hospital]." The description of the lands provided in section 58-704 again refers to waters and water rights appurtenant thereto. The use of the terms "water rights" and "appurtenant" in sections 58-703 and 58-704 is a strong indicator that the Foundation merely controlled the use of the water under a traditional state water right that is appurtenant to lands at Lava Hot Springs.

The grant from the United States in 1902 provided that title to Lava Hot Springs was to be held by the state of Idaho under such regulations as the state may prescribe. In 1919, the Idaho Legislature passed laws directing the department of welfare to manage and control the hot springs and hot waters at Lava Hot Springs. It appears that the department of welfare was directed to manage and control the hot springs and the same hot waters that had been used for many years at Lava Hot Springs prior to the passage of the 1919 Act. In fact, the Foundation recognized this earlier use and claimed a 3 cfs year round water right with a 1902 priority when it filed a Claim to a Water Right with the Idaho Department of Water Resources in 1980. The Foundation filed applications for additional water rights as its needs increased over the years and the Department has processed the applications and issued two water right licenses authorizing the use of additional waters at Lava Hot Springs.

C. The Water at Lava Hot Springs is Subject to State Regulation under Title 42 and must be Applied in a Manner Consistent with the Underlying Water Right

Idaho Code § 67-4401 places a duty on the Foundation to manage and control the hot springs and hot waters arising from lands at Lava Hot Springs. The most reasonable interpretation of this statute is that jurisdiction and control is limited to those waters appropriated under state law. The Foundation's water rights acquired under the appropriation process are the same type of water rights held by other water users in the state and are subject to regulation under title 42 of the Idaho Code.

Finally, under Idaho Code § 67-4402, the Foundation is authorized to exercise such powers as are incidental or conducive to the attainment of the purposes of the Foundation. The authority granted to the Foundation in Idaho Code § 67-4402 appears sufficient to allow the Foundation to enter into agreements pertaining to easements, provided the purpose of the agreement is incidental or conducive to the attainment of the purposes of the Foundation. An agreement which pertains to an easement to discharge waste water from lands managed by the Foundation appears to fall within the grant of authority under Idaho Code § 67-4402. However, as with all appropriators of water, the Foundation must use its water in a manner that is consistent with its underlying water rights. The Foundation's water rights are appurtenant to the lands described in Idaho Code § 67-4403 and should not be applied to other lands. If an adjacent property owner desires to make beneficial use of the Foundation's waste water, that person needs to file an application for permit to appropriate water with the Idaho Department of Water Resources. The Foundation does not have the ability to enter into contracts authorizing the use of its waste water on lands not authorized under the water right.

AUTHORITIES CONSIDERED

1. Federal Statutes:

32 Stat. 330 (1902).

2. Idaho Constitution:

Art. 15, § 3.

3. Idaho Code:

§ 42-101.

§ 42-103.

§ 42-104.

§ 42-106.

§ 42-1503.

§ 58-703.

§ 58-704.
§ 67-4301.
§ 67-4304.
§ 67-4307.
§ 67-4308.
§ 67-4309.
§ 67-4310.
§ 67-4311.
§ 67-4401.
§ 67-4402.
§ 67-4403.

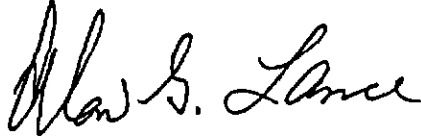
4. **Idaho Cases:**

Speer v. Stephenson, 16 Idaho 707, 102 P. 365 (1909).

5. **Other Authorities:**

1919 Idaho Sess. Laws 108.
1935 Idaho Sess. Laws 16.

DATED this 9th day of January, 1997.



ALAN G. LANCE
Attorney General

Analysis by:

JOHN W. HOMAN
Deputy Attorney General

1. See Idaho Code § 67-4301, Appropriation of waters at Big Payette Lake; Idaho Code § 67-4304, Appropriation of waters at Priest, Pend d'Oreille and Coeur d'Alene Lakes; Idaho Code § 67-4307, Appropriation of waters at Malad Canyon; Idaho Code § 67-4308, Appropriation of waters at Niagra Springs; Idaho Code § 67-4309, Appropriation of waters at Big Springs; Idaho Code § 67-4310, Appropriation of waters at Box Canyon; Idaho Code § 67-4311, Appropriation of waters at Thousand Springs.