

**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 39576

) Subcase 43-99C

) (Insert the Subcase number from the

) Objection to which you are responding)

**STANDARD FORM 2
RESPONSE TO CORRECTED
AMENDED OBJECTION**

INSTRUCTIONS

This form must be used to file a response to any objection filed against a water right recommended in a Director's Report. Forms may be obtained from the SRBA Court, the Idaho Department of Water Resources (IDWR), or you may copy or reproduce this blank form. If you copy or reproduce this form, please copy on both sides with the even-number pages upside down.

The water right number listed as the "Subcase on the objection you are responding to must be inserted above as the "Subcase." You may respond to all objections filed against one water right using one response form. But you must use a separate form for each different water right. If you choose to file one form to respond to all objections filed against the same water right, your response should cover every issue raised in all the objections.

You must file your response by the deadline shown in the notice that IDWR mailed to you. The response must be received by the court on or before the deadline specified. Instructions for mailing this response are found at Page 5 and must be strictly followed.

This form has been adopted by the court in *SRBA Administrative Order 1, Rules of Procedure* (amended Sept. 30, 1996), Section 4, which may be consulted for further information.

Any party physically filing 25 or more responses must contact the Clerk of the SRBA Court no later than 14 days prior to the filing deadline and arrange for an appointment to file multiple responses.

By filing a response form, you are certifying that the response is well-grounded in fact; that it is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law; and that it is not filed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase in the cost of litigation.

I. GENERAL INFORMATION

Please fill in the following information:

Party/Claimant responding:

Name: **J. R. Simplot Company**

Address: **PO Box 27
Boise, Idaho 83707**

Phone: Work: **208-336-2110** Home:

Briefly describe your interest in this water right:

J. R. Simplot Company ("Simplot") is the claimant.

If this response is filed by an attorney:

Attorney Name:

Attorney Address:

Attorney Phone No.:

If filed by an attorney, notice of pending court proceedings will be sent to the attorney only.

2. *Party/Claimant who filed objection:*

Name: **Ted Higley and Betty Higley**

Address: **PO Box 57
Malta, ID 83342**

II. STATEMENT OF THE RESPONSE

Please check each box which identifies your response.

1. ☐ **Name and Address:** I respond to the objection concerning the name and/or address of the owner of the water right.
2. ☐ **Source:** I respond to the objection concerning the source of water.
3. **Quantity:** I respond to the objection concerning:
 - ☒ a. the total quantity of water used in cubic feet per second; or
 - ☐ b. the total quantity of water stored in acre feet per year; or
 - ☐ c. the total quantity of water reserved for each and every purpose, including all present and future uses.
4. ☐ **Priority Date:** I respond to the objection concerning the priority date.
5. ☒ **Point(s) of Diversion:** I respond to the objection concerning the legal description of the point(s) of diversion.
6. ☐ **Instream Flow:** I respond to the objection concerning the legal description of the beginning and ending points of the instream flow.
7. ☐ **Purpose(s) of Use:** I respond to the objection concerning the purpose(s) of use.
8. ☐ **Period of Year:** I respond to the objection concerning the period of year when water is used or is necessary for the purpose stated.
9. **Place of Use:** I respond to the objection concerning:
 - ☐ a. the legal description of the place of use; or
 - ☐ b. the number of irrigated acres within each 40-acre subdivision.
10. ☐ **Consumptive Use:** I respond to the objection concerning the annual volume of consumptive use.
11. **Water Right Recommendation:** I respond to the objection concerning:
 - ☐ a. this water right being recommended at all; or
 - ☐ b. this water right not being recommended.

12. ☐ Description of Reservation: I respond to the objection concerning the legal description of the reservation.
13. ☐ Other: I respond to the objection concerning:

REASONS SUPPORTING EACH BOX CHECKED

You must state the reason(s), by number, for each box checked. You may use additional pages if necessary.

Reason for Checking Box 3.a: In the attached Deed Record for the Warranty Deed recorded in the real property records of Cassia County on July 9, 1947, in Book 53 of Deeds at page 44 as instrument no. 159895, H.F. and Rosa Deardorff, the Grantors, conveyed the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 12 Township 13 South, Range 26 East Boise Meridian containing approximately 80 acres, to a predecessor of the current landholder, together with those water rights specifically identified as "...80 inches of the decreed water of Cassia Creek bearing a priority 1894.." Similarly, in the attached Deed Record for the Warranty Deed recorded in the real property records of Cassia County on November 9, 1945, in Book 49 of Deeds at page 565 as instrument no. 152869, the Deardorffs conveyed the NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 13 Township 13 South Range 26 East Boise Meridian containing approximately 120 acres, to a predecessor of the current landholder, together with those water rights specifically identified as "...120 inches of the decreed water of Cassia Creek bearing date of priority 1894.."

In *Paddock v. Clark*, 22 Idaho 498, 126 P. 1053 (1912) the Idaho Supreme Court stated as follows:

"We think the rule is well recognized in this state that water applied to land for a beneficial use in the cultivation and development of the same becomes appurtenant to the land, and where such land is conveyed, that the water right appurtenant thereto passes with the conveyance of the land, where nothing to the contrary appears, but where such conveyance specifies the specific water conveyed in the body of the deed in connection with the description of the land, it is a clear and distinct declaration of the intention of the parties to the contract of conveyance to pass title to the land, and likewise the water rights described, and that no other water appurtenant to the land is intended to be conveyed; and that the provision in the deed "together with all and singular....appurtenances thereto," was not intended by the parties to include other water rights in addition to those specifically described."

Consequently, in circumstances such as this subcase where a deed conveying real property lists specific water rights to be included in the conveyance, Idaho law limits the water rights conveyed to only those specifically identified in the deed. The conveyance of any other right not identified in the deed is excluded from the land transfer [*Paddock v. Clark*, *Ibid.*; *Harris v. Sewell*, 51 Idaho 283, (1931); *Davis v. Randall*, 44 Colo. 488, (1908)].

The Claimant is the successor in interest to land and related water rights formerly owned by the Deardorffs. The water rights were reserved by the Deardorffs and were not conveyed in either of the deeds conveying adjacent parcels and specific water rights to others. The Grantees in both of the attached Warranty Deeds are entitled to only that portion of the water right particularly described in the deeds (a portion of water right no. 43-103). The Grantees in both real property transfers are entitled to only the water rights expressed, and did not take any additional rights by implication [*Kofoed v. Bray*, 69 Mont. 78 (1923)]. Deardorff reserved those rights which were not conveyed. Consequently, the

Claimant is entitled to 2.5 cfs, the full quantity awarded in the Jobe Adams Decree for the recommended place of use.

Reason for Checking Box 5:

The Objector seeks to remove two of the five points of diversion recommended by the Director in his report for claim no. 43-99C. These two points of diversion located within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ ("Harper Diversion") and the SE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ ("Middle Diversion") of Section 14 Township 13 South, Range 26 East, B.M. are both situated on land owned by Simplot. Out of the five recommended diversion points the Harper Diversion is Simplot's furthest downstream Cassia Creek point of diversion. Simplot uses this diversion during the high seasonal spring run-off periods. When the flow in Cassia Creek recedes following spring run-off, Simplot discontinues the use of this diversion in favor of using Simplot's other 4 upstream diversion points. This practice allows Simplot to irrigate with the water that would otherwise be lost to seepage when transporting it the additional distance to the downstream Harper Diversion. When the Cassia Creek flow tapers off during the normal course of the irrigation season, the upstream diversion points allow Simplot to more efficiently utilize the dwindling quantity of water available to Simplot under Simplot's water rights. Simplot denies the Objector's allegation that Simplot has never used the Harper Diversion.

With respect to the Middle Diversion, the basis for the Objector's complaint is a dispute over the costs allegedly incurred to re-construct this diversion after it was washed-out by high spring Cassia Creek flows several years ago. Simplot has diverted water from the Middle Diversion since acquiring its real property interest in this area. The Objector's complaint about this diversion does not relate to Simplot's continuous use of the Middle Diversion to divert and beneficially use of water from Cassia Creek. It would not be appropriate to remove this diversion from Simplot's water right as a result of a dispute over a financial matter related to an event which occurred several years ago. The Snake River Basin Adjudication, which will adjudicate the rights to divert and beneficially utilize water from the Snake River and its tributaries, is not the appropriate forum to resolve an old financial claim.

CHANGES TO THE DIRECTOR'S REPORT

Specifically describe how you want the Director's Report to be changed. You may use additional pages if necessary.

Simplot agrees with the Director's Recommendation and does not propose any changes.

Note: You should attach copies of documents which support your response. Note on each document the box number it supports.

☒ Check here if you are submitting documents. Please list each document by the title and number of pages. You may use additional pages if necessary:

1. Deed Record for Warranty Deed recorded in the real property records of Cassia County on July 9, 1947, in Book 53 of Deeds at page 44 as instrument no. 159895.
2. Deed Record for Warranty Deed recorded in the real property records of Cassia County on November 9, 1945, in Book 49 of Deeds at Page 565 as instrument no. 152869.

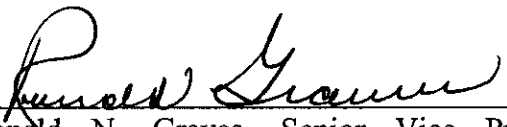
VERIFICATION (Must be Completed)

State of Idaho)
)
County of Ada)

Ronald N. Graves duly sworn, upon oath, deposes and says:
(Name of person filing response)

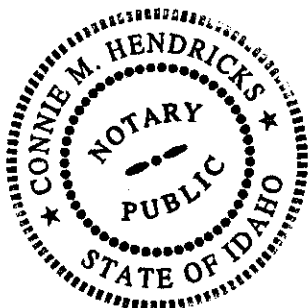
That I am the party/claimant filing this response (as listed on Page 2, Section 1, "Party/Claimant responding"), that I am a water claimant or party in this proceeding as defined by I.C. §§ 42-1401A(l) and (7) or that I am the attorney for the party/claimant responding, and that I have read this response, know its contents and believe that the statements are true to the best of my knowledge.

J. R. Simplot Company

By: 
Ronald N. Graves, Senior Vice President,
Secretary and Chief Legal Officer

Attorney signing in representative capacity

Subscribed and sworn to before me on:




Notary Public for
Residing at: Boise
My Commission expires: 8/22/08

INSTRUCTIONS FOR MAILING

You must mail the response including all attachments, to the Clerk of the Court. FAX filings will not be accepted. You must also send a copy to all the parties listed below in the Certificate of Mailing.

CERTIFICATE OF MAILING

I certify that on October 10, 2002, I mailed the original and copies of this response, including all attachments, to the following persons, by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court *Via Overnight Mail*
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

Name: **J. R. Simplot Company**

Address: **P. O. Box 27**
Boise, ID 83707

3. One copy to the party who filed the objection, or if represented by an attorney, to their attorney at the following address:

Name: **Roger D. Ling & Jason D. Walker**

Address **Ling & Robinson**
615 'H' Street
PO Box 396
Rupert, ID 83350-0396

4. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environmental and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

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



Signature of Respondent or attorney
mailing on Respondent's behalf

49/565 152869
DEED RECORD No. 49, CASSIA COUNTY, IDAHO

#152869 COMPARED

WARRANTY DEED

(\$13.20 revenue stamps attached)

THIS INDENTURE, Made this Fifth day of November in the year of our Lord one thousand nine hundred and forty five between H. F. Deardorff and Rosa V. Deardorff, his wife of Burley, County of Cassia, State of Idaho, the part les of the first part, and Blaine Wight and Viola Wight, his wife of Malta, County of Cassia, State of Idaho

the part les of the second part: WITNESSETH, That the said parties of the first part, for and in consideration of the sum of Twenty thousand and no/100----- DOLLARS, lawful money of the United States of America, to them in hand paid by the said part les of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey, and confirm unto the said parties of the second part, and to their heirs and assigns forever, all the following described real estate, situated in Cassia County, State of Idaho, to-wit:

All of the Northeast quarter of the Northwest quarter (NE1/4NW1/4), the Northwest quarter of the Northeast quarter (NW1/4NE1/4) and the Northeast quarter of the Northeast quarter (NE1/4NE1/4) of Section 13, Twp. 13 South, Range 26 E.B.M. except therefrom all land deeded to the State of Idaho for Highway purposes therein as recorded in Book of Deeds no. 48 of Cassia County, Idaho, at page 561; together with 120 inches of the deepest water of Cassia Creek bearing date of priority 1894 and all ditches and ditch rights pertaining to the land herein described. Also all water developed from that well located in the South portion of said land.

Also the use of 1/2 of the water developed from that Tile stream located in the NW1/4 of said section each year from Nov. 1, to April first of the succeeding year. Said water to be used for stock watering purposes on the property herein conveyed and not diverted to other lands.

Said parties of the first part hereby reserve a continuous easement and right to use a portion of the land herein conveyed and the perpetual use of an irrigation well thereon. Said land being more particularly described as beginning at the intersection of the East boundary line of Idaho highway no. 30 S. and the North boundary line of the NE1/4NW1/4 of said section 13, Twp. 13 South, Range 26 E.B.M. thence East 3 rods, thence South three rods, thence West three rods, thence North three rods to the place of beginning.

TOGETHER With all and singular the tenements, hereditaments and appurtenances therunto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property as well in law as in equity, of the said part les of the first part:

TO HAVE AND TO HOLD, All and singular the above mentioned and described premises, together with the appurtenances, unto the parties of the second part, and to their heirs and assigns forever. And the said parties of the first part, and their heirs, the said parties in the quiet and peaceable possession of the said part les of the second part, their heirs and assigns, against the said part les of the first part, and their heirs, and against all and every person and persons whatsoever, lawfully claiming or to claim the same, shall and will WARRANT and by these presents forever DEFEND.

IN WITNESS WHEREOF, The said part les of the first part have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered in the Presence of:

Charlotte Runzinger

H. F. Deardorff

(SEAL)

Wm. H. Thompson

Rosa V. Deardorff

(SEAL)

(SEAL)

(SEAL)

STATE OF IDAHO,

COUNTY OF Cassia

On this 6th.

day of November

in the year 19 45 before me,

Wm. H. Thompson

Notary Public in and for said State, personally appeared

H. F. Deardorff and Rosa V. Deardorff, his wife

known to me (

persons whose names are subscribed to

the within instrument, and acknowledged to me

that

they

executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(NOTARIAL SEAL)

Wm. H. Thompson

My commission expires Feb. 1, 1946

Notary Public residing at Burley, Idaho

STATE OF IDAHO

COUNTY OF CASSIA

I hereby certify that this instrument was filed for record at the request of Blaine Wight

at 55 minutes past 3 o'clock P.M. this 6th

day of November

A.D. 19 45

in my office, and duly recorded in Book 49 of Deeds

at page 565

Ivin Hogan,

Ex-Officio Recorder

Fee \$ 1.40

By D. G. McCluslin

154895 53/44

DEED RECORD No. 11, CASSIA COUNTY, IDAHO

154895 J.M.F.A.R.

WARRANTY DEED (32.35 Reynolds 137)

THIS INSTRUMENT, Made this 25th day of March, in the year of our Lord one thousand nine hundred and forty-six, between E. F. Beardorff and Doris V. Beardorff, his wife, of the County of Cassia, State of Idaho, the part 1st of the first part, and O. Ross Sanders and Laurine Sanders, his wife, of the County of Cassia, State of Idaho, the parties of the second part. WITNESSETH That the said part 1st of the first part, for and in consideration of the sum of Fifty-five Hundred and no/100 (\$5500.00) DOLLARS of the United States of America, to them in hand paid by the said part 1st of the second part, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell, convey, and confirm unto the said part 2nd of the second part, and to their heirs and assigns forever, all of the following described real estate, situated in Idaho, to-wit:

The Northeast quarter of the Southwest quarter (NE1/4SW1/4) and the Southeast quarter of the Southwest quarter (SE1/4SW1/4) of Section Twelve (12), Township Thirteen (13) South, Range Twenty-six (26) East of the Boise Meridian, together with eighty (80) inches of the decreed water of Cassia, commencing date of priority 1894 and all ditches and ditch shares pertaining to the land herein described; together with all water developed from a certain well located in the Northwest (NW) corner of the Northeast quarter of the Northwest quarter (NE1/4NW1/4) of Section Thirteen (13), Township Thirteen (13) South, Range Twenty-six (26) East of the Boise Meridian and more particularly described as beginning at the intersection of the East boundary line of U. S. Highway No. 30 South and the Boise Meridian of the Northeast quarter of the Northwest quarter (NE1/4NW1/4) of Section Thirteen (13), Township Thirteen (13) South, Range Twenty-six (26) East of the Boise Meridian, thence East three (3) rods, thence South three (3) rods, thence West three (3) rods, thence North three (3) rods to the place of beginning; also continuous easement and perpetual right to use the land last described above and the water developed thereon.

Also the said part 1st of the water developed from that well located in the Northwest quarter of the Northwest quarter (NW1/4NW1/4) of Section Thirteen (13) each year from November 1st to the 1st of January of the succeeding year. Said water to be used for stock water on the property herein conveyed and not diverted to other uses.

And I, the said part 1st, do hereby warrant, defend, and hold the title and singular the tenants, hereditaments and appurtenances hereunto belonging or in anywise appertaining, excepting the rights of the State of Idaho.

Beginning at a point 140 feet West of the Northeast corner of the Northwest quarter of the Southwest quarter (NW1/4SW1/4) of said Section 12, Range 26 East, Boise Meridian, thence South 200 feet; thence West 125 feet; thence North 132 feet; thence East 574 feet to the point of beginning.

Beginning at a point 140 feet South of the Northwest corner of the Southwest quarter of the Southwest quarter (SW1/4SW1/4) of said Section 12, Range 26 East, Boise Meridian, thence East 125 feet; thence North 90 feet, to the point of beginning.

Beginning at a point 140 feet South of the Northwest corner of the Southwest quarter of the Southwest quarter (SW1/4SW1/4) of said Section 12, Range 26 East, Boise Meridian, thence East 125 feet; thence North 150 feet, to the point of beginning.

Beginning at a point 140 feet South of the Northwest corner of the Southwest quarter of the Southwest quarter (SW1/4SW1/4) of said Section 12, Range 26 East, Boise Meridian, thence East 125 feet; thence North 100 feet, to the point of beginning.

On or after the date of recording to the State of Idaho for highway rights.

Witness my hand and seal of the first day of February, 1950.

Notary Public, residing at Burley, Idaho

STATE OF IDAHO

County of Cassia

I, the undersigned, County Clerk, do hereby certify that the foregoing was filed for record at the request of E. F. Beardorff and Doris V. Beardorff, his wife, and O. Ross Sanders and Laurine Sanders, his wife, on the 25th day of March, 1950.

Cassia County Abstract Co.,

day of July, A.D. 19 47

at page 44

EVIN HOGGAN

Ex-Officio Recorder

By J. G. McClafflin

Deputy