

**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING  
SUBCASE NO. 21-4140**

In Re SRBA  
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources  
David R. Tuthill, Director  
Donald V. Shaff, Adjudication Bureau Chief

January 30, 2008

## **I. INTRODUCTION**

In accordance with Idaho Code § 42-1412(4) and Administrative Order 1, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) submits this Supplemental Director’s Report regarding subcase number 21-4140. This report is submitted in response to Special Master Bilyeu’s *Trial Scheduling Order*, dated July 31, 2007. The Supplemental Director’s Report (“Report”) sets forth the basis of the Department’s recommendation for the above-listed water right and was prepared under the supervision of David R. Tuthill, Jr., Director, and Donald V. Shaff, Adjudication Bureau Chief for IDWR.

The following IDWR employees have knowledge of the information contained in the Report: Ernest Carlsen, Senior Water Resource Agent, Eastern Region Office in Idaho Falls.

## **II. SUMMARY OF THE ISSUES**

The issue in this case is whether a water right claim filed with the Department pursuant to Idaho Code § 42-243 (also known as a “statutory claim”) can be considered as evidence of priority in the Snake River Basin Adjudication (“SRBA”).

## **III. BACKGROUND**

Wm. Gordon McCrea & Algenia S. McCrea (the “McCreas”) filed a statutory claim with IDWR on June 30, 1983. A copy of the statutory claim is attached hereto as Exhibit A. In the statutory claim, the McCreas claimed a priority date of October 1, 1935. The McCreas filed an amended statutory claim with IDWR in February or March of 1985.<sup>1</sup> The amended statutory claim added stock water to the claimed water uses. The claimed priority date was still October 1, 1935. A copy of the amended statutory claim is attached hereto as Exhibit B.

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<sup>1</sup> The amended claim was not date stamped by IDWR. The claim was notarized on February 21, 1985 and published on March 14, 1985. The claim must have been submitted to IDWR between those dates.

The McCreas filed their Notice of Claim to a Water Right Acquired Under State Law in the SRBA (“SRBA claim”) for water right no. 21-4140 with IDWR on March 20, 1989. The claimed priority date on the SRBA claim is the same as the claimed priority date on the statutory claims: October 1, 1935. A copy of the SRBA claim is attached hereto as Exhibit C.

On May 21, 1990, IDWR received a change of ownership form, changing ownership for water right no. 21-4140 from Wm. Gordon McCrea and Algenia McCrea to F. Mitchell Jacobs or Valynn H. Jacobs.

On August 7, 2003, IDWR received a change of ownership form, changing the ownership for water right no. 21-4140 from F. Mitchell Jacobs and Valynn H. Jacobs to Eagle Ridge Ranch, LLC. Eagle Ridge Ranch, LLC is the current owner.

IDWR issued its recommendation for water right no. 21-4140 on January 17, 2006. The Department recommended that the water right be disallowed for failure to submit proof of priority.

On March 22, 2006, IDWR received an objection to the recommendation for water right no. 21-4140. The objection was filed by Eagle Ridge Ranch, LLC. The objection stated that the water right should be recommended as claimed. A copy of the objection is attached hereto as Exhibit D.

At the initial hearing for this subcase, counsel for Eagle Ridge Ranch, LLC provided IDWR with an affidavit from Robert E. Wilkins. A copy of the Affidavit of Robert E. Wilkins is attached hereto as Exhibit E. In the affidavit, Mr. Wilkins states that he is sixty-eight (68) years of age, having been born on August 5, 1937. (Wilkins Aff. at ¶ 3). Mr. Wilkins spent summers in Island Park at property owned by his family. Mr. Wilkins states, “Affiant first began coming

to Island Park with his family before he was old enough to remember, and has visited, worked on and enjoyed the ranch land on numerous occasions ever since.” *Id.* Mr. Wilkins further states:

Specifically, affiant is familiar with the existence of an artificial lake or reservoir located on a tributary to Sheep Creek, known as Blue Lake, in the NWSW, Section 14, T13N., R42E., in Fremont County, Idaho. The dam or dike and reservoir or lake were in existence before the time of affiant’s earliest recollections, (such recollections begin with the time affiant was between the ages of five and ten years).

Wilkins Aff. at ¶ 4.

#### **IV. CURRENT STATUS**

The affidavit of Robert E. Wilkins constitutes acceptable proof of priority such that IDWR can now recommend the water right in the SRBA. However, IDWR cannot recommend the 1935 priority date claimed because the recollection of Mr. Wilkins starts when he was five. Mr. Wilkins was born on August 5, 1937. Five years from August 5, 1937 is August 5, 1942. Thus, the Department is willing to recommend an August 5, 1942 priority date for this water right. It is IDWR’s understanding that a 1942 priority date is not acceptable to the current owner, Eagle Ridge Ranch, LLC. Eagle Ridge Ranch, LLC claims that the Department should consider the statutory claims filed by the McCreas as evidence of priority back to 1935. In response, IDWR points to Idaho Code § 42-246 as limiting IDWR’s ability to consider such affidavits of proof of priority.

#### **V. DISCUSSION**

The sole issue before this court is whether a statutory claim filed by a water user may be used as proof of priority in the SRBA. Idaho Code provides:

42-246. FILING OF CLAIM NOT DEEMED ADJUDICATION OF RIGHT -- EVIDENCE. The filing of a claim does not constitute an adjudication of any claim to the right to use of waters as between the water use claimant and the state, or as between one (1) or more water use claimants and another or others. A statement of claim filed pursuant to section 42-243, Idaho Code, shall be

admissible in a general adjudication of water rights as evidence of the times of use and the quantity of water the claimant was withdrawing or diverting as of the year of the filing, if, but only if, the quantities of water in use and the time of use when a controversy is mooted are substantially in accord with the times of use and quantity of water claimed in the claim. A claim shall not otherwise be evidence of the priority of the claimed water right.

IDWR interprets this statute to mean that IDWR generally cannot consider a statutory claim filed pursuant to Idaho Code § 42-243 as evidence of priority. The one exception that the Department recognizes is when the person who first put the water to beneficial use is also the person who filed the statutory claim. In such a situation, the Department will accept the statutory claim as evidence of priority. This is because the person who filed the statutory claim has personal knowledge of the water use. However, where the person who developed the water right is not the one who filed the statutory claim, the Department will require additional evidence of priority. Firsthand knowledge of when the water use began is the key. The Department will not rely upon a statutory claim where the person who signed the claim does not have first hand knowledge of when the water use began. The Department recently relayed this position to counsel for Eagle Ridge Ranch, LLC. The Department has not yet received information from Eagle Ridge Ranch, LLC showing that the McCreas were the ones that developed this water right.

## **VI. CONCLUSION**

The Department recommends that this water right be recommended in the SRBA as claimed except with an August 5, 1942 priority date.

Submitted this 30<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
Donald V. Shaff  
Adjudication Bureau Chief

## 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 electronic mail and United States mail with the correct postage affixed thereto on this 30 day of January 2008.

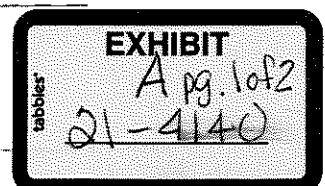
Document Served: SUPPLEMENTAL DIRECTOR'S REPORT REGARDING  
SUBCASE NO. 21-4140

Persons Served: Rob Harris  
P.O. Box 50130  
Idaho Falls, Idaho 83405  
rharris@holdenlegal.com

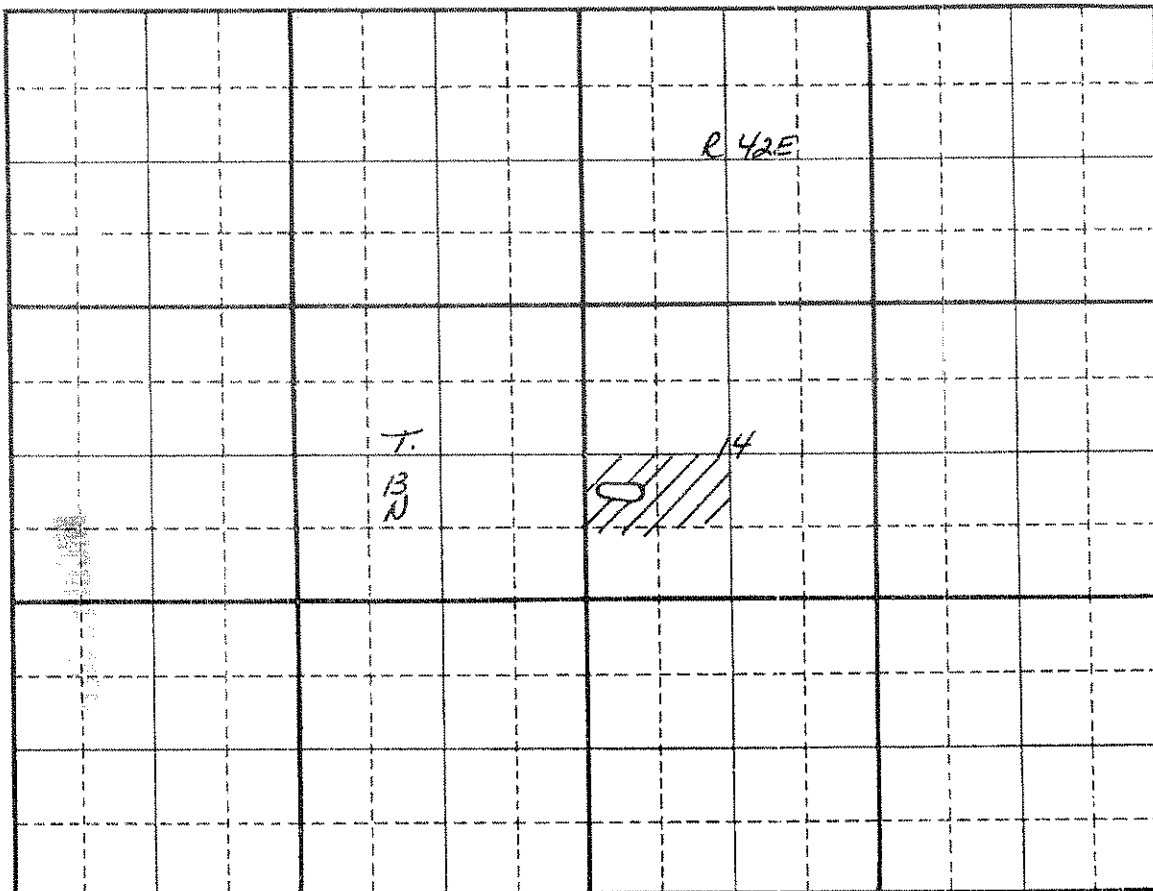
  
Idaho Department of Water Resources

# Exhibit A

Under the provisions of Section 42-243, Idaho Code, any person using or claiming rights to the public waters of Idaho established by diversion and application to a beneficial use must file a claim with the Department of Water Resources on or before June 30, 1983. Exempted from this filing are single family domestic uses as defined in Section 42-230(d), Idaho Code. Also exempted are rights represented by a permit, license, decree, adjudicated right, or a previously filed claim.



(8) Remarks \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



Scale: 2 inches equal 1 mile.

Map should show the location of the point of diversion and the place of use of the water by 40-acre subdivisions, section, township and range of the public land survey system.

State of Idaho )  
County of Bingham ) ss.

Be it known that the undersigned, being duly sworn, deposes and says that he, she, they subscribed the foregoing claim to a water right, together with all attached information, and that the matters and facts therein are true to the best of the affiant's knowledge.

[Signature]  
(Claimant)

Sworn to before me this 30<sup>th</sup> day of June, 1983.

[Signature]  
Notary Public:  
Residing at Firth, Idaho

My commission expires 2/14/86

FOR DEPARTMENT USE ONLY

|                                            |                     |                     |              |      |
|--------------------------------------------|---------------------|---------------------|--------------|------|
| Received by <u>[Signature]</u>             | Date <u>6-30-83</u> | Exception filed by: | Forwarded to | Date |
| Prelim. check by <u>[Signature]</u>        | Date <u>9-05-83</u> |                     | claimant by: |      |
| \$30.00 fee received by <u>[Signature]</u> | Date <u>6-30-83</u> |                     |              |      |
| Published in <u>[Signature]</u>            | <u>7-5-83</u>       |                     |              |      |
| Dates <u>6-30-83</u>                       |                     |                     |              |      |

# Exhibit B

Under the provisions of Section 42-243, Idaho Code, any person using or claiming rights to the public waters of Idaho established by diversion and application to a beneficial use must file a claim with the Department of Water Resources on or before June 30, 1983. Exempted from this filing are single family domestic uses as defined in Section 42-230(d), Idaho Code. Also exempted are rights represented by a permit, license, decree, adjudicated right, or a previously filed claim.

Notice is hereby given that Wm. Gordon McCrea & Algernia S. McCrea

(Name of Claimant)

P.O. Box 17, Island Park, ID 83429

(Mailing Address)

(Zip Code)

Telephone No. 558-7420

claims a right to the diversion and beneficial use of the surface or ground water. The extent and nature of said claim is as follows:

- (1) Date of priority: (When was the water first applied to a beneficial use) October 1, 1935

A claim is not acceptable on a ground water source with a priority later than March 25, 1963 or on a surface water source with a priority later than May 20, 1971. An exception is that a claim may be filed on single family domestic use from a ground water source.

- (2) Describe the source of water: (Name of stream, lake, spring, etc., or ground water)

Describe the source of water (Name of stream, lake, spring, etc.) or ground water.  
Blue Lake tributary to Sheep Creek/Henrys Fork

- (3) Describe the purpose for which the water has been used and the time during the year when you have used the right claimed:

|           |              |                                     |                           | (Both dates inclusive) |                            |
|-----------|--------------|-------------------------------------|---------------------------|------------------------|----------------------------|
| (cfs, af) |              | (Domestic, Irrigation, Stock, Etc.) |                           | (Mo., Day)             | (Mo., Day)                 |
| Quantity  | <u>75 af</u> | Use                                 | <u>Fish Propagation</u>   | Period of Use From     | <u>1-1</u> To <u>12-31</u> |
| Quantity  | <u>75 af</u> | Use                                 | <u>Recreation</u>         | Period of Use From     | <u>6-15</u> To <u>10-1</u> |
| Quantity  | <u>11 af</u> | Use                                 | <u>Stockwater Storage</u> | Period of Use From     | <u>1-1</u> To <u>12-31</u> |
| Quantity  | <u>11 af</u> | Use                                 | <u>Stock water</u>        | Period of Use From     | <u>1-1</u> To <u>12-31</u> |
| Quantity  |              | Use                                 |                           | Period of Use From     |                            |

- (4) 75 af TOTAL QUANTITY USED.  
(cls. af)

- (5) A) Point of diversion: (Location of point where water is diverted from its source)

NW ¼ SW ¼, Sec. 14 Twp. 13N Rge. 42E S.M., County of Fremont

Additional points of diversion:

B) Describe means of diversion of water: (Pump and pipeline, well, diversion dam, reservoir, length of ditch and field, etc.). Give sizes and capacities: be as specific as possible. Describe any changes in the system and give the date of the change. Dam approximately 12 feet high, 200 feet long

- (6) A) Describe location of use by listing number of irrigated acres within each 40-acre tract in appropriate box. If use is not for irrigation, place an "X" in appropriate box to show location.

[illegible]

No. of acres

B) If water is used for other than irrigation, fully describe that use, being as specific as possible:

B) If water is used for other than irrigation, fully describe that use, being as specific as possible.  
Stockwatering 500-800 head of cattle, recreation on private licensed fish pond. Cattle use pond for water.

NOTE: Include here the type and number of stock watered: 500-800 range cattle

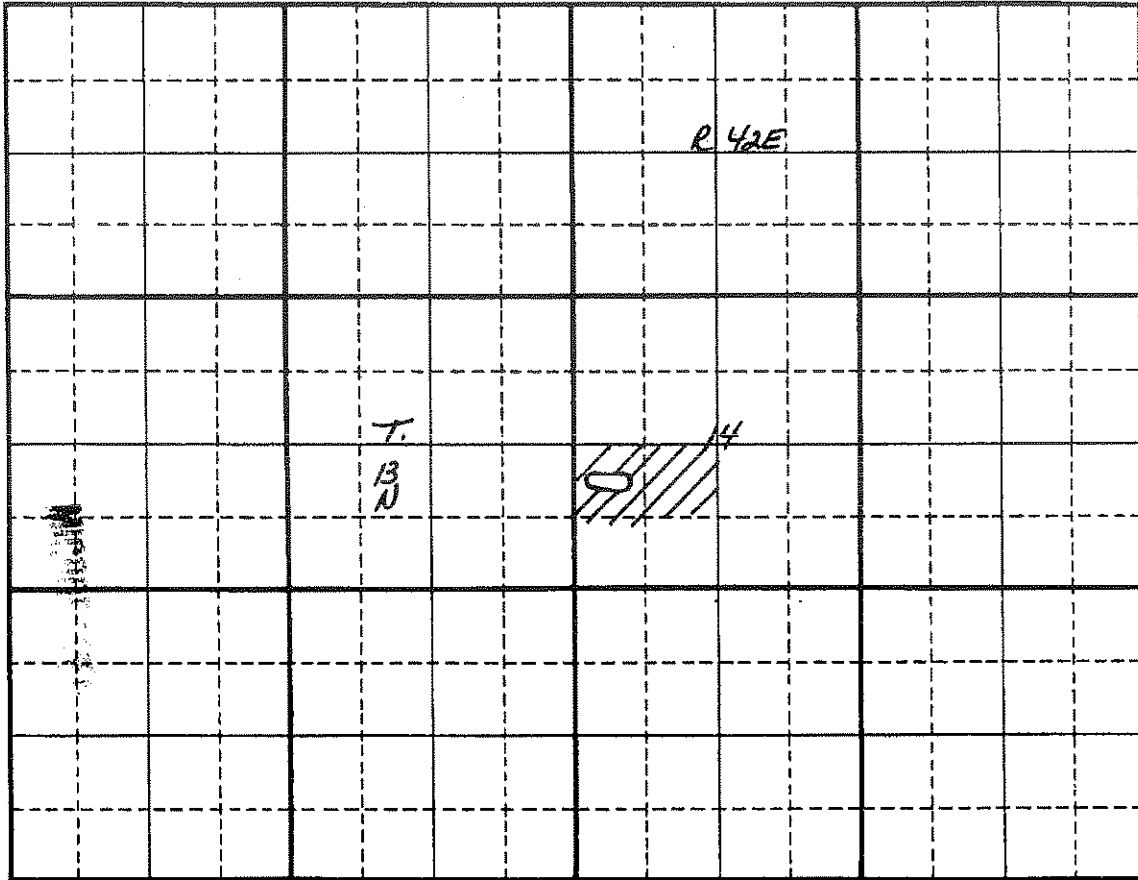
- (7) If you are claiming water as a member of an organization, list name of organization:

# MICROFILME

## EXHIBIT

Bpg. 1 of 2  
21-4140

(8) Remarks \_\_\_\_\_



Scale: 2 inches equal 1 mile.

Map should show the location of the point of diversion and the place of use of the water by 40-acre subdivisions, section, township and range of the public land survey system.

State of Idaho )  
County of Bingham ) ss.

Be it known that the undersigned, being duly sworn, deposes and says that he, she, they subscribed the foregoing claim to a water right, together with all attached information, and that the matters and facts therein are true to the best of the affiant's knowledge.

[Signature]  
(Claimant)

Sworn to before me this 30<sup>th</sup> day of June, 1983.

[Signature]  
Notary Public  
Residing at Firth, Idaho

My commission expires 2/14/86

FOR DEPARTMENT USE ONLY

|                                   |                     |                     |              |      |
|-----------------------------------|---------------------|---------------------|--------------|------|
| Received by <u>CU</u>             | Date <u>6-30-83</u> | Exception filed by: | Forwarded to | Date |
| Prelim. check by <u>RCW</u>       | Date <u>9-28-83</u> |                     | claimant by: |      |
| \$30.00 fee received by <u>CU</u> | Date <u>6-30-83</u> |                     |              |      |
| Published in <u>Idaho Star</u>    | <u>4-5-81</u>       |                     |              |      |
| Dates <u>10/13/10/20/82</u>       |                     |                     |              |      |

# Exhibit C

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: A21-04140  
Date Received: 3/20/1989  
Receipt No: 0005920  
Received By: RLD

NOTICE OF CLAIM TO A WATER RIGHT  
ACQUIRED UNDER STATE LAW

1. Name: WILLIAM GORDON MC CREA 208-558-7420  
Address: P.O. BOX 217  
ISLAND PARK, ID 83429

AND/OR

Name: ALGENIA S. MC CREA ESTATE  
Address: P.O. BOX 217  
ISLAND PARK, ID 83429

2. Date of Priority: OCT 01, 1935

3. Source: BLUE LAKE Trib. to: SHEEP CREEK

4. Point of Diversion:

| Township | Range | Section | 1/4 of | 1/4 of | 1/4 of | Lot | County  |
|----------|-------|---------|--------|--------|--------|-----|---------|
| 13N      | 42E   | 14      | NW     | SW     |        |     | FREMONT |

5. Description of diverting works:  
12 X 200 FT DAM

6. Water is used for the following purposes:

| Purpose            | From  | To    | C.F.S | (or) | A.F.A. |
|--------------------|-------|-------|-------|------|--------|
| STOCKWATER         | 01/01 | 12/31 |       |      | 11.00  |
| STOCKWATER STORAGE | 01/01 | 12/31 |       |      | 11.00  |
| FISH PROPAGATION   | 01/01 | 12/31 |       |      | 75.00  |

7. Total Quantity Appropriated is:  
C.F.S. (and/or) 75.00 A.F.A.

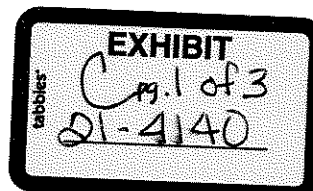
8. Total consumptive use is Acre Feet Per Annum.

9. Non-irrigation uses:  
S/800 RANGE, FISH PROPAGATION

A21-04140

Page 1

Date: 03/20/89



MICROFILMED  
OCT 20 1992

10. Place of Use:

| Township | Range | Section | 1/4 of 1/4 | Lot | Use   | Acres |
|----------|-------|---------|------------|-----|-------|-------|
| 13N      | 42E   | 14      | NE         | SW  | STOCK |       |
|          |       |         | NW         | SW  | STOCK |       |
|          |       |         | NW         | SW  | FISH  |       |

11. Place of use in counties: FREMONT

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

13. Other Water Rights Used:  
NONE

14. Remarks:

15. Basis of Claim: STATUTORY CLAIM

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): *Jim Gordon McRea* Date: 3/20/89  
\_\_\_\_\_  
Date: \_\_\_\_\_

State of Idaho )  
County of Ada ) SS.

Subscribed and sworn (or affirmed) before me this 20<sup>th</sup> day  
of March 19 89

*Helen Harrington*  
Notary Public

Seal

Helen Harrington, Notary Public  
Residing at Boise, Idaho  
Residing at My Commission Expires December 1, 1994  
My Commission Expires \_\_\_\_\_

# Exhibit D

RECEIVED

MAR 22 2006

DEPARTMENT OF  
WATER RESOURCES

COPY

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

A Subcase 21-4140

Case No 35976

STANDARD FORM 1  
OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Eagle Ridge Ranch, LLC

Address: 2880 N. 55 W.

Idaho Falls, ID 83402

Daytime Phone: 208-

Name & Address of Attorney, if any:

Kent W. Foster

Holden, Kidwell, Hahn & Crapo, PLLC

PO Box 50130

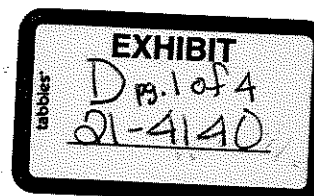
Idaho Falls, ID 83405-0130

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: Eagle Ridge Ranch, LLC

Address: 2880 N. 55 W.

Idaho Falls, ID 83402



D. I object to the following elements as recommended in the Director's Report (Please check the appropriate box(es)).

1. ☒ **Name and Address**  
Should be: Eagle Ridge Ranch, LLC
2. ☒ **Source**  
Should be: Blue Lake, Tributary to Sheep Creek
3. ☒ **Quantity**  
Should be: 75.00 Acre Feet
4. ☒ **Priority Date**  
Should be: October 1, 1935
5. ☒ **Points of Diversion**  
Should be: NWSW, Section 15, T13N., R42E.
6. ☐ **Instream Flow Description**  
Should be: \_\_\_\_\_
7. ☒ **Purpose(s) of Use**  
Should be: Stockwater Storage, Stockwater, Fish Propagation
8. ☒ **Period of Year**  
Should be: Stockwater Storage - 01/01 to 12/31, Stockwater - 01/01 to 12/31, Fish Propagation - 01/01 to 12/31
9. ☒ **Place of Use**  
Should be: Stockwater - T13N., R42E., Sec. 14, NESW, NWSW; Fish Propagation - T13N., R42E., Sec. 14, NWSW
10. **I object because:**  
☐ This water right should not exist.  
☒ This water right was not recommended, but should be recommended with the elements described above.

E. **REASONS SUPPORTING OBJECTION(S):** The evidence indicates this dam, reservoir, storage and the uses have continued since the claimed priority date through the present time. Applicant does not understand why the Department concluded no beneficial use had been found.

VERIFICATION

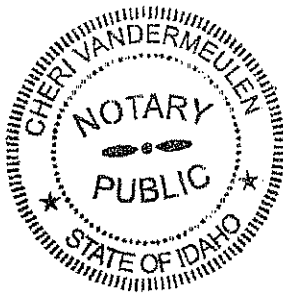
State of Idaho                    )  
                                          )ss  
County of Bonneville         )

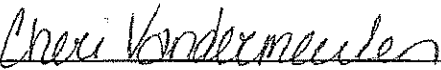
Kent W Foster, duly sworn, upon oath, deposes and says:

That I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

  
\_\_\_\_\_  
Kent W. Foster

Subscribed and sworn to before me on this 20<sup>th</sup> day of March, 2006.



  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Idaho Falls, ID  
My Commission Expires: July 7, 2009

## CERTIFICATE OF MAILING

I hereby certify that on the 20<sup>th</sup> day of March, 2006, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

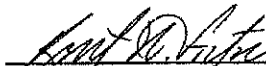
Clerk of the District Court  
Snake River Basin Adjudication  
253 Third Avenue North  
P.O. Box 2707  
Twin Falls, ID 83303-2707

2. Copies to:

IDWR Document Depository  
P.O. Box 83720  
Boise, ID 83720-0098

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

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

  
\_\_\_\_\_  
Kent W. Foster

G:\WPDATA\KWF\11129 Eagle Ridge ranch LLC\Objection 4140 wpd

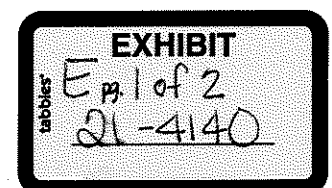
# Exhibit E

## AFFIDAVIT OF ROBERT E. WILKINS

STATE OF IDAHO                 )  
                                              )ss  
County of Bonneville         )

Robert E. Wilkins being first duly sworn, on his oath, deposes and says:

1. Affiant is over the age of 18 years, has personal knowledge of the facts set forth herein, and states the following from his own personal knowledge:
2. Affiant resides at 755 Marin Dr., Mill Valley, CA 94941, and his home telephone number is (415) 383-4772.
3. Affiant is of the age of sixty-eight (68) years, having been born August 5, 1937. Affiant's family has owned land in Island Park, Idaho, for several generations. Affiant is a great grandson of A. S. Trude, who first came to Island Park in about 1888 and began to acquire property there in 1891. Affiant and affiant's family, including affiant's father, grand father and great grandfather have spent a great deal of time at and near the family property in Island Park, Idaho, primarily during the summers, since affiant's great grandfather, A.S. Trude, began acquiring property there. Affiant first began coming to Island Park with his family, before he was old enough to remember, and has visited, worked on and enjoyed the ranch land on numerous occasions ever since.
4. Specifically, affiant is familiar with the existence of an artificial lake or reservoir located on a tributary to Sheep Creek, known as Blue Lake, in the NWSW, Section 14, T13N., R42E., in Fremont County, Idaho. The dam or dike and reservoir or lake were in existence before the time of affiant's earliest recollections, (such recollections begin with the time affiant was between the ages of five and ten years). When affiant first became aware of the dam and lake, they had the appearance of having been there a long time. Cattle which were raised and pastured on the adjoining property always drank from and were watered at the lake as well.
5. The most recent family members to have owned the land on which the dam and lake are located were Gordon and Algenia McCrea. Both are now deceased. The property was purchased by F. Mitchell Jacobs in about 1984, and was subsequently purchased by Mr. Frank Vandersloot about 2003.



DATED this 7th day of June, 2006.

Robert E. Wilkins  
Robert E. Wilkins

STATE OF IDAHO            )  
                                      )ss.  
County of Bonneville        )

On this 7<sup>th</sup> day of June, 2006, before me a notary public in and for said State, personally appeared Robert E. Wilkins, known or identified to me (or proved to me on the oath of Robert E. Wilkins) to be the person whose name is subscribed to the within instrument, and acknowledged to me that he 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.



Kent W. Foster  
Notary Public for Idaho  
Residing at Idaho Falls, Idaho  
My commission expires: 11/20/2010