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12 **IN THE DISTRICT COURT OF THE JUDICIAL DISTRICT OF THE**
 13 **STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

14 In Re SRBA) Subcase Nos. 45-10480, 45-10481,
 15) 45-10502 and 45-12906
 16)
 17) **AFFIDAVIT OF MICHAEL P. TRIBE IN**
 18) **OPPOSITION TO EARL WARTHEN'S**
 19) **MOTION FOR SUMMARY JUDGMENT**
 20) **ON ALL CLAIMS AND WITHDRAWING**
 21) **OBJECTION TO SUBCASE NO. 45-10502**

22 STATE OF IDAHO)
 23) ss.
 24 County of Minidoka)

25 Michael P. Tribe, being first duly sworn upon oath, deposes and states as follows:

26
 27 1 I am the attorney representing Kevin Smyer, Norman Smyer, and Dolores
 28 Smyer in the above-entitled subcases, and make the following affidavit upon my personal
 knowledge of the facts and circumstances set forth hereinbelow.

29 AFFIDAVIT OF MICHAEL P. TRIBE IN OPPOSITION TO EARL
 30 WARTHEN'S MOTION FOR SUMMARY JUDGMENT ON ALL
 31 CLAIMS AND WITHDRAWING OBJECTION TO SUBCASE NO. 45-10502 - 1

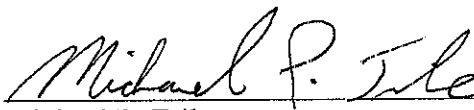
2 Attached hereto as Exhibit "A" is a true and correct copy of the
supplemental Director's Report Regarding Subcase Nos 45-10480, 45-10481, 45-10502,
45-12906, and 45-13669 dated February 8, 2006.

3 Attached hereto as Exhibit "B" is a true and correct copy of the
Memorandum Decision an Order of Gary Spackman dated January 14, 1991.

4 Attached hereto as Exhibit "C" is a true a correct copy of the Department
of Water Resources' Order Adopting Proposed Memorandum Decision and Order dated March
1, 1991.

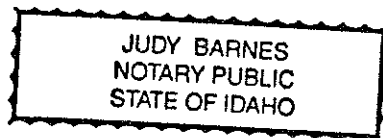
5 Attached hereto as Exhibit "D" is a true a correct copy of the Affidavit of
Loren Goodman dated December 12, 2005.

FURTHER THIS AFFIANT SAITH NAUGHT.


Michael P. Tribe

SUBSCRIBED AND SWORN to this 28th day of February, 2006

(SEAL)




Notary Public for Idaho
Residing at: Rupert, Idaho
My Commission expires: 02/12/2011

AFFIDAVIT OF MICHAEL P. TRIBE IN OPPOSITION TO EARL
WARTHEN'S MOTION FOR SUMMARY JUDGMENT ON ALL
CLAIMS AND WITHDRAWING OBJECTION TO SUBCASE NO. 45-10502 - 2

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of February, 2006, I served the original/ true and correct copies of the foregoing *Affidavit of Michael P. Tribe in Opposition to Earl Warthen's Motion for Summary Judgment on All Claims and Withdrawing Objection to Subcase No. 45-10502*, by the method indicated below, and addressed to the following:

Original to:	Clerk of the Court	☒ U. S. Mail
	Snake River Basin Adjudication	☐ Hand Delivery
	P. O. Box 2707	☒ Facsimile Transmission
	Twin Falls, ID 83303-2707	☐ Court Folder
	Facsimile (208) 736-2121	
Copies to:	Shelley M. Davis, Esq.	☒ U. S. Mail
	Barker, Rosholt & Simpson	☐ Hand Delivery
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	Boise, ID 83701-2139	☐ Court Folder
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	Environment & Nat'l Resources Div.	☐ Hand Delivery
	550 W. Fort Street, MSC 033	☐ Facsimile Transmission
	Boise, ID 83724	☐ Court Folder
	Chief, Natural Resources Div.	☒ U. S. Mail
	Office of the Attorney General	☐ Hand Delivery
	P. O. Box 44449	☐ Facsimile Transmission
	Boise, ID 83711-4449	☐ Court Folder

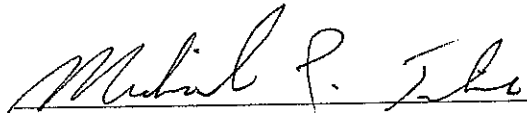

Michael P. Tribe

EXHIBIT “A”

**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
SUBCASE NOS. 45-10480, 45-10481, 45-10502,
45-12906, AND 45-13669**

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
Karl J. Dreher, Director
Donald V. Shaff, Adjudication Bureau Chief

February 8, 2006

EXHIBIT "A"

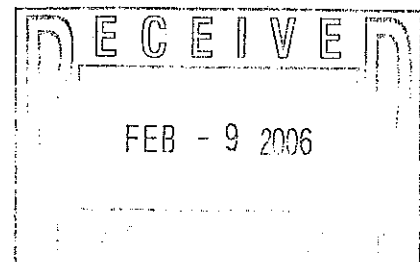


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I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Dolan's January 3, 2006 *Order Requesting Preparation of Rule 706 Report*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase numbers 45-10480, 45-10481, 45-10502, 45-12906, and 45-13669; setting forth the bases for the Department's recommendations for those water rights. The Report was prepared under the supervision of Karl J. Dreher, Director, and Donald V. Shaff, Adjudication Bureau Chief.

The following Department employee has knowledge of the information contained in the Report: Kelly K. Christensen, Senior Water Resource Agent, Southern Region Office in Twin Falls ("Agent Christensen").

II. SUMMARY OF THE ISSUES

At issue are the Department's recommendations for five beneficial use surface water rights in Basin 45 that were ordered consolidated into one subcase by Special Master Dolan. In its Basin 45 Director's Report for Irrigation and Other Uses, the Department recommended the following water rights: 45-10480 and 45-10481 in the name of Kevin Smyer ("Smyer"); 45-10502 in the name of Earl Warthen ("Warthen"); and 45-12906 in the names of Norman and Delores Smyer ("the Smyers"). The Department recommended as disallowed water right no. 45-13669 in the name of Warthen. Warthen objects to each of the Department's recommendations.

The Department will first address its recommendations for Kevin Smyer's claims; next, its recommendation for Norman and Delores Smyer's claim; and, finally, its recommendations for Earl Warthen's claims.

III. BACKGROUND

The recommendations at issue in this Report are located in the Albion Valley and divert surface water from unnamed streams, springs, and Spring Creek for irrigation. Attached hereto as Attachment A are two images depicting the area at issue. The sources are tributary to sinks, Howell Creek, and Summit Creek, all of which are part of the Marsh Creek drainage. While the water rights at issue in this Report were claimed as beneficial use rights, it is important to note that rights to Marsh Creek, including its tributaries Spring Creek, Howell Creek, and Summit Creek, were decreed in four previous adjudications: *Chatburn v. Brim* (Idaho Territory, Cassia County, April 19, 1884); *Vaughn v. Harroun* (Idaho Territory, Cassia County, December 1, 1885); *Wood v. Stokes* (State of Idaho, Cassia County, March 11, 1892); and *Bridger v. Tremayne* (State of Idaho, Cassia County, March 17, 1910). Therefore, the earliest priority date the Department recommend for the beneficial use water rights at issue in this Report was March 18, 1910, one day after the *Bridger v. Tremayne* decree.

A subsidiary issue that has arisen is the identification of Spring Creek and its historic channel.

IV. DISCUSSION

A. Kevin Smyer

1. Water Right No. 45-10480

On May 9, 1989, Kevin Smyer filed a notice of claim to a beneficial use surface water right for irrigation in the Snake River Basin Adjudication ("SRBA"), which was amended on August 28, 2003, and later recommended as claimed by the Department. The pertinent elements

of Kevin Smyer's claim and the Department's recommendation are depicted as follows:

	Claim	Recommendation
Priority	March 18, 1910	March 18, 1910
Source	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.
Quantity	1.05 cfs	1.05 cfs
Point of Diversion	T.12S., R.25E., Sec. 16 SWSWNE T.12S., R.25E., Sec. 16 NESWNE T.12S., R.25E., Sec. 16 SESWNE T.12S., R.25E., Sec. 16 NWSENE	T.12S., R.25E., Sec. 16 SWSWNE T.12S., R.25E., Sec. 16 NESWNE T.12S., R.25E., Sec. 16 SESWNE T.12S., R.25E., Sec. 16 NWSENE
Place of Use	T.12S., R.25E., Sec. 16 NENE (22 acres), SWNE (16), SWNE (16): 54 acres	T.12S., R.25E., Sec. 16 NENE (22 acres), SWNE (16), SWNE (16): 54 acres

On January 3, 2005, Warthen objected to the Department's recommendation for water right no. 45-10480, stating that the "water right should not exist" because there was never a "lawful appropriation."

Water right no. 45-10480 was recommended as claimed for the following reasons. First, the claimed priority date is based on historic beneficial use. Because water from the claimed points of diversion is not always available, both sources were recommended. Historic diversions for water right no. 45-10480 have existed and been available for use since their development in the early 1900s. It is likely that the diversion system was historically part of the original diversion system for water right no. 45-292. Attached hereto as Attachment B is a true and correct copy of a page from *Wood v. Stokes* decreeing water right no. 45-292. As water for water right no. 45-10480 would have been incidental to the original decreed right, and naturally captured by the Howell Creek system, the Department recommended water right no. 45-10480 with a priority date of March 18, 1910, one day after the *Bridger v. Tremayne* decree.

Second, the Department recommended the sources for water right no. 45-10480 as claimed. Through the course of these proceedings, however, the Department's recommendation of which channel constitutes Spring Creek has been drawn into question. Typically, the Department recommends sources as they are identified by the United States Geological Survey ("USGS"). According to the USGS, there are no channels in the area that are identified as Spring Creek. The USGS' finding is contrary to the finding of the District Court in *Wood v. Stokes*, which decreed water rights to Spring Creek. Attached hereto as Attachment C is a true and correct copy of a page from *Wood v. Stokes* decreeing water right no. 45-517 to Spring Creek. Attached hereto as Attachment D is a true and correct copy of water right no. 45-517D, which was partially decreed by the SRBA District Court for irrigation from Spring Creek, and represents a split of the original right decreed by *Wood v. Stokes*. Therefore, for purposes of consistency in the SRBA, the Department recommended the first source for water right no. 45-10480 as Spring Creek tributary to Howell Creek.

The historic channel of what is locally known as Spring Creek has also been drawn into question. During the Department's field investigation with Richard Anderson for water right no. 45-517D, Anderson identified three points of diversion from the Spring Creek channel. See *Attachment A*. At Anderson's southern point of diversion, the historic Spring Creek channel is clearly visible and can be followed north onto the Anderson farmstead where it enters a pond just north of the farmstead road. *Id.* At this point, the direction of the channel becomes unclear. *Id.* A channel just to the west of the pond leads to the Warthen property and enters a pond on that ground, which is the point of diversion Warthen claimed for Spring Creek in water right no. 45-10502. *Id.* The eastern channel leads to a pond just south of Kevin Smyer's property and is claimed by Norman and Delores Smyer through water right no. 45-12906. *Id.* Based on the

Department's review of the area in question, it was determined that the western channel is the historic Spring Creek channel, which is tributary to Howell Creek; the eastern channel is an unnamed stream, which is tributary to Summit Creek.¹ *Id.* Therefore, the western channel is Spring Creek, while the eastern channel is unnamed stream.

The western channel that the Department recognized in its recommendation for water right no. 45-10480 is the same channel recommended to Warthen for water right no. 45-10502 and Norman and Delores Smyer for water right no. 45-12906. That channel flows north from Warthen's pond, goes under Highway 77, and enters Kevin Smyer's property in the southwest corner. At that point, the channel flows into a ditch from which water can be spread onto the ground around Smyer's current place of use and to the north. Portions of the ditch are visible in 1962 and 1968 aerial photography.

The second source recommended for water right no. 45-10480, the eastern channel, is an unnamed stream that was also recommended by the Department for water right no. 45-12906, claimed by Norman and Delores Smyer. *Id.* The unnamed stream flows from a small reservoir in the SWNESE of Section 16, goes under Highway 77, through a pond on the Redman property, and onto Kevin Smyer's property where the first diversion from that channel can be found. The diversion ditch then flows west to an old orchard and can irrigate ground on the south end of Smyer's property. Two additional points of diversion from that channel were found approximately 1,250 feet north of the first point of diversion. Those diversions allow water to reach the northern portion of the place of use. The ditches from this system are visible in 1962 and 1968 aerial photography.

¹ Summit Creek is not visible in Attachment A.

At no time was the Department able to find that water right no. 45-10480 had been abandoned or forfeited. Therefore, based on the above information, the Department recommended water right no. 45-10480 as claimed by Kevin Smyer.

2. Water Right No. 45-10481

On May 9, 1989, Kevin Smyer filed a notice of claim to a beneficial use surface water right for irrigation in the SRBA, which was amended on August 28, 2003, and later recommended as claimed by the Department. The pertinent elements of Kevin Smyer's claim and the Department's recommendation are depicted as follows:

	Claim	Recommendation
Priority	March 18, 1910	March 18, 1910
Source	Spring trib. to Sinks	Spring trib. to Sinks
Quantity	0.14 cfs	0.14 cfs
Point of Diversion	T.12S., R.25E., Sec. 16 SWNWNE	T.12S., R.25E., Sec. 16 SWNWNE
Place of Use	T.12S., R.25E., Sec. 16 NWNE (6.8 acres): 6.8 acres	T.12S., R.25E., Sec. 16 NWNE (6.8 acres): 6.8 acres

On January 3, 2005, Warthen objected to the Department's recommendation for water right no. 45-10481, stating that the "water right should not exist" because there was never a "lawful appropriation."

Water right no. 45-10481 was recommended as claimed for the following reasons. The source, Spring tributary to Sinks, is located in the middle of the place of use recognized for water right no. 45-10480. *See Attachment A.* During the Department's field investigation, Agent Christensen found a small pond at the spring location and a ditch coming off the pond that ran north. The pond is visible in 1962 aerial photography of the area. Based on the location of the ditch and ground contour, it was determined that 6.8 acres could be irrigated from the system.

The spring water would have commingled with Howell Creek water when water right no. 45-292 was being used in 1881 and later. Because water right no. 45-10481 was not decreed in the previous decrees in the Albion Valley, the Department recommended water right no. 45-10481 with a priority date of March 18, 1910, one day after the *Bridger v. Tremayne* decree.

At no time was the Department able to find that water right no. 45-10481 had been abandoned or forfeited. Therefore, based on the above information, the Department recommended water right no. 45-10481 as claimed by Kevin Smyer.

B. Norman and Delores Smyer

1. Water Right No. 45-12906

On August 17, 1999, Norman and Delores Smyer filed a notice of claim to a beneficial use surface water right for irrigation in the SRBA, which was amended on August 7, 2003, and later recommended by the Department. The pertinent elements of Norman and Delores Smyer's amended claim and Department's recommendation are as follows:

	Claim	Recommendation
Priority	March 18, 1910	March 18, 1910
Source	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.	Spring Cr. trib. to Howell Cr. Unnamed Str. trib. to Summit Cr.
Quantity	0.14 cfs	0.14 cfs
Point of Diversion	T.12S., R.25E., Sec. 16 SESESW	T.12S., R.25E., Sec. 16 SESESW
Place of Use	T.12S., R.25E., Sec. 16 NWSE (4.6 acres): 4.6 acres	T.12S., R.25E., Sec. 16 NWSE (4.6 acres): 4.6 acres

On January 3, 2005, Warthen objected to the Department's recommendation for water right no. 45-12906, stating that the "water right should not exist" because there was never a "lawful appropriation."

Water right no. 45-12906 was recommended as claimed for the following reasons.

First, the claimed priority date is based on historic beneficial use. Historic diversions for water right no. 45-12906 have existed and been available for use since their development in the early 1900s when the Smyers' property was irrigated as part of what was originally the Anderson farmstead. The water that has been appropriated by the Smyers is water that is available in excess of irrigation flows from Anderson's irrigation practices. Since the Smyers claimed beneficial use of any water that would have been available after Anderson's irrigation practices were met, the Department recommend a priority date of March 18, 1910, one day after the *Bridger v. Tremayne* decree.

Second, the place of use and points of diversion for water right no. 45-12960 could be recommended based on historic use. As previously stated, the place of use for water right no. 45-12906 was originally part of the Anderson farmstead. *See Attachment A*. A small reservoir is located on the unnamed stream just south of the Smyers' property. This channel has also been identified as the eastern channel. *Id.* Overflow from the reservoir makes its way into a ditch on the east side of the Smyers' property and loops to the west for the irrigation of a majority of the 4.6 acres.

The second point of diversion is from the western channel that is locally known as Spring Creek, located approximately 175 feet upstream from Warthen's point of diversion for water right no. 45-10502. *Id.* Agent Christensen was informed by the Smyers that, when they purchased the property, the ditches existed, but were in sufficient disrepair that they had to be refurbished. The Smyers' claim was recommended based on the understanding that the place of use was historically part of the Anderson property and constituted an extension of the Anderson irrigation system to the south. At an unknown date the small reservoir was constructed on the

unnamed stream and an overflow ditch was constructed to specifically apply water to the ground now owned by the Smyers. The historical development of the ditch from the Spring Creek source is not known.

At no time was the Department able to find that water right no. 45-12906 had been abandoned or forfeited. Therefore, based on the above information, the Department recommended water right no. 45-12906 as claimed by Norman and Delores Smyer.

C. Earl Warthen

1. Water Right No. 45-10502

On May 11, 1989, Warthen filed a notice of claim to a beneficial use surface water right for irrigation and ground water recharge in the SRBA, which was amended on November 19, 1998. The pertinent elements of Warthen's amended claim and Department's recommendation are as follows:

	Claim	Recommendation
Priority	August 31, 1874	May 26, 1964
Source	Spring Cr. trib. to Sinks	Spring Cr. trib. to Howell Cr.
Quantity	0.40 cfs for irrigation 0.20 cfs for ground water recharge	0.40 cfs for irrigation
Point of Diversion	T.12S., R.25E., Sec. 16 SENESW	T.12S., R.25E., Sec. 16 SENESW
Place of Use	T.12S., R.25E., Sec. 16 NENW (40 acres), NWNW (20), SENW (19), NESW (20 irrig/20 gw. rechg): 99 acres	T.12S., R.25E., Sec. 16 NENW (37 acres), NWNW (15), SENW (16), NESW (18): 86 acres

On January 3, 2005, Warthen filed an objection to the Department's recommendation, asserting that his claimed priority of August 31, 1874 was correct. Warthen further noted in Part E of his objection that "Water from Spring Creek and co-mingled wastewater from adjacent property has always been diverted in connection with adjacent property's water rights."

Warthen's claimed priority, August 31, 1874, for water right no. 45-10502, a beneficial use water right, may be based on water right no. 45-517, a right decreed by the District Court in *Wood v. Stokes*. See Attachment C. On August 4, 1951, transfer no. 775 moved 0.20 cfs of water right no. 45-517 onto Warthen's property in the NW quarter of Section 16. A true and correct copy of transfer no. 775 is attached hereto as Attachment E. Transfer no. 775 did not, however, include the twenty acres in the NESW of Section 16. On May 25, 1964, transfer no. 1029 moved the water off Warthen's property and back onto property owned by Richard Anderson. A true and correct copy of transfer no. 1029 is attached hereto as Attachment F. Water right no. 45-517 was never appurtenant to the twenty acres owned by Warthen in the NESW of Section 16.

Because Warthen claimed a beneficial use water right from Spring Creek, a previously decreed source, the Department could not recommend a priority date that was earlier in time than the last of the four decrees in the Albion Valley, *Bridger v. Tremayne* (March 17, 1910). Therefore, Warthen's claimed priority date of August 31, 1874 could not be recommended.

Because Warthen claimed the ground east of Highway 77, located in the NE quarter and the eastern half of the NESW of Section 16 in one claim, the Department could not recommend a priority date that was earlier in time than the last day the portion of water right no. 45-517 was on Warthen's property, May 25, 1964. Therefore, the earliest date the Department could recommend for water right no. 45-10502 was the first day after transfer no. 1029 moved the water off Warthen's property, May 26, 1964.² The recommendation for water right no. 45-

² If Warthen were to file a separate claim listing the place of use as the NESW of Section 16, the Department could recommend the claim with a March 18, 1910 priority. The Department would then remove the NESW of Section 16 as a place of use for water right no. 45-10502.

10502 is also based on the assumption that water from Spring Creek is still used on the property when there is water in the channel in excess of all other valid rights with an earlier priority date.

Warthen's objection to the Department's recommendation for water right no. 45-10502 also addresses whether the water that is delivered to the property is from Spring Creek, or is Spring Creek water that is commingled with waste water. As stated above in the discussion regarding water right no. 45-10480, and as also depicted in *Attachment A*, Warthen diverts water from the western channel, which is the historic Spring Creek channel. Any waste water that enters the western channel prior to Warthen's property is considered water of that channel. Because the western channel is Spring Creek, the Department recommended Spring Creek water, not waste water.

2. Water Right No. 45-13669

On March 2, 2004, Warthen filed a notice of claim to a beneficial use surface water right for irrigation, irrigation storage, and root zone storage in the SRBA. In remarks, Warthen stated that the waste water being claimed is from water right nos. 45-284B, 45-285, 45-327D, and 45-517D, currently owned by Richard Anderson.³ Warthen stated that the diversion system consisted of a pond, open ditches, and tile drains. Remarks further described the distribution system as water stored in a pond and distributed via ditches, tile drains, and a pressurized irrigation system.

Warthen's claim for water right no. 45-13669 was recommended disallowed by the Department for failure to show a lawful appropriation. The pertinent elements of Warthen's

³ These water rights, respectively, represent splits of water rights decreed by the District Court in *Wood v. Stokes* as follows: 134 inches (2.68 cfs) from Howell Creek, priority April 1, 1875; 15 inches (0.30 cfs) from Howell Creek, priority April 1, 1878; 150 inches (3.00 cfs) from Howell Creek, priority March 1, 1881; and 20 inches (0.40 cfs) from Spring Creek, priority August 31, 1874.

claim and Department's recommendation are as follows:

	Claim	Recommendation
Priority	August 13, 1874	Disallowed
Source	Waste water trib. to Howell Cr.	Disallowed
Quantity	0.40 cfs for irrigation/irrigation from storage/root zone storage	Disallowed
Point of Diversion	T.12S, R.25E., Sec. 16 SENESW	Disallowed
Place of Use	T.12S., R.25E., Sec. 16 NENW (40 acres), NWNW (20), SENW (19) NESW (20): 99 acres	Disallowed

On January 20, 2006, Warthen filed a Standard Form 4 to amend his claim to water right no. 45-13669. As of the date of the filing of this Report, the Court has not ruled on Warthen's motion to amend. Therefore, for purposes of this Report, the Department will only address its original recommendation and Warthen's objection thereto.

Warthen's claim was recommended disallowed for several reasons. First, the claimed priority date could not be recognized because Warthen could not prove that the claimed delivery system historically existed. The claimed delivery system was previously identified during the licensing examinations for water right nos. 45-7366 and/or 45-7538 (45-7538 is not a part of the adjudication process). The licensing examination for water right no. 45-7538 described the source as a buried perforated pipeline running east to the pond and eventually to a pipeline going to the ground north and east of Highway 77. A true and correct copy of the pertinent page from the licensing examination for water right no. 45-7538 is attached hereto as Attachment G.

Second, the Department could not recognize the claimed source. Although much of the claimed water likely originates from one or more sources related to Richard Anderson's irrigation practices, Warthen's claim incorrectly identified the source as waste water. The source

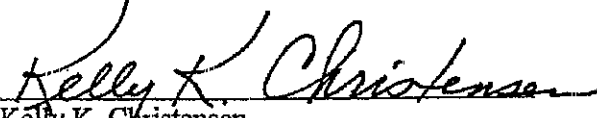
should instead be identified as Spring Creek, as it is the same channel that delivers water to points of diversion for water right nos 45-10480, 45-10481, and 45-12906.

Third, the claimed purposes could not be recommended because Warthen could not prove historic use. Warthen's claim for irrigation from storage is apparently in reference to a pond that is located on his property. However, the pond does not appear in 1968 aerial photography; thus, irrigation from storage was not recommended. The claimed use for root zone storage during the winter months was not recommended because Warthen could not prove historic practice. While the irrigation component of the claim is a valid use, the claimed source, priority date, and the point of diversion could not be recommended; therefore, the entire claim was recommended disallowed.

V. CONCLUSION

The Department's recommendations for water right nos. 45-10480, 45-10481, 45-10502, 45-12906, and 45-13669 are based on historical evidence of beneficial use and reasonable conclusions. Therefore, the Department respectfully requests that these water rights, as described in the Director's Report, be recommended to the Snake River Basin Adjudication District Court for partial decree.

Submitted this 8th day of February, 2006


Kelly K. Christensen
Senior Water Resources Agent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 8th day of February 2006.

Document Served: Supplemental Director's Report Regarding Subcase Nos.
45-10480, 45-10481, 45-10502, 45-12906, and 45-13669

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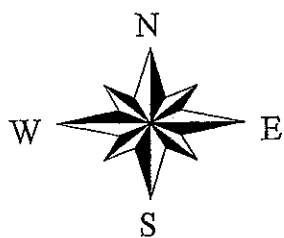

Idaho Department of Water Resources

Attachment A

Map Depicting Warthen/Smyer Places of Use and Points of Diversion

T.12S. R.25E. Sec.16

1968 aerial photo



Kevin Smyer

45-10480

45-10481

Earl Warthen

45-10502

45-13669

Norman Smyer

45-12906

Howell Creek

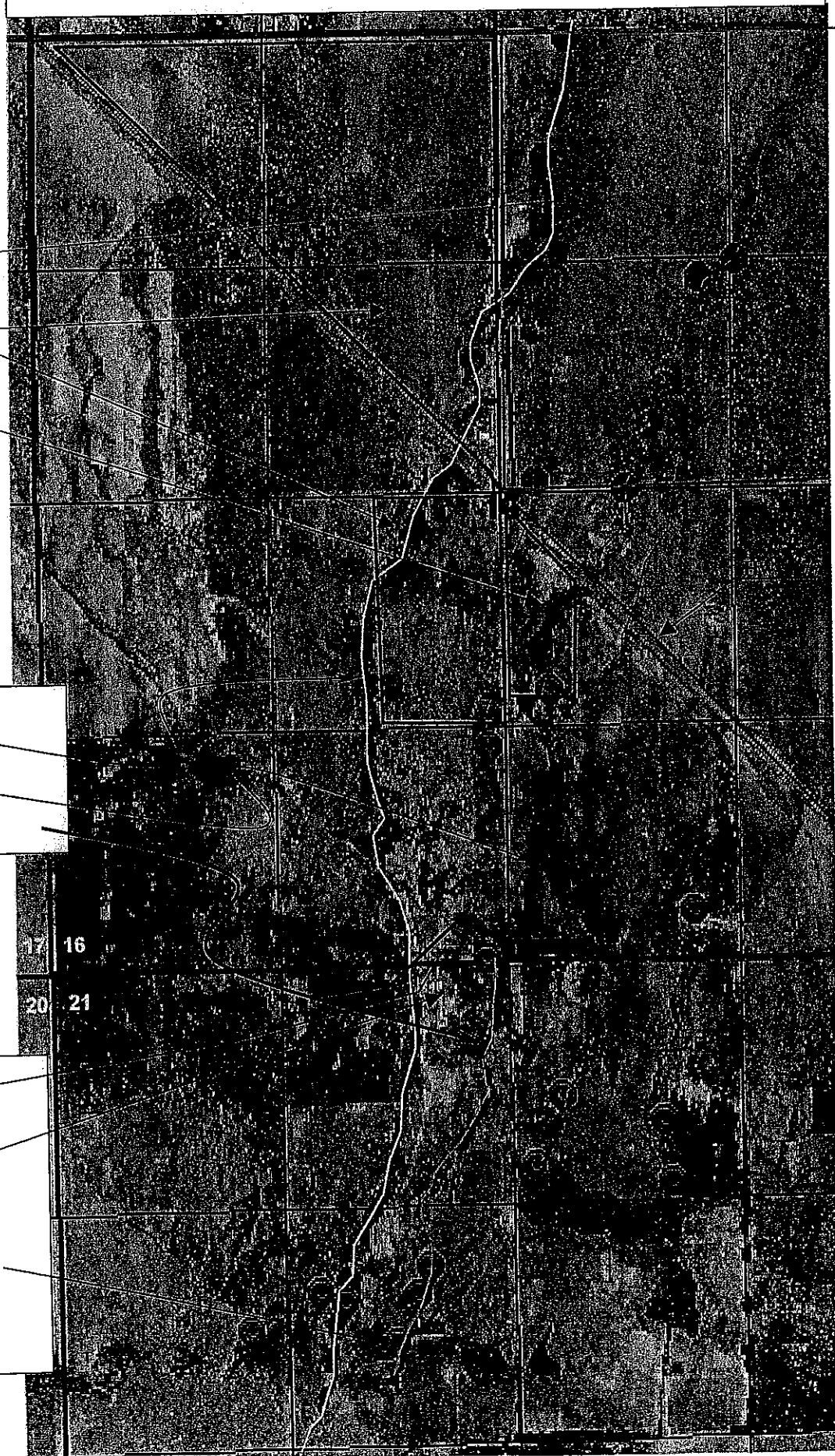
Unnamed Stream

Spring Creek

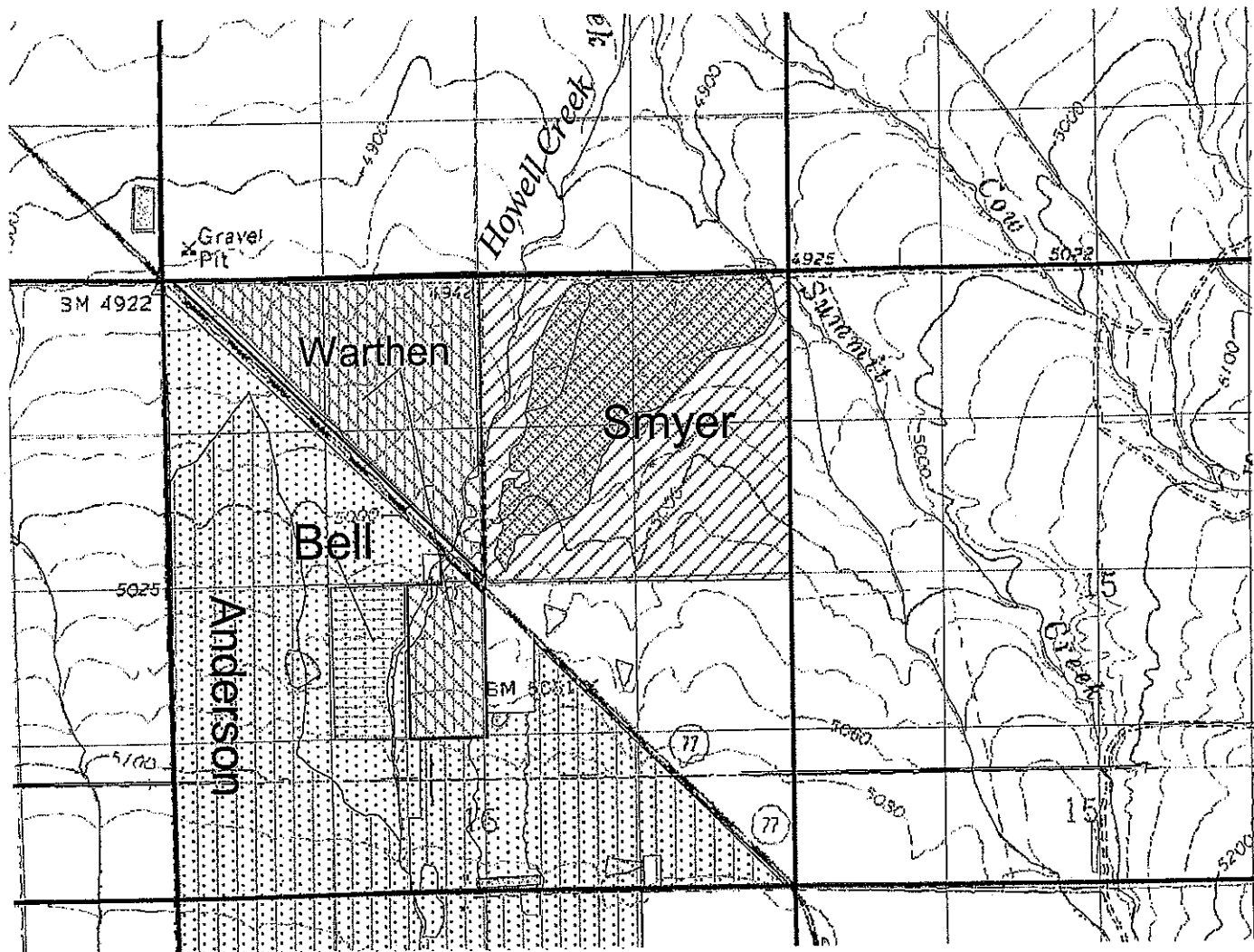
**Pond North of Anderson
Farmstead**

Anderson Farmstead

**Anderson/Hawker Spring
Creek Recommended P/D**

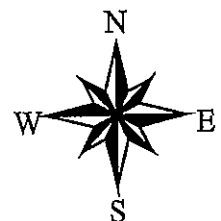


Depiction of Area of Concern Subcase No. 45-10480 et al.



0.4 0 0.4 0.8 Miles

- Sections
- Quarter-Quarter
- Streams
- Smyer Parcel
- Smyer POU
- Warthen Parcel
- Warthen POU
- Bell Parcel
- Bell pous.shp
- Anderson Parcels
- Anderson POU



IDWR
USGS Quadrangles
Drawn by: D. Shaff
Date: Jan 7, 2006

Attachment B

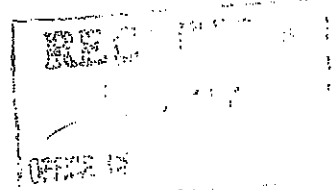
In the District Court of the Fourth
Judicial District in and for the
County of Cassia, State of Idaho 45-G

R. L. Wood, et al
Plaintiffs

vs

Wm. Stokes, et al
Defendants,

Transfers Noted



This cause having been heretofore tried by the Court with-
out a jury and the Court having made its findings and conclusions
of law,

It is now ordered adjudged and decreed that the following
persons parties to this action are entitled to divert from Marsh
Creek and its tributary streams situate in Cassia County, Idaho, the
amount of water hereinafter indicated, the amount of each party to
date from the time hereinafter stated and set apposite his or their
name, to-wit:

- 1 45 0258 Hardy Sears one hundred (100) inches from Land Creek tribu-
tary to Marsh Creek March 1st. 1875.
- 45 0259 Hardy Sears, Thirty inches from Rose Creek, tributary to
Marsh Creek March 1st. 1875.
- 2 45 0260 M. A. Harroun Seventy inches (70) from Howell Creek Tribu-
tary to Marsh Creek, March 31st. 1876.
- 3 45 0261 Josiah Bridger Fifty inches (50) from Marsh Creek March
31st. 1882.
- 4 45 0262 John Bridger Sixty inches from Marsh Creek November 30, 1879.
- ✓ 45 0263 J. W. Lamoreaux Sixty inches from Marsh Creek April 16th
1881.
- ✓ 45 0264 J. W. Lamoreaux, Sixty (60) inches from Marsh Creek July 21st
1884.
- ✓ 45 0265 J. W. Lamoreaux Four hundred and eighty (480) inches from
Marsh Creek from January 1st. to July of each year when not in use by
prior appropriators.
- 6 45 0266 T. A. Starrh, Sixty inches from Land Creek Tributary to
Marsh Creek June 15, 1875. Transfer # 35 30"
- 7 45 0267 S. R. Guin Fifty inches from Marsh Creek June 5th, 1875. {Trans 678
- 7 45 0268 S. R. Guin one hundred and thirty three and 1/3 inches from
Marsh Creek May 30, 1879.

SCANNED

DEC 16 2002

27.

45 0290 B. F. Mahoney, Forty inches (40) of the waters of Howell Creek, a tributary of Marsh Creek, from the 31st. day of May 1881.

28.

45 0291 Margaret A. Mahoney Twenty five (25) inches of the Waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of May 1884.

29.

45 0292 B. F. Mahoney twelve (12) inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 31st. day of March, 1881.

30.

45 0293 Dora A. Quinn, twenty five (25) inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of March 1882.

31.

45 0294 George Giles, and Andrew Park, as Administrator of the estate of John Park, deceased, (240) Two hundred Forty inches from Cleveland Lake, from the 31st. day of March 1888. and George Giles to have ~~Seventy Five~~ (75) inches of said water and the said Andrew Park, as the Administrator of the Estate of the John Park, deceased, to have ~~one hundred and fifty~~ inches, (150) thereof at the point of diversion from Marsh Creek, when said Giles shall have turned in Eighty (80) inches into said Creek from said Lake, and said Park shall have turned in one hundred Sixty (160) inches into said Creek from said Lake; said two hundred and forty (240) inches of water to be measured at the point where it enters said Marsh Creek, under a four inch pressure, and at the head of said ditches when taken upon said described land as the same are described in the findings herein.

32.
33

45 0295 Thomas Walton twenty (20) inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 31st. day of March 1883.

34.

45 0296 Thomas E. Harper, Fifty inches of the waters of Marsh Creek a tributary of Marsh Creek, from the 31st. day of March 1877.

35.

SCANNED

DEC 16 2002

Attachment C

In the District Court of the Fourth
Judicial District in and for the
County of Cassia, State of Idaho 45-G

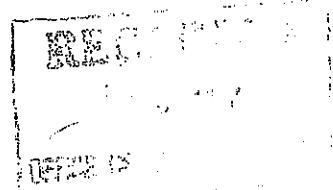
①
list #16

R. L. Wood, et al
Plaintiffs

vs

Wm. Stokes, et al
Defendants,

Transfers Noted



This cause having been heretofore tried by the Court with-
out a jury and the Court having made its findings and conclusions
of law,

It is now ordered adjudged and decreed that the following
persons parties to this action are entitled to divert from Marsh
Creek and its tributary streams situate in Cassia County, Idaho, the
amount of water hereinafter indicated, the amount of each party to
date from the time hereinafter stated and set apposite his or their
name, to-wit:

- 1 45 0258 Hardy Sears one hundred (100) inches from Land Creek tribu-
tary to Marsh Creek March 1st. 1875.
- 1 45 0259 Hardy Sears, Thirty inches from Rose Creek, tributary to
Marsh Creek March 1st. 1875.
- 2 45 0260 M. A. Harroun Seventy inches (70) from Howell Creek Tribu-
tary to Marsh Creek, March 31st. 1876.
- 3 45 0261 Josiah Bridger Fifty inches (50) from Marsh Creek March
31st. 1882.
- 4 45 0262 John Bridger Sixty inches from Marsh Creek November 30, 1879.
- 5 45 0263 J. W. Lamoreaux Sixty inches from Marsh Creek April 16th
1881.
- 5 45 0264 J. W. Lamoreaux, Sixty (60) inches from Marsh Creek July 21st
1884.
- 5 45 0265 J. W. Lamoreaux Four hundred and eighty (480) inches from
Marsh Creek from January 1st. to July of each year when not in use by
prior appropriators.
- 6 45 0266 T. A. Starrh, Sixty inches from Land Creek Tributary to
Marsh Creek June 15, 1875. Transfer # 85 30"
- 7 45 0267 S. R. Guin Fifty inches from Marsh Creek June 5th, 1875.
- 7 45 0268 S. R. Guin one hundred and thirty three and 1/3 inches from
Marsh Creek May 30, 1879.

SCANNED

DEC 16 2002

JUN 05 1896
Trans 578

Marsh Creek from the 31st. day of March, 1878.

19.

45 0282 Mary R. Norton one hundred (100) inches of the waters of Marsh Creek from the 30th day of April 1874. Trans #678

20.

45 0283 D. B. Stark one hundred (100) inches of the waters of Land Creek, a tributary of Marsh Creek, from the 1st. day of March 1875, and thirty (30) inches of the waters of Rose Creek, a tributary of Marsh Creek, from 1st. day of March 1875, and 80 inches of the waters of Marsh Creek from the 1st. day of April 1876. Trans #89 - #111

21.

45 0284 William Stokes 134 inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of April 1875, and twenty (20) inches of the waters of Spring Creek (a tributary of Marsh creek, from the 31st. day of August 1874, and ninety five (95) inches of the waters of Rose Creek, a tributary of Marsh Creek, from the 1st. day of April 1876, and 2 inches of water from Springs, tributary of Marsh Creek, from the 1st. day of April 1875. Trans #639-738 #775 #1027 #129

22.

45 0285 William Stokes for the heirs of George Stokes, Fifteen inches of the waters of Howell Creek, a tributary of Marsh Creek, from the 1st. day of April 1878.

23.

45 0286 E. J. Stokes, Eighty (80) inches of the waters of Howell Creek tributary of Marsh Creek, from the 1st. day of September 1880.

24.

45 0287 Wm. Stokes, Potter claims, Seventy inches of the waters of Rose Creek, a tributary of Marsh Creek, from the 5th day of June 1875.

25.

45 0288 C. M. Gray one hundred and twenty five (125) inches of the waters of Land Creek a tributary of Marsh Creek, from the 3d. day of November 1875.

26

45 0289 B. Williams Forty inches of the waters of Land Creek, a tributary of Marsh Creek, from June 30th 1881.

SCANNED

DEC 13 2002

JUN 05 1996

Attachment D

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)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 45-00517D

NAME AND ADDRESS: HELEN ANDERSON
RICHARD S ANDERSON
BOX 114
1100 S 50 W
ALBION, ID 83311

SOURCE: SPRING CREEK TRIBUTARY: HOWELL CREEK

QUANTITY: 0.20 CFS

PRIORITY DATE: 08/31/1874

POINT OF DIVERSION: T12S R25E S16 SESESW Within Cassia County
S21 NESENW
SWSESW
NESESW

PURPOSE AND
PERIOD OF USE: PURPOSE OF USE PERIOD OF USE QUANTITY
Irrigation 04-01 TO 10-31 0.20 CFS

The use of water for irrigation under this right may begin as early as March 15 provided other elements of the right are not exceeded. The use of water before April 1 under this remark is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE: Irrigation Within Cassia County
T12S R25E S16 NWNW 1.7 SWNW 28.0
NWSW 33.0 SWSW 39.0
SESW 28.0 NWSE 8.3
SWSE 29.0 SESE 18.0
S21 NWNW 40.0 NENW 39.0
NWNW 41.0 SWNW 36.0
SESW 37.0
378.0 Acres Total

USE OF THE RIGHTS LISTED BELOW IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 378 ACRES IN A SINGLE IRRIGATION SEASON. COMBINED RIGHT NOS. 45-275, 45-284B, 45-285, 45-327D, 45-517D, 45-523A, AND 45-13589
THIS RIGHT IS LIMITED TO THE IRRIGATION OF 120 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

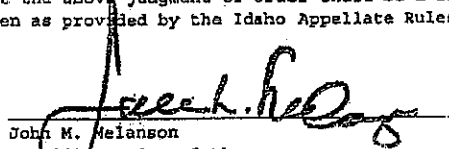
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6)

SRBA Partial Decree Pursuant to I.R.C.P. 54(b) (continued)

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.


John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

Attachment E

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

Certificate of Water Right
Transferred Right No. 775

THIS IS TO CERTIFY That RICHARD STORRY ANDERSON of Albion, Idaho,
is the owner of and using the following water rights in Howell and Spring
Creeks:

.50 cubic foot per second
with priority of March 1, 1881.

1.5 cubic foot per second
with priority of April 1, 1875. *Howell Cr.*

.20 cubic foot per second with *Spring Cr.*
priority of August 31, 1874.

said water being decreed to William Stokes, et al., by Judge O. C. Stockslager
of the Fourth Judicial District of the State of Idaho, in and for the County
of Cassia, in the case of

R. L. WOOD, et al.,
Plaintiff,

vs.

WILLIAM STOKES, et al.,
Defendants.

said decree bearing date of March 21, 1892.

738 That by said decree and by Certificates of Transfer Nos. 475 and
733, these waters were made appurtenant to the following described lands,
to-wit:

.50 cubic foot per second, March 1,
1881, appurtenant to NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$,
NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16,

.50 cubic foot per second, April 1,
1875, appurtenant to NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 21;

.50 cubic foot per second, April 1, 1875
and .20 cubic foot per second, August 31,
1874, appurtenant to E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 21.

.50 cubic foot per second, April 1, 1875,
appurtenant to W $\frac{1}{2}$ NW $\frac{1}{4}$ Section 21;

All in Township 12 South, Range 25 East,
E.M.

That said decree has been entered in the records of the Department
of Reclamation of the State of Idaho, in Volume 1 of Decrees, beginning at
Page 102 and said Transfer Certificates in Volume 2 of Transfers, on Pages
475 and 733, respectively.

That said Richard Storey Anderson of Albion, Idaho, has become the owner of said water rights through purchase.

And that now upon the application of Richard Storey Anderson of Albion, Idaho, for the transfer of two and twenty-hundredths (2.20) cubic feet per second of the waters of Howell Creek and Spring Creek, made before the State Reclamation Engineer of the State of Idaho, and said application having been granted, the right to the use of two and twenty hundredths (2.20) cubic feet per second of the waters of Howell Creek and Spring Creek upon the above described lands is hereby abandoned and the place of use of said water under such right hereby confirmed shall by this Certificate become appurtenant for irrigation and domestic purposes is described as follows, to-wit:

NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section
16; NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 21, Township
12 South, Range 25 East, B.M.

That said water is to be limited at any given time to an amount actually needed and beneficially used for such purposes, and shall not exceed the following amount, to-wit:

.50 cubic foot per second
with priority of March 1, 1881.

1.5 cubic feet per second
with priority of April 1, 1875.

.20 cubic foot per second with
priority of August 31, 1874.

That the right to the use of the water aforesaid, hereby confirmed, is restricted to the lands or place of use last above described, as provided by the laws of the State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho to be hereunto affixed at Boise, Idaho, this 4th day of August, 1931.

MARK R. KILP
State Reclamation Engineer

Attachment F

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

CERTIFICATE OF DECREED WATER RIGHT
TRANSFERRED RIGHT NO. 1029

THIS IS TO CERTIFY, That Richard Storey Anderson of Box 126, Albion, Idaho, is the owner of and using a certain water right of 1.7 cubic feet per second, bearing date of priority as follows: August 31, 1874 for 0.2 cubic feet per second of the waters of Spring Creek; April 1, 1875, for 1.5 cubic feet per second of the waters of Howell Creek, County of Cassia, State of Idaho, decreed to William Stokes by decree of Judge G. O. Stockslager of the 4th Judicial District of the State of Idaho, in and for the County of Cassia, in the case of

R. L. WOOD, et al

Plaintiffs

vs.

WILLIAM STOKES, et al

Defendants

said decree bearing date of March 21, 1892, and being appurtenant to the following described lands, to-wit:

NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$,
Section 16; NW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$,
Section 21, Township 12 South,
Range 25 E.B.M., (by Transfer
No. 775)

That said decree has been entered in the records of the Department of Reclamation of the State of Idaho in Volume 1 of Decrees at Page 607 thereof;

That said Richard Storey Anderson has become the owner of said water right by purchase;

And that now, upon the application of Richard Storey Anderson, for the transfer of 1.7 cubic feet per second of the waters of Howell and Spring Creeks, made before the State Reclamation Engineer of the State of Idaho, and said application having been granted, the right to the use of 1.7 cubic feet per second of the waters of Howell and Spring Creeks upon the above described land is hereby abandoned, and the land under such right and to which the water right HEREBY CONFIRMED, shall become appurtenant by this Certificate for irrigation purposes, is described as follows, to-wit:

SW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$,
Section 16;
NW $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 21, Town-
ship 12 South, Range 25 E.B.M.,

That the said water is to be limited at any given time to an amount actually needed and beneficially used for such purpose, and shall not exceed the following amount, to-wit:

0.2 cubic feet per second
of the waters of Spring Creek,
with priority of August 31, 1874;

1.5 cubic feet per second of the
waters of Howell Creek, with
priority of April 1, 1875;

That the water right hereby transferred has heretofore been conducted from said streams to the first above described lands through private ditch with points of diversion in the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 16; NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 21, Township 12 South, Range 25 E.B.M.,

That the water right hereby transferred will hereafter be conducted to the last above described lands through private ditch with points of diversion in the SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 16; NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, of Section 21, all in Township 12 South, Range 25 E. B. M.,

That the right to the use of the waters aforesaid, hereby confirmed, is restricted to the lands last above described, as provided by the laws of the State of Idaho.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the official seal of the Department of Reclamation of the State of Idaho to be hereunto affixed at Boise, Idaho, this 25th day of May, 1964,

(SEAL)

s/ CARL E. TAPPAN

CARL E. TAPPAN
State Reclamation Engineer

RECEIVED
MAY 26 1964
STATE RECLAMATION ENGINEER
BOISE, IDAHO

Attachment G

From Licensing Examination for Water
Right No. 45-7366

E. NARRATIVE/REMARKS/COMMENTS

The water for this farm comes from four different sources. The first source is a well (P/D for permit 45-07366) located in the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. The second source is groundwater collected by an underground perforated pipeline (P/D for permit 45-07538) which runs parallel to southern border of the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. The third source is a waste water right (adjudication claim A45-10502) that catches water from a drainage ditch that is diverted at the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. The final source of water comes from Howell Creek (adjudication claim A45-00327E) from two points of diversion. The first Howell Creek point of diversion is located in the NW 1/4 - SE 1/4 - SW 1/4 of section 16 - township 12S - range 25E and the second Howell Creek point of diversion is located in the SE 1/4 - SE 1/4 - NW 1/4 - of section 16 - township 12S - range 25E.

Drainage Ditch
aka Spring
Creek

RE perforated
pipe

The water from all of these sources are used in a common 8 inch mainline system the mainline begins at the main pond located in the SE 1/4 - NE 1/4 - SW 1/4 of section 16 - township 12S - range 25E. From the pond the mainline travels due north approximately 3/8 of a mile and then turns west 1/8 of a mile and then travels due north 3/8 of a mile where it ends. Approximately 3/16 of a mile from the end the mainline has a spur that travels west for 1/8 of a mile and then turns north 1/8 of a mile where it ends. There are four lines of handlines which have an average of 20 heads per line. The pressure for this mainline operates solely on the head differential from the top of the system to the lower portion. The system is not pressurized by any pump or other external means.

The water from the well (permit # 45-07366) is pumped out of the well by a 25 Hp pump and is discharged into a 4 inch pipeline that travels northeast approximately 200 feet where it intersects with the 8 inch mainline. The groundwater from the perforated pipe (permit # 45-07358) is collected in the pipe and then the perforated pipe travels through the pond and collects enough water from the pond to fill the mainline system. The waste water (adjudication claim A45-10502) enters the pond from a drainage ditch located to the south of the pond. The Howell Creek water (adjudication claim A45-00327E) is diverted from Howell Creek and travel northeast where it enters a small collection pond and then travels due east through the perforated pipe to the pond and through the mainline. The Howell Creek water can also be diverted through a second point of diversion after it crosses State Highway 77 and flows through an open ditch to flood irrigate the pastures or fields. The water in the pond is used to irrigate the 20 acre pasture in the southwest 1/4 of section 16.

FILMED

MAR 06 1998

EXHIBIT “B”

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

IN THE MATTER OF APPLICATION FOR TRANSFER	)	
	)	
OF WATER RIGHT NO. 45-00292 IN THE NAME	)	PROPOSED
	)	MEMORANDUM
OF KEVIN SMYER	)	DECISION AND
	)	ORDER
	)	

On March 15, 1990, the applicant, Kevin Smyer filed with the Idaho Department of Water Resources (Department) an application for transfer to establish a point of diversion for water right no. 45-00292. The application was filed in accordance with the provisions of Chapter 2, Title 42, Idaho Code.

The application was properly advertised, and was protested by Earl Warthen. The protest was heard on November 13, 1990, at the Albion City Hall. A hearing having been held, and evidence submitted to the Department, the hearing officer, as a representative of the Director, proposes the following findings, conclusions, and order:

FINDINGS OF FACT

1. Water right no. 45-00292 was decreed by the District Court of Idaho in the case of Wood v. Stokes. The court decreed 12 inches of water (.24 cfs) of Howell Creek, a tributary of Marsh Creek, to B.F. Mahoney, for the purpose of irrigating land located in the NE1/4 of an unidentified section, T12S, R25E, B.M. The Wood decree and related findings of fact and conclusions of

EXHIBIT "B"

law contained in the files of the Department of Water Resources do not identify the location of the place of use.

2. The decree also does not locate the point of diversion for water right no. 45-00292. The purpose of the application for transfer is to locate a point of diversion.

3. Earl Warthen protested the application for transfer, alleging that the right had been forfeited.

4. Historic watermaster annual reports and daily records do not record a water right delivered to B.F. Mahoney. Water was delivered to B. Mahoney and Bert Mahoney for irrigation of land located in Section 16, T12S, R25E, but there is no correlation between the amount of water delivered and the flow rate decreed to B. F. Mahoney.

5. The legal description of the place of use irrigated by B. Mahoney and Bert Mahoney is not consistent. Protestant's exhibit C lists both the NW1/4 and the NE1/4 of Section 16, although the record for 1917, the earliest of the watermaster reports, locates the place of use in the NW1/4 of Section 16.

6. A copy of the findings and conclusions of the Wood decree, submitted by the applicant as exhibit no. 4, contain a handwritten "16" inserted after the word "Section." No evidence was submitted as proof that the decreeing court had authorized the addition. Furthermore, no evidence was submitted to establish facts supporting the addition. The handwritten section "16" is given insignificant weight and will be used only for the purpose of corroborating other evidence.

7. The protestant stated that the last date of recorded delivery of the right was 1925. After reviewing the watermaster records, I cannot conclude that water right no. 45-00292 was delivered at anytime before or after 1925. What I can conclude is that there is no record of delivery of water irrigating the NE1/4 of Section 16, T12S, R25E, B.M. after 1932.

8. The current watermaster testified that it would be unusual for a right that was delivered and administered not to be recorded in the watermaster records.

9. The applicant testified that water has been delivered to a place of use located in NE1/4 of Section 16, T12S, R25E, by means of old natural channels of Howell Creek, and that water has not been diverted directly from Howell Creek. The applicant alleged that diversion from Howell Creek has been unnecessary during high run-off years, or when waste water is being discharged into the natural channels.

10. The channels labeled as "old Howell Creek channels" on Applicant's Exhibit no. 5 may have been prehistoric Howell Creek channels. They are presently intermittent channels that capture waste run-off water, with the exception of the Spring Creek channel, which contains some spring flows that are diverted by another water user.

11. The applicant has filed adjudication claim no. A45-00292 in the Snake River adjudication.

CONCLUSIONS OF LAW

1. Idaho Code § 42-222 states the criteria by which the Department must review an application for transfer:

The director of the department of water resources shall examine all of the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, and the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in Section 42-203A(5), Idaho Code; except the director shall not approve a change in the nature of use from agricultural where such change would significantly affect the agricultural base of the local area.

2. The burden of proof in a water right hearing is normally upon the applicant. The issue of forfeiture relates to the injury and enlargement questions. Forfeiture must be established by clear and convincing evidence. The burden of establishing forfeiture originally rests with the protestant.

3. The absence of delivery records or any evidence of delivery, and the non-existence of a diversion structure is sufficient clear and convincing evidence of non-use that the burden shifted to the applicants to show that water right no. 45-0292 had not been forfeited.

4. The applicant showed that water had been diverted out of intermittent channels rather than Howell Creek. No evidence was submitted to show that the water right has been diverted from Howell Creek in recent history, or that the NE1/4 of Section 16, T12S, R25E, has been irrigated from Howell Creek since 1932. In fact, the applicant admitted that water has not been diverted from Howell Creek.

5. At best, the predecessors of the applicant began diverting water from the natural channels rather than Howell Creek, completing an unrecorded transfer to the natural channels.

6. There was no evidence, however, that this unrecorded transfer was intentionally made. The records of the watermaster should have reflected the change.

7. I conclude that use of water from the natural channels (old Howell Creek channels) is only authorized by a beneficial use right that was perfected when the water was first diverted and beneficially used from the natural channels, and has no relationship to the water right attempted to be transferred by this application.

8. Idaho Code § 42-222 establishes when non-use will result in a forfeiture of the right:

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

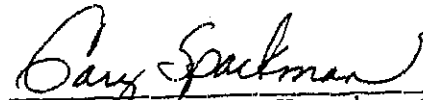
9. The right to divert water pursuant to right no. 45-00292 has been lost through years of nonuse.

ORDER

IT IS HEREBY ORDERED that the application to transfer water right no. 45-0292 by establishing a point of diversion in Howell Creek is DENIED.

IT IS FURTHER ORDERED that water right no. 45-00292 is FORFEITED.

Dated this 14th day of January, 1991.



GARY SPACKMAN, Hearing Officer
Department of Water Resources

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of January, 1991, I mailed a true and correct copy of the Memorandum Decision and Order, postage prepaid, to the following individuals:

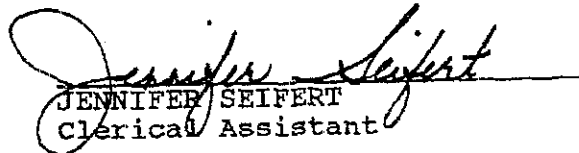
Kevin Smyer
P.O. Box 482
Albion, ID 83311

Don Danner
Watermaster
Albion, ID 83311

Rick Bollar
Box 335
Rupert, ID 83350

Earl Warthen
Box 145
Albion, ID 83311

Norman Smyer
Rt. 1, Box 2
Declo, ID 83323



JENNIFER SEIFERT
Clerical Assistant

EXHIBIT “C”

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE
STATE OF IDAHO

IN THE MATTER OF APPLICATION FOR	)	
	)	ORDER ADOPTING
TRANSFER OF WATER RIGHT NO.	)	PROPOSED MEMORANDUM
	)	DECISION AND ORDER
45-00292 IN THE NAME OF KEVIN SMYER	)	
	)	

A Proposed Memorandum Decision and Order in the above-captioned matter has been issued and a copy served on the parties;

WHEREAS, more than fifteen days have passed since the service of the Proposed Memorandum Decision and Order; and,

WHEREAS, no exception to that Proposed Memorandum Decision and Order has been received;

IT IS, THEREFORE, HEREBY ORDERED that said Proposed Memorandum Decision and Order be adopted and issued as the Final Decision and Order.

Dated this 1ST day of March, 1991.

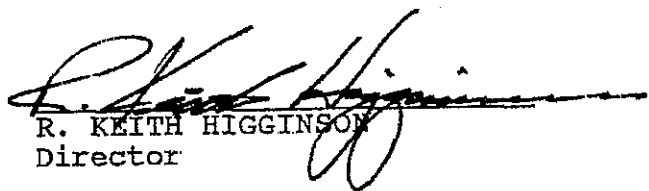

R. KEITH HIGGINSON
Director

EXHIBIT "C"

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of March, 1991, I mailed a true and correct copy of the Order Adopting Proposed Memorandum Decision and Order, postage prepaid, to the following individuals:

Kevin Smyer
P.O. Box 482
Albion, ID 83311

Earl Warthen
Box 145
Albion, ID 83311

Don Danner
Watermaster
Albion, ID 83311

Norman Smyer
Rt. 1, Box 2
Declo, ID 83323

Rick Bollar
Box 335
Rupert, ID 83350

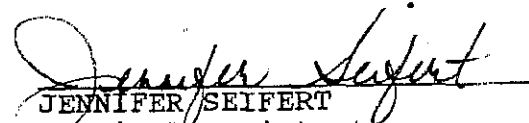

JENNIFER SEIFERT
Clerical Assistant

EXHIBIT “D”

I Loren Goodman nephew of
Kayte Bridger helped my aunt
Kayte Bridger with general Ranch
work through mid seventies thru
early eighties some of which included
irrigating using existing ditch as well
as new ditches I dug. one Channel
that carried water we utilized was
Spring Creek Channel that enters
South West Corner of property,
also the next draw to the east
would produce small quantities of water,
this is property now owned by
Kevin Smyer

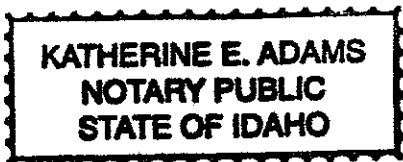


EXHIBIT "D"

STATE OF IDAHO
COUNTY OF CASSIA

On this 12 day of December 2005
before me a notary public in and for said State, Kevin
appeared, _____

_____ known to me to be
(person/persons) whose (name/names) (is/are) subscribed
the within instrument and acknowledged to me that (he
they) executed the same.

Katherine E. Adams
Notary Public

Residing at Albion, Idaho

My commission expires 10-1-10