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DEPARTMENT OF
WATER RESOURCES

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DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho

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**SUPPLEMENTAL DIRECTOR'S REPORT REGARDING
SUBCASE NOS. 45-2810A and 45-10491**

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

April 25, 2008

I. INTRODUCTION

The Director of the Idaho Department of Water Resources (“IDWR” or “the Department”) submits this Supplemental Director’s Report regarding subcase numbers 45-2810A and 45-10491 in accordance with Idaho Code § 42-1412(4), Administrative Order 1 and to the *Order Setting Deadline and Status Conference* of Special Master Dolan dated October 30, 2007. This report was prepared under the supervision of David R. Tuthill, Jr., Director, and Donald V. Shaff, Adjudication Bureau Chief for IDWR.

The following IDWR employee has knowledge of the information contained in this report: Technical Engineer 1 Douglas Jones. Following the filing of the BLM’s objection to IDWR’s recommendation of claim numbers 45-2810 and 45-2810A, primary responsibility for them was initially assigned to Senior Water Resource Agent Roxanne Brown and then to Senior Water Resource Agent Vikie Hancock, both of whom have left the employment of IDWR. Agent Vikie Hancock also was assigned to the investigation and recommendation of claim number 45-10491.

II. BACKGROUND

45-2810 and 45-2810A: Water right 45-2810 is the parent right of water right 45-2810A. Right 45-2810 was licensed right for livestock watering from Worthington Spring, with an August 16, 1963 priority date and a quantity of .01 cfs. The kind of works noted on the permit was spring development and pipeline. The development involved 1 ¼” plastic pipe and 6 troughs. The permit was applied for by the United States Department of the Interior, Bureau of Land Management (“BLM”) and the subsequent license was issued to the BLM. The licensed point of diversion was the

NENW Section 33, Township 16 S, Range 22E. The licensed place of use was also the NENW Section 33, Township 16, Range 22E.

BLM filed a claim to licensed right 45-2810 in the SRBA, but the claim included numerous places of use that didn't appear on the license. BLM amended its claim several times following its initial filing.

In early March of 1998, the Director's Report, Domestic & Stock, Reporting Area 10 (IDWR Basin 45) was filed with the court. In that report, claim 45-2810 was disallowed as an incomplete claim. The disallowal also listed three separate claimants on the right: USDI Bureau of Land Management, Bruce Bedke and State of Idaho Department of Lands ("State of Idaho").

From that point forward the procedural history of these claims is lengthy and complex. Since Special Master Dolan has already summarized that history in his *Order Denying United States' Motion for Summary Judgment and Setting Scheduling Conference*, entered May 24, 2006, that history will not be repeated here, other than to summarize that (1) pursuant to a change of ownership claim 45-2810 was split into 45-2810A, held by the BLM, and 45-2810B, held by the State of Idaho, and Mr. Bruce Bedke's name was removed from it; (2) claims 45-2810A and 45-2810B were disallowed as incomplete; (3) the BLM objected to the disallowance of claim 45-2810A; (4) Messrs. Bruce and Jared Bedke filed a late objection to 45-2810A that ultimately was determined to constitute a response to the BLM objection to 45-2810A; (5) the State of Idaho objected to the disallowance of claim 45-2810B; (6) the objection to 45-2810B was

resolved through the filing of a Standard Form 5 / Amended Claim; and (7) water right 45-2810B subsequently was partially decreed.¹

45-10491: Beneficial use right 45-10491 was claimed in the SRBA by Bruce Bedke for a stockwater use on Worthington Spring. Mr. Bedke claimed .230 cfs for use on the SESW of Section 24, Township 16S, Range 21E; the SWNE, NWNW and SWSW of Section 19, Township 16S, Range 22E; the NWSW of Section 20, Township 16S, Range 22E and the NWNE of Section 29, Township 16S Range 22E. The point of diversion claimed was the NENENW of Section 33, Township 16S, Range 22E. The claimed priority date was April 1, 1872.

On July 7, 2004, Sr. Water Resource Agent Vikie Hancock visited the site of the source for this yet unreported right, a visit arranged in part to assist in the resolution of the objections to water rights 45-2810A and B. The agent's Memo to File describing the site visit is included as Attachment 1. Based on the information gathered during her site visit, the agent prepared the recommendation for right 45-10491, and the right was reported on September 7, 2004, in the Director's Report for Irrigation and Other Uses, Reporting Area 10, IDWR Basin 45. The right was recommended with a point of diversion described as the NWNENW of Section 33, Township 16S, Range 22E. The place of use was recommended as claimed by Mr. Bedke. The recommended quantity was reduced to .010 cfs. The right was recommended with an August 16, 1963 priority date.

Four objections were filed to the recommendation of right 45-10491. The State of Idaho objected stating the water right shouldn't exist. The State noted it owned the lands

¹ Parent right 45-2810 was decreed disallowed on May 24, 2006. Split right 45-2810B also was decreed on May 24, 2006.

described as the point of diversion. It further noted it had granted the BLM an easement for the development of Worthington Spring, the recommended source of the right. Water right 45-2810B describes the State's use of waters of Worthington Spring. The BLM objected to the recommended priority date, point of diversion and place of use of right 45-10491, stating, "There is no evidence that the claimant, or his predecessors, satisfied the test for a valid appropriation of water, where point(s) of diversion and/or place(s) of use are designated on federal public land." They further stated, "The claimant also does not have a valid claim as this water use has been licensed to BLM." Bruce Bedke and Jared Bedke each objected to the recommended priority date, both asserting that the priority date should be January 1, 1872, as that was when the water was first put to beneficial use by the claimant's predecessors in interest.

III. ELEMENTS OF WATER RIGHT NO. 45-2810A

IDWR understands that the basis of the BLM's objection to IDWR's recommendation of this right is to its disallowance and the basis of the Bedkes' response to the objection is that the right should not exist, an issue for the court to determine at trial. IDWR did not initially disallow the claim for 45-2810 on the basis that the right should not exist, but because initially it did not have the information it needed to properly investigate and recommend an accomplished change in the place of use. It subsequently recommended disallowance, when it split the claim into 45-2810A and 45-2810B and removed Bruce Bedke's name from it, purely for procedural reasons that are addressed below. Therefore in the present report it recommends for the first time the elements of that right as it has determined them to be. See Attachment 2.

IDWR does not believe there is disagreement by either party as to what the elements of 45-2810A should be, if the court determines that the right should exist. However, because IDWR has not previously recommended the elements it will discuss them each in turn.

A. BASIS OF THE RIGHT

Water right number 45-2810A is recommended as a licensed water right. The type of license is referred to as a “D” permit, a particular type of license for small stockwater use on the public domain, provided for by Idaho Code §42-501. A copy of this license is attached as Attachment 3. Idaho Code §42-501 expressly provides that the BLM is the only entity that can apply for and receive “D” permitted rights.

It appears the “D” permit was obtained contemporaneously with the BLM entering into a Cooperative Agreement for range improvements in August 1963, with the individuals whom IDWR presumes to have been the grazing allottees on the BLM grazing allotment where Worthington Spring is located. The improvements detailed in the Cooperative Agreement were for the collection of water from Worthington Spring and its delivery through plastic pipe to various watering troughs. A second Cooperative Agreement was entered into in 1971, which appears to have extended or otherwise modified the delivery system. IDWR believes the individuals who signed the 1963 Cooperative Agreement were the predecessor allottees to respondents Bruce and Jared Bedke. Bruce Bedke was one of the individuals who signed the 1971 Cooperative Agreement. The two agreements are attached as Attachments 4 and 5, respectively.

B. NAME

Pursuant to the split previously done of right no. 45-2810, IDWR recommends right no. 45-2810A to the United States of America acting through USDI Bureau of Land Management. If the court should determine the right to be valid, IDWR knows of no disagreement that this is the correct name.

C. SOURCE

IDWR recommends the source of this right to be Worthington Spring, tributary to sinks. IDWR's policy is to recommend the name used by the United States Geologic Survey in its official materials. Here the name "Worthington Spring" is shown on the USGS Blue Hill Quadrangle Map. IDWR understands that residents of the area use the name "Worthington Spring" to refer to a different source, a tributary of Blue Hill Creek that is unnamed on the USGS Blue Hill Quadrangle Map. This has caused confusion which IDWR believes has now been resolved. The Worthington Spring listed as the source of 45-2810A is located near Granite Creek, tributary to Birch Creek, in the NWNENW of Section 33, Township 16S, Range 22E. Other rights recommended from this source are 45-2810A, 45-10491, and 45-11050. The Bedkes also have an in-stream stockwater right in the reach of Granite Creek adjacent to this source partially decreed as 45-13677. The unnamed stream on the USGS Blue Hill Quadrangle Map that is the source referred to locally as "Worthington Spring" is the source of the Bedkes' in-stream stockwater right no. 45-13678.

D. QUANTITY

IDWR recommends the quantity of this right as being 0.01 cfs. This is the quantity applied for by the BLM and licensed pursuant to the "D" permit. Because of the change of ownership splitting water right number 45-2810 into A and B portions, the

quantity element contains a combined use limit of 0.01 cfs when the B portion is used in combination with the A portion².

E. PRIORITY DATE

IDWR recommends a priority date of August 16, 1963, for this right. This is the date of the BLM's application for the "D" permit.

F. POINT OF DIVERSION

As discussed above, IDWR understands that the water used pursuant to this right is diverted from Worthington Spring. It therefore recommends the point of diversion for this right as being in the NWNENW of Section 33, Township 16S, Range 22E B.M. This is the legal description of the ten acre parcel where Worthington Spring is located.

G. PURPOSE AND PERIOD OF USE

IDWR recommends the purpose of use for this right as being for livestock watering, as provided for in the "D" permit.³ The period of use recommended for this right is year around.

H. PLACE OF USE

The place of use IDWR recommends for this right is the legal descriptions of the quarter quarter sections or Government Lot numbers where the watering troughs have been located pursuant to the 1963 and 1971 Cooperative Agreements.⁴ There is also a

² IDWR believes that if the court also recommends claim no. 45-10491 from this source, that water right will have to be included in the combined use limiter because claim 45-10491 is claimed out of the same delivery system and the license limits the quantity to be delivered through the system to 0.01cfs. Decreed right no. 45-11050 is also included in the combined use limiter.

³ The original claim also listed wildlife as an additional purpose of use, but wildlife was not claimed in the final subsequent amended claim.

⁴ There is also a trough in the NENW of Section 33, close to Worthington Spring, but this trough is located on land owned by the state of Idaho, and therefore has been recommended to the State of Idaho under water right number 45-2810B, pursuant to the split of water right number 45-2810 between the State of Idaho and the BLM.

remark denoting which tracts contain more than one trough. The legal descriptions are listed on Attachment 2 and won't be repeated here.⁵

I. OTHER PROVISIONS NECESSARY

Under this section of the recommended water right description IDWR lists only the standard placeholder remark for future general provisions.

J. EXPLANATORY MATERIAL

The explanatory material section of the water right description lists only further identification information, and other information, useful to IDWR in its future administration of this right. This information consists of the basis of the right, the BLM's identification number for the right, and the number of the "D" permit upon which the right is based, and details on the number of troughs or other watering sites within the place of use. It also notes that water right 45-2810A is a split of right 45-2810, and that the recommendation contains an accomplished change in the place of use, allowed pursuant to Idaho Code §42-1425.

IV. PRIMA FACIE WEIGHT OF THE RECOMMENDATION OF WATER RIGHT NUMBER 45-2810A

At the time it split 45-2810 into the A and B portions and removed Bruce Bedke's name from the recommendation IDWR perceived there were procedural impediments to recommending the elements of 45-2810A and 45-2810B. Therefore it continued its recommendation of disallowance, but intended that recommendation to only serve as a

⁵ It should be noted that the place of use legal descriptions listed on Attachment 2 correct a previous error. Updated GPS data gathered by the BLM reveals that the place of use previously listed as being in the NWNW of Section 19 is in error. In fact the two troughs in question are actually located a short distance to the north of where they previously were thought to be, and are, in fact, located in the SWSW of Section 18. This error also has implications for the place of use description for water right claim number 45-10491, discussed below. As the Bedkes are claiming for the place of use of claim number 45-10491 the same troughs as are recommended by IDWR for 45-2810A, should the court issue a recommendation for that right the place of use description will need to be brought into conformance with the place of use description for 45-2810A.

placeholder until it could remove those impediments.⁶ Special Master Dolan appears to have recognized this insofar as in his decision on summary judgment he refused to give prima facie weight to the recommendation of disallowance on the basis that no elements were recommended that he could give prima facie weight to. See the Special Master's *Order Denying United States' Motion for Summary Judgment and Setting Scheduling Conference*, entered May 24, 2006. The recommendation of right 45-2810A contained in Attachment 2 is IDWR's first recommendation of the elements of that right.

ELEMENTS OF WATER RIGHT NO. 45-10491

Since IDWR has previously filed a recommendation of this right in this report it will discuss only the elements that are objected to, or that need to be discussed in order to explain the issues before the court⁷.

A. PRIORITY DATE

⁶ By mid-June, 2004, Agent Vikie Hancock had pretty much determined what her recommendations of water rights 45-2810A, 45-2810B, and 45-10491 would be, subject to revision based upon new information received during her July, 2004, field examination. See undated memo to file, attached hereto as Attachment 6. Her July 7, 2004, field examination confirmed that determination in most respects. See July 9, 2004, notes to file, attached hereto as Attachment 1. However, the problem was the trough on State land in Section 33. It had not been included on the original claim when the claim was split between the BLM and the State in 1993, and accordingly the State would need to file an amended claim for it on 45-2810B. This would be crucial since the land in Section 33 would be the entire place of use for that right. IDWR informed the State and the BLM that it believed that the most expedient procedure for accomplishing this change would be for it to continue to disallow 45-2810A and 45-2810B when it filed its NCAP splitting the claim in October, 2004, anticipating that the State and BLM would file objections to the disallowance. The State objection could then be resolved through the execution and filing of an SF-5/Amended Claim adding Section 33 as the place of use for 45-2810B. This is indeed what happened. The BLM objection could be resolved through the execution and filing of an SF-5 deleting Section 33 from the place of use of 45-2810A. This procedure would also allow the "clean up" of any other loose ends in the description of the water rights. IDWR did not anticipate that the Bedkes would oppose this resolution of 45-2810A and 45-2810B because it believed it had alleviated their concerns by recommending their claim to Worthington Spring in its recommendation of 45-10491, contained in the director's report for irrigation and other rights in Basin 45, filed September 9, 2004, a month before the NCAP was filed. However, the Bedkes concerns were not alleviated and they now are parties respondent in subcase 45-2810A. Thus resolution of that subcase through the SF-5 procedure would require their participation.

⁷ The State of Idaho objected to all elements, but for the purpose of asserting the right should not exist. The BLM objected to priority date, point of diversion, and place of use, but also for the purpose of asserting the right should not exist. The Bedkes objected only to priority date.

The Bedkes claimed an 1872 priority date. The agent recommended a 1963 priority date. It is IDWR's understanding that the Bedkes' claimed priority date of 1872 is based on the assertion that their predecessor in interest was grazing stock in this area by that time, and that he developed an in-stream stockwater right in Worthington Spring. The agent rejected this position based upon the statement of Bruce Bedke, during the field investigation of July, 2004, that until the horizontal drain pipe and catch basin were installed in 1963, stock were unable to get water from the spring. See Attachment 1, p. 1. Instead she recommended a 1963 priority date as the date that the right could first have been developed because water from the spring was not available to livestock until that time.

Unfortunately the agent failed to properly consider the significance of the 1963 priority date. By that date the land in Section 33 where Worthington Spring is located was owned by the State of Idaho. Because of the limited nature of IDWR's investigation and recommendation of *de minimis* stockwater claims it normally would not inquire into whether the Bedkes had the legal right to establish a point of diversion on public land. However, in the present case, where IDWR was investing additional resources into further investigation of the claim at issue here, the agent likely ought to have conducted further research into the issue of whether the Bedkes' were legally entitled to establish a point of diversion on State land in 1963 before she recommended a 1963 priority date. Unfortunately there is no evidence in the file that the agent did this. However, even without the agent investigating this question it has been raised by the objection of the State of Idaho and thus is before the court for determination.

B. PLACE OF USE

Water right number 45-10491 was claimed as a diversionary stockwater right rather than an in-stream stockwater right. As such, to justify the claimed 1872 priority date, the claimants would have to show that their predecessor diverted water from Worthington Spring in 1872 for stockwater purpose. However it appears from the claim that the Bedkes claimed as the place of use for the right the locations of the troughs installed on federal land as part of the improvements to the spring made pursuant to the 1963 and 1971 Cooperative Agreements. IDWR considers bootstrapping an early priority date onto improvement to the place of use made subsequent in time as constituting an impermissible enlargement of the use.

IDWR views the Bedkes as having the following three choices in the type of claim to file:

1. An 1872 diversionary stockwater right. This would require proof that the water was diverted from the source in 1872. The place of use would be that area served by the 1872 diversion.

2. An 1872 in-stream stockwater right. No diversion would be required for this. Technically even though there is no point of “diversion” for an in-stream claim both the point of diversion and place of use elements are listed as the stream reach where the use occurs. Where, however, the place of use is not a stream, but only a spring, the point of diversion and place of use elements would have the same legal description. Therefore in the present case both the point of diversion and the place of use would list the legal description of the location of Worthington Spring.

3. A 1963 diversionary stockwater right. The point of diversion for this right would be the location of the spring. The place of use would consist of those areas served

by the pipe and troughs installed in 1963 and modified in 1971. There are significant problems with this option that are discussed below.

The Bedke's claim to right no. 45-10491 is a combination of options 1 or 2 (a claimed priority date of 1872) and option 3 (a place of use consisting of the areas served by the pipe and troughs installed in 1963 and modified in 1971). Believing this amalgam to be an impermissible enlargement, the agent recommended the claim pursuant to option 3. The problem with the agent recommending claim number 45-10491 with a 1963 priority date is that she created a water right description identical to the description of 45-2810A for all elements save the name and address of the owner. However, since the development was undertaken pursuant to a "D" permit, and Idaho Code §42-501 limits the development of water rights pursuant to "D" permits to the United States BLM alone, the Bedkes could not have developed a "D" permit right.⁸ Moreover, there has been no evidence provided to IDWR showing that the Bedkes have some kind of joint ownership interest with the BLM in water right number 45-2810, the right developed pursuant to the "D" permit. There does not appear to be anything in the Cooperative Agreements of 1963 or 1971 that entitles the Bedkes to develop their own water right separate from, but identical to, the BLM right, using the same delivery system and troughs developed pursuant to the Cooperative Agreements. Therefore, if claim number 45-10491 were in fact for a water right identical to 45-2810A, the agent should have disallowed the claim on the basis that it was being recommended as claim number 45-2810A or allowed the Bedkes to amend the claim.

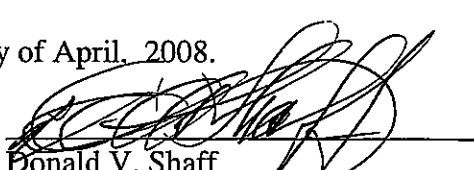
⁸ Where there is a competing claim to a BLM "D" permit, IDWR's policy is to recommend the right to the BLM and disallow the competing claim. See July 3, 1997, letter from David R. Tuthill, Jr., especially the paragraph at the bottom of p. 1 and the top of p.2. Attachment 7. By recommending claim number 45-10491 with a 1963 priority date the agent inadvertently turned it into the type of competing claim that should have been disallowed.

However, it is IDWR's understanding that the Bedkes are not asserting a claim to water right number 45-2810A; rather, IDWR understands their contention to be that water right 45-10491 was established in 1872 as an in-stream stockwater right that in 1963 and 1971 metamorphosed into a diversionary stockwater right using the same point of diversion and delivery system to the same troughs on the same places of use as the BLM's water right number 45-2810A. Setting aside the issue of whether the Bedkes have the legal right to utilize a delivery system developed pursuant to Cooperative Agreements to deliver their own right to the same places of use as the BLM's water right number 45-2810B, IDWR views the change in use of an in-stream stockwater right having a single place of use into a diverted stockwater right having multiple places of use as an impermissible enlargement of the right. The agent should have disallowed the claim on this basis, rather than recommending it with a 1963 priority date, or allowed the Bedkes to amend their claim.⁹

VI. CONCLUSION

In conclusion, IDWR hereby recommends water right number 45-2810A as described in Attachment 2. With benefit of further review it believes it recommended claim number 45-10491 incorrectly, and that it should have disallowed that claim.

IDWR respectfully submits the Supplemental Director's Report Regarding Subcase Nos. 45-2810A and 45-10491 this 25th day of April, 2008.


Donald V. Shaff
Adjudication Bureau Chief

⁹ There is evidence in the file indicating that the agent did suggest to the Bedkes that they could amend water right claim number 45-10491, but they chose not to. See Attachment 6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April, 2008, I caused to be served a true and correct copy of the foregoing by the following method to:

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

☐ Overnight Mail
☐ Regular Mail
☐ Hand-Delivered
☐ Facsimile

2. United States Department of Justice
Environment & Natural Resources Div.
550 West Fort St. MSC 033
Boise, ID 83724

☐ Overnight Mail
☐ Regular Mail
☐ Hand-Delivered
☐ Facsimile

David J. Barber
Deputy Attorney General
P.O. Box 44449
Boise, ID 83711-4449

☐ Overnight Mail
☐ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Bruce Bedke
Jared K. Bedke
Martha J. Bedke
42 E Basin Rd.
Oakley, ID 83346

☐ Overnight Mail
☐ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Cassia County Courthouse
1459 Overland Ave.
Burley, ID 83318

☐ Overnight Mail
☐ Regular Mail
☐ Hand-Delivered
☐ Facsimile

Deserae D. Kramer
Signature of person mailing document

MEMO TO FILE

From: Vikie Hancock

7/9/04

RE: Site visit to Worthington Spring

Claim Nos: 45-2810A - BLM

45-2810B - State of Idaho

45-10491 - Bruce Bedke

45-11050 - Jones and Hawker

On July 7, 2004 I visited the site of the source for the above referenced SRBA claims. This source is identified on the USGS Blue Hill Quadrangle map as Worthington Spring. It is located in the NWNENW Section 33, T16S, R22E in close proximity to Granite Creek, which is tributary to Birch Creek. I was accompanied by Bryce Taylor of the Idaho State Department of Lands, Bruce Bedke and Jared Bedke. The BLM was notified but did not join us.

The purpose of the site visit was to clear up any confusion about the actual source of the above claims and the location of the point of diversion from the spring relative to Granite Creek. The claimed source provides water to six troughs and a small reservoir. These sites were not visited, as there is no disagreement as to their locations. An additional goal was to ascertain the location of an unnamed stream that the Bedke's state is locally known as Worthington Spring. This has caused some confusion regarding the source of the above referenced claims.

At the site USGS identifies as Worthington Spring I documented two separate sources and two separate points of diversion. The earliest development, dating from 1963, was described by Bruce Bedke. According to him, buried perforated pipe drains a boggy area that is gathered into a catch basin and conveyed through 1.25 inch pipe to the troughs. The bog was chosen as the source for the pipeline because Granite Creek was already being used for instream stockwater at that location and the bog represented an additional source of water that was not palatable to the cows for drinking until the system was developed. The boggy area is located to the south of Granite Creek and up-gradient [see GIS map]. It is within a fenced enclosure and growing grass, willows and other common riparian-type plants. There was no surface water flowing out of the bog, however when I stepped through it, water filled my footprints. Also within the enclosure we found the catch basin west of the bog, a metal cylinder buried in the ground [see photo]. There was water in the basin flowing into a nearby trough. The float in the trough was not functioning, and the overflow pipe was discharging approximately ½ garden hose of water. The bog, aka Worthington Spring, the catch basin and nearby trough are all located on State land. The catch basin and trough were GPS'd for accuracy.

From this first trough, buried pipe runs down hill to the northwest and crosses Granite Creek. Not far from the north bank of the creek, this pipeline connects

to another pipeline coming from a diversion out of Granite Creek that is located on BLM land [sites GPS'd, see map]. The diversion consists of a metal box, approximately 3 inches high and 1 foot square with a mesh lid. The box is placed in the stream bed and designed so that water should flow into the box through the mesh lid. A pipe, appearing to be 1.5" in diameter, leads from the metal box. At the time of my visit, no water was flowing into the box, but rather around both sides of it. According to IDWR records, the BLM was granted permit 45-13402 for this diversion from Granite Creek in 2001. Bruce Bedke agreed that that date of development was most likely correct.

After the pipelines from the two sources are interconnected, water flows to the remaining five troughs and small reservoir, all located on BLM land. The trough located on State land does not receive any water from Granite Creek.

In addition to the two points of diversion discussed above, there was a third point that has been abandoned. This point was located just north of the current Granite Creek diversion, perhaps 10 feet from the bank of the creek, on BLM land. It consisted of a catch basin that was designed to trap underflow water and divert it to the pipeline, and according to Bedke this installation was most probably in 1971. This diversion was abandoned when water ceased flowing into the catch drain, not long after it was installed.

Bruce Bedke also has an instream stockwater claim in the SRBA to this reach of Granite Creek recommended as 45-13677. Before we left this site, I described to Bruce and Jared Bedke the pipeline systems as I saw them:

- The SRBA claims of the BLM, the State of Idaho, Bedkes and Jones/Hawker which described use of the pipeline and troughs are from the spring source south of Granite Creek that was developed in 1963.
- The pipeline to the five troughs and reservoir from Granite Creek was developed in 2001 and only the BLM has a permit describing that right.



Boggy
area to
south of
Granite Creek
identified by
USGS as
Worthington
Spring



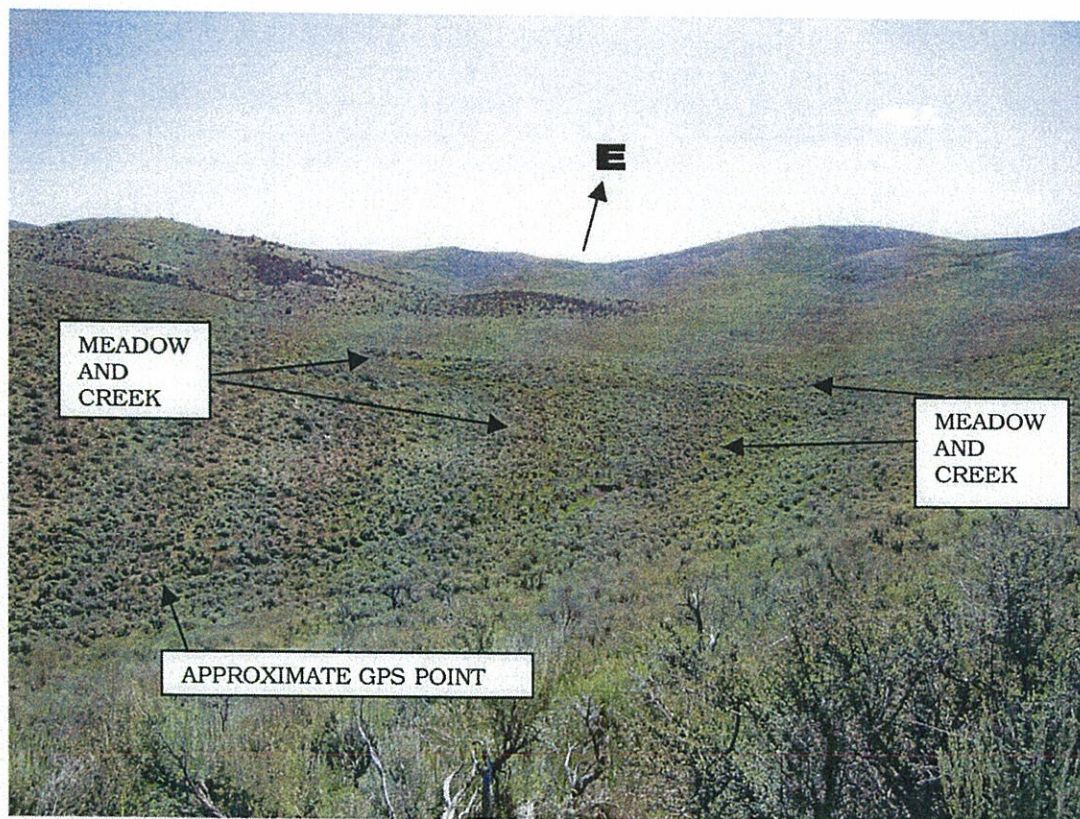
Catch basin located to west of boggy area.



Pipe from spring crossing Granite Creek.

We next visited the area that the Bedke's refer to as Worthington Springs. It is tributary to Blue Hill Creek and is unnamed on the USGS Blue Hill Quad map. I GPS'd a point on the south bank of the creek downstream from where two smaller streams join to form one [see photo and GIS map]. There was very little water in the stream. The Bedke's told me that they refer to this as Worthington Springs because a man named Worthington homesteaded the meadows here, but later abandoned the area. According to Jared Bedke, the water originates at three springs higher in the hills to the east. The water runs underground for a time before re-surfacing in two small meadows from which the two aforementioned small streams originate [see photo].

According to the USGS quadrangle map the three springs referred to by Bedke are located in T16S R22E Section 27, NENESE, NWNESW, SESESW. They are recommended to Bruce Bedke for undeveloped stockwater under claim 45-13678. The subject Unnamed Stream is also recommended to Bedke for instream stockwater use under 45-13678.



Unnamed stream referred to as Worthington Spring by the Bedkes. Stream runs through S $\frac{1}{2}$ NE, SENW and NWNW of Section 28, T16S, R22E.

I asked Bedkes what they personally called the spring at the site USGS identifies as Worthington Spring and they said there was really no locally used name for it. I told them that Gary and Richard Jones called it "Granite Spring"

and Bruce said that sounded as good as anything. I discussed with them the situation wherein many locally named streams are recommended in the SRBA as Unnamed Stream because of IDWR's policy to identify geographic features as they are identified by USGS. I advised them that there was a process available for them to petition the USGS to change geographic names, but at this time, IDWR would identify the sources as they are named on the USGS quad map.

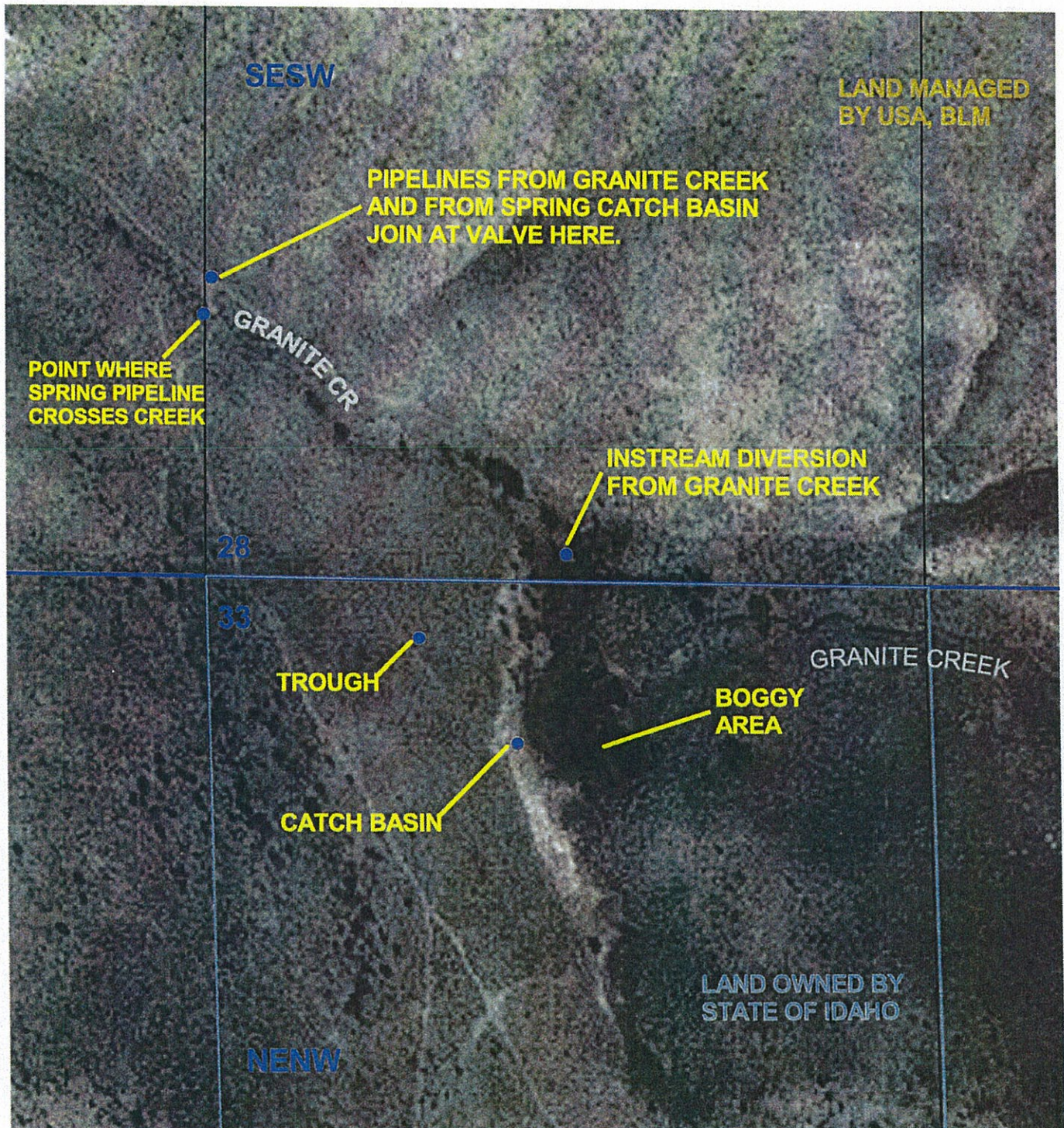
Other than the Bedke's opposition to the name of Worthington Spring used to describe the spring located next to Granite Creek, I don't believe there is really any confusion by the parties about which source serves the pipeline under recommendations 45-2810A, 45-2810B, 45-10491 & 45-11050.

An explanatory remark added to recommendation 45-13678 will help identify that right as the one including the unnamed stream and springs Bedke's call Worthington Spring.

No information was gathered during the field exam to change my proposed recommendations of 45-2810A, 45-2810B or 45-11050 as outlined in my memo of 6/10/04. The only change in my recommendation for 45-10491 is a removal of the option for a 1872 priority date with place of use at the spring site; this because I learned during my site visit that the spring was not available to stock for drinking prior to the 1963 development.

WORTHINGTON SPRING
PIPELINE SOURCE

T16S, R22E



1998 AERIAL PHOTO

GPS POINTS COLLECTED
JULY 7, 2004
V. HANCOCK
IDWR

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

45-2810A

P. O.

TO APPROPRIATE THE PUBLIC WATERS OF THE STATE OF IDAHO
FOR FARMSTEAD, DOMESTIC, OR STOCK WATERING PURPOSES

BY THE UNITED STATES DEPARTMENT OF THE INTERIOR

Application No. D. 1728

Permit No. D 1728 45-2810

District No. _____

- REMARKS:

Department of the Interior

Applicant Bureau of Land Management

Agent.

District Manager

[illegible]

Approval of State Reclamation Engineer

The number of this permit is D 1728

Recorded in Book 4 Page D 1728 Approved August 28, 1963

This is to certify that I have examined the within application for a permit to appropriate the public waters of the State of Idaho, and hereby approve the same, subject to the following limitations and conditions:

Work to begin on or before completed and to continue diligently and uninterruptedly to completion, unless temporarily interrupted by circumstances over which the permit holder has no control.

Completion of Works and Beneficial Use of Water appropriated in accordance herewith, to be made on or before completed

Witness my hand this 28th day of August, 1963

State Reclamation Engineer.

IN TESTIMONY WHEREOF, We, ROBERT E. SMYLLIE Governor of the State of Idaho, and ARNOLD WILLIAMS Secretary of State of the State of Idaho, have caused this instrument to be executed in the name of the State of Idaho, and caused the Great Seal of the State of Idaho to be hereunto affixed, this 28th day of August, 1963

Countersigned:

STATE OF IDAHO

By _____ Secretary of State.

By _____ Governor.

No. D 1728

PERMIT

Date of first receipt at office of State Reclamation Engineer

6:00 A. M. August 16, 1963

Returned to applicant for correction

Corrected application received

Fees \$ 1.00

STATE OF IDAHO LICENSE AND CERTIFICATE OF WATER RIGHT

Water License No. D 1728

U. S. Department of the Interior
Bureau of Land Management

Source of Supply Worthington Spring

Amount .01 Sec. Feet

Place of Use NE 1/4 Sec. 33, T4N, R16E, Page 22 EBM

Purpose Livestock Watering

Date of Priority August 16, 1963

Recorded Aug. 28, 1963

In Book 4 of Licenses, Page D-1728

LICENSE AND CERTIFICATE OF WATER RIGHT

Water License No. D 1728 Priority August 16, 1963 Amount .01

This is to certify that Bureau of Land Management of Burley, Idaho made proof to the satisfaction of the State Reclamation Engineer of Idaho, of a right to the use of the waters of Worthington Spring under Use Permit No. D 1728, and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume D 4 of Licenses, at page D-1728 on the 30th day of August, 1963

The right to the use of the water aforesaid hereby confirmed is restricted to the lands or place of use herein described as provided by the laws of Idaho.

WITNESS THE SEAL and signature of the State Reclamation Engineer, affixed at Boise, Idaho, this 30th day of August, 1963

State Reclamation Engineer.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

FOR OFFICE USE ONLY

Expires

EXTENDED TO

Project Number(s)

Project Name(s)

COOPERATIVE AGREEMENT

RESOURCE DEVELOPMENT AND CONSERVATION PROJECTS

1. ~~We~~ Herschel Bedke, Jess Bedke, of Oakley, Idaho
Ray C. Bedke, Critchfield L. & L. Co., of Oakley, Idaho
V.L. Gill & C.H. Bell, Pickett R. & S. Co., of Oakley, Idaho
and Owen Jones of Almo, Idaho

hereinafter called Cooperator(s) and the United States of America, by the Bureau of Land Management, hereinafter called the Bureau, for and in consideration of the mutual benefits hereunder, and in accordance with the Tay Grazing Act (43 U.S.C. 315, 315a-315r), as amended, and the National Soil Conservation Act (16 U.S.C. 590a-590q, as amended, do enter into this cooperative agreement for the construction and/or maintenance of range improvement installation of conservation works or establishment of conservation practices, hereinafter referred to collectively improvements, for the benefit of the Federal Range or other public lands and of the Cooperator(s).

2. The improvements known as the Worthington Spring Pipeline

☒ will be ☐ are located upon: ¼ Sec(s) 19, 20, 28, 29, T. 16 S

R. 22 E, Boise, Meridi

County of Cassia, State of Idaho

3. IT IS MUTUALLY AGREED:

(a) The parties hereto will furnish labor, materials, and equipment as required, the total cost or value not exceed the amount listed below for each of the parties respectively for the initial construction and/or installation the improvements indicated in paragraph 2.

NAME(S) OF COOPERATOR(S)	ITEMS	TOTAL COST OR VALUE
Herschel Bedke, Jess Bedke, Ray C. Bedke, Critchfield L. & L. Co., V. L. Gill & C. H. Bell, Pickett R. & S. Company, Owen Jones	Installation of pipeline and troughs	\$ 1000.00
Bureau of Land Management	3 miles 1½" plastic pipe, fittings, headboxes, trenching, supervision	2000.00
BUREAU OF LAND MANAGEMENT		
	AGGREGATE COST	\$ 3000.00

(b) Upon notice, either orally or in writing from the Authorized Officer of the Bureau, Cooperators will promptly supply labor, materials, and equipment as specified in paragraph 3(a) as required. Contributed materials in excess of the amount required shall be returned to the contributor. Equipment contributed shall also be returned promptly following completion of the work. Work will be conducted under the supervision and direction of the Authorized Officer and shall be pursued with diligence until completed.

4(a) The Cooperator(s) shall be liable, jointly and severally, for the repair and maintenance of the said improvements following completion, in good and serviceable condition. The Cooperator(s), without further notice from the Authorized Officer, shall do such repair work as may be necessary from time to time, promptly and in a workmanlike manner. If such work is not performed as necessary, the Authorized Officer shall allow Cooperator(s) not less than thirty (30) days from written notice within which to complete the same, as required.

(b) In the event the Cooperator(s) shall default, after due notice, in the repair and maintenance of the said improvements following completion, the Authorized Officer may do or cause such work to be done for and in behalf of the Cooperator(s); and the necessary cost and expense thereof or proportionate share as determined by the Authorized Officer, shall become a charge and obligation upon and shall be paid by the Cooperator(s). It is further understood in case of default hereunder, that any permit, license, or lease, or renewal thereof issued to the Cooperator(s) and administered by the Authorized Officer of the Bureau, and in connection with which these improvements are constructed, shall not be renewed or extended or any assignment thereof shall not be approved; and that such default may result in cancellation of the permit or license as provided in the Federal Range Code for Grazing Districts, 1962 Rev. (43 CFR Secs. 161.9(d) and 161.15(f)) as amended, or in the cancellation of the lease, unless and until all charges and costs owed by the Cooperator(s) hereunder shall have been paid; provided that the Bureau may pursue such other remedies, legal or administrative, as may be authorized.

(c) Repair and maintenance, as herein required, shall mean normal upkeep and maintenance necessary to preserve, protect, and prolong the useful life of the improvements, but shall not include major repairs where the damage is due to floods, earthquakes, or other acts of God, or fire not the proximate result of fault or negligence of the Cooperator(s) as determined by the Authorized Officer.

5. IT IS FURTHER AGREED:

(a) Title to the said improvements in place, together with all labor and materials furnished by either party

and used in the construction and maintenance thereof shall be in the United States of America. The improvements may be removed, in whole or in part, during term of this agreement or any extension thereof, mutual consent of the parties or by direction of Authorized Officer; such removal shall be made by Cooperator(s), or by the Bureau at its option. Upon removal of the improvements, any salvageable materials, after deducting an amount to compensate for actual cost of removal, shall be available for distribution to the parties then subject to this agreement in proportion to the actual amount of their respective contributions to the initial construction of the improvements, as determined by the project records of the Bureau. The parties shall take possession and remove their portion of the salvaged materials within 90 days after first notification in writing that such materials are available; upon their failure to do so within the time allowed, the materials shall be deemed to have been abandoned and title thereto shall thereupon vest in the United States.

(b) During the course of salvaging the materials, the United States assumes no responsibility for protection or preservation of said material.

6(a) If the Cooperator shall assign or transfer interest in any grazing permit, license, or lease embracing the lands upon which the improvements constructed or in connection with which they are used, the Cooperator may include in such assignment or transfer his interest in this Cooperative Agreement, including his right to the use of the improvements (Section 1) and to his proportionate share of the salvaged material (Section 5(a)). Before the assignee or transferee will be recognized as successor to the Cooperator interest hereunder, such assignee or transferee shall be required by the Authorized Officer to accept assignment of this agreement and agree to be bound by the provisions respecting the use and maintenance of the improvements.

(b) Should the land upon which the improvements are constructed be included in application for classification and disposal under Sections 7 and 14 of Taylor Grazing Act, or other public land laws, the Authorized Officer agrees not to allow such application if allowance of the application or disposal is discretionary upon the Authorized Officer until the applicant has agreed in writing to compensate the Cooperator(s) for his loss of the improvements in an amount mutually agreed upon and payable separately to the Bureau and to the Cooperator; or, if the parties are unable to agree, the District Manager will determine the present reasonable value of the improvements in accordance with 43 CFR 161.15(g) or 43 CFR 160.11.

SCANNED

MAY 2 - 2001

whichever is applicable and determine the amounts payable to the Bureau and to the Cooperator which shall be in proportion to the actual amount of their respective contributions to the initial construction of the improvement; or the Bureau, at its option, may require the removal of such improvements under the provisions of Section 5(a) of this agreement.

7. The Cooperator(s) use of the improvements will be in conformity with the General Rules of the Range specified in the Federal Range Code for Grazing Districts (43 CFR Part 161) if the improvements are in a grazing district, or to the special stipulations, if any, included in the grazing lease covering such area, if outside a grazing district, and to the Management Plan, if any, for the area in which the lands serviced by these improvements are located, to the extent such rules, stipulations and plans are applicable for the conservation, protection, and proper utilization of the improvements constructed hereunder.

8. This agreement shall not accord to Cooperator(s) any preference, privilege, or consideration with respect

to any permit, license, or lease not expressly provided herein or in the rules and regulations governing such permit, license, or lease.

9. Items 2 and 3 of this agreement may be modified or cancelled by written agreement of the parties, and this agreement shall become a part hereof. Items 4 to 9 inclusive may also be amended but first must be approved by the State Director.

10. This contract is subject to the provisions of Executive Order No. 10925 of March 6, 1961, which sets forth the nondiscrimination clauses. A copy of which may be obtained from the signing officer.

11. This agreement shall remain in full force and effect until indefinite, 19 unless (1) sooner terminated by mutual written consent of the parties, or (2) is terminated by the Authorized Officer after due notice in writing because of Cooperator default or violation of any of the terms or provisions of this agreement, or (3) in accordance with Section 5.6 of this agreement.

12. Special conditions:

Herschel Bedke
Herschel Bedke

Jesse Bedke
Jesse Bedke

COOPERATOR(S):

Ray C. Bedke
Ray C. Bedke (Signature) (Date)

Keith Critchfield 8/1/63
Critchfield L.P. & L. Co. (Date)

Charles H. Bell
V. L. Gail & (Signature) C. H. Bell (Date)

Pickett R. & S. Co.
Pickett R. & S. Co. (Signature) (Date)

Owen Jones 9/13/63
Owen Jones (Signature) (Date)

THE UNITED STATES OF AMERICA

State of Idaho

District Twin Falls, I-2

By [Signature]
(Signature)

District Manager
(Title)

SEP 16 1963

(Date)

SCANNED

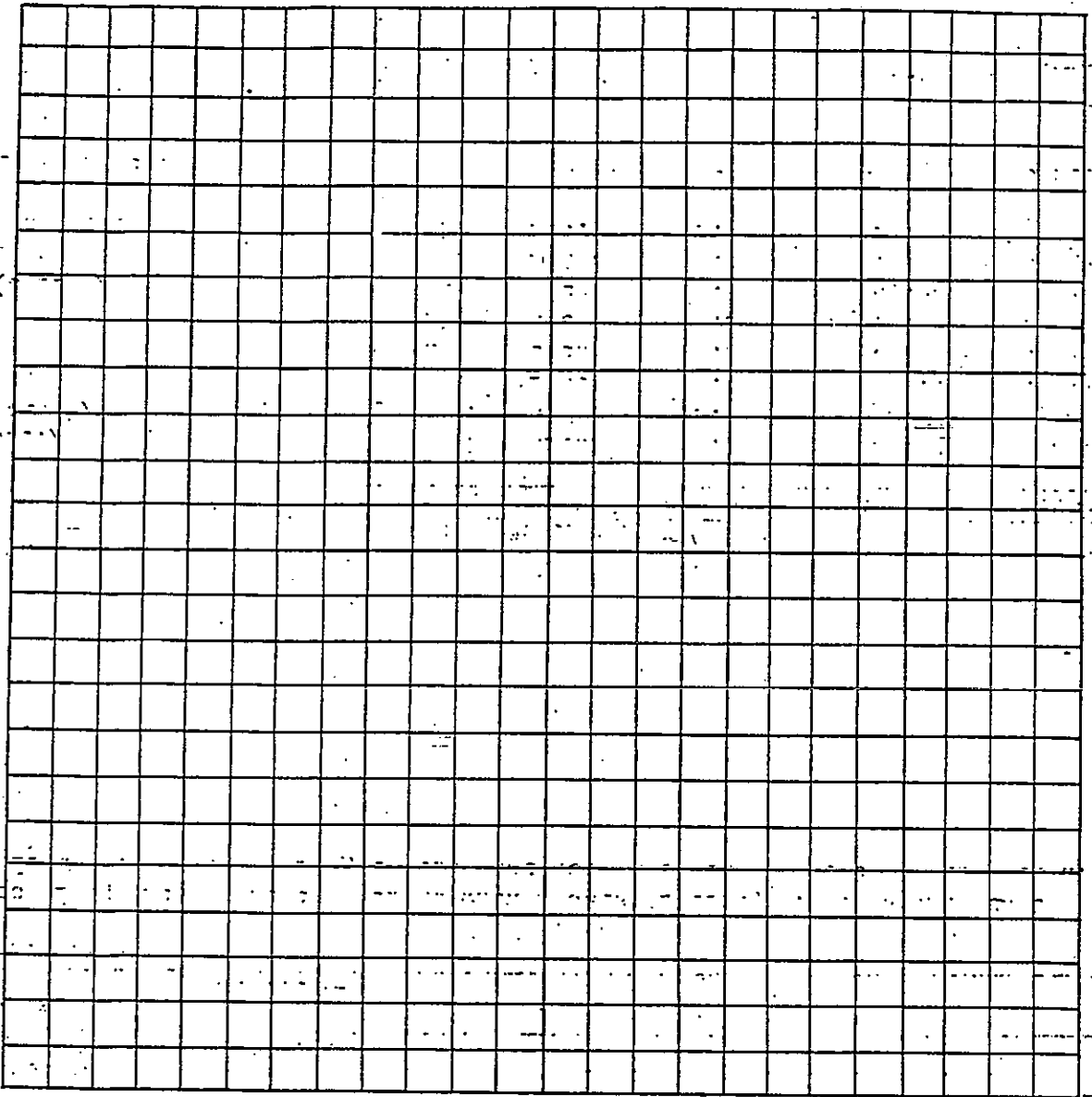
GPO 859

MAV 2 1964

LOCATION PLAT

PROJECT LOCATION

1/4 1/4, Section _____, Township 16 S, Range 22 E, _____ Mer



Scale _____ inches equal one mile

Remarks:

LEWIS

JOSEPH P. F. 1911

JOSEPH P. F. 1911

JOSEPH P. F. 1911

JOSEPH P. F. 1911

JOSEPH P. F. 1911

JOSEPH P. F. 1911

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

COOPERATIVE AGREEMENT
RANGE IMPROVEMENTS AND CONSERVATION
PRACTICES

FOR OFFICE USE ONLY

Expires	EXTENDED TO
Job Number(s)	
4050	
Job Name(s)	
Worthington Spring Ext.	

1. ☒ (We) Bruce Bedke, Herschel Bedke, Ray of
Bedke, Critchfield Land and Live-
stock Company, W. E. & Maxine of
Hunter, Pickett Ranch & Sheep Co. all of Oakley, Idaho 83346
and Owen & Richard Jones of Almo, Idaho 83312

hereinafter called cooperator(s) and the United States of America, by the Bureau of Land Management, hereinafter called the Bureau, for and in consideration of the mutual benefits hereunder, and in accordance with the Tay Grazing Act (43 U.S.C. 315, 315a-r), as amended, and the National Soil Conservation Act (16 U.S.C. 590a-q(1)), amended, do enter into this cooperative agreement for the construction and/or maintenance of range improvement installation of conservation works or establishment of conservation practices, hereinafter referred to collectively improvements, for the benefit of the Federal Range or other public lands and of the cooperator(s).

2. The improvements known as the Worthington Spring Extension.

☐ will be ☒ are located upon: ¼, Sec(s). 24 & 25 T. 16S, R. 21E and ~~xxx~~
~~xx~~ Secs. 19, & 30 T. 16S, R. 22E Boise Meridi
County of Cassia, State of Idaho

~~XXXXXXXXXXXXXXXXXXXX~~

~~xxxxxxx will furnish labor and equipment as required for the construction of the improvements indicated in paragraph 2.~~

~~XXXXXXXXXXXXXXXXXXXX~~	~~XXXXXX~~	~~TOTAL XXXXXXXXXXXX~~
		\$
~~BUREAU OF LAND MANAGEMENT~~		
~~AGGREGATE COST~~		\$

(b) Upon notice, either orally or in writing from the authorized officer of the Bureau, cooperator(s) will promptly supply labor, materials, and equipment as specified in paragraph 3(a) as required. Contributed materials in excess of the amount required shall be returned to the contributor. Equipment contributed shall also be returned promptly following completion of the work. Work will be conducted under the supervision and direction of the authorized officer and shall be pursued with diligence until completed.

4(a) The cooperator(s) shall be liable, jointly and severally, for the repair and maintenance of the said improvements following completion, in good and serviceable condition. The cooperator(s), without further notice from the authorized officer, shall do such repair work as may be necessary from time to time, promptly and in a workmanlike manner. If such work is not performed as necessary, the authorized officer shall allow cooperator(s) not less than thirty (30) days from written notice within which to complete the same, as required.

(b) In the event the cooperator(s) shall default, after due notice, in the repair and maintenance of the said improvements following completion, the authorized officer may do or cause such work to be done for and in behalf of the cooperator(s); and the necessary cost and expense thereof or proportionate share as determined by the authorized officer, shall become a charge and obligation upon and shall be paid by the cooperator(s). It is further understood in case of default hereunder, that any permit, license, or lease, or renewal thereof issued to the cooperator(s) and administered by the authorized officer of the Bureau, and in connection with which these improvements are constructed, shall not be renewed or extended or any assignment thereof shall not be approved; and that such default may result in cancellation of the permit or license as provided in the Federal Range Code for Grazing Districts, 1962 Rev. (43 CFR 4115.2-1(d) and 4115.2-5(a)(6)) as amended, or in the cancellation of the lease, unless and until all charges and costs owed by the cooperator(s) hereunder shall have been paid; provided that the Bureau may pursue such other remedies, legal or administrative, as may be authorized.

(c) Repair and maintenance, as herein required, shall mean normal upkeep and maintenance necessary to preserve, protect, and prolong the useful life of the improvements, but shall not include major repairs where the damage is due to floods, earthquakes, or other acts of God, or fire not the proximate result of fault or negligence of the cooperator(s) as determined by the authorized officer.

5. IT IS FURTHER AGREED:

(a) Title to the said improvements in place, together with all labor and materials furnished by either party

and used in the construction and maintenance thereof shall be in the United States of America. The improvements may be removed, in whole or in part, during term of this agreement or any extension thereof by mutual consent of the parties or by direction of the authorized officer; such removal shall be made by the cooperator(s), or by the Bureau at its option. Upon removal of the improvements, any salvageable material after deducting an amount to compensate for the actual cost or removal, shall be available for distribution to the parties then subject to this agreement in proportion to the actual amount of their respective contributions to the initial construction of the improvements as determined by the job records of the Bureau. The parties shall take possession and remove their portion of the salvaged materials within 90 days after notification in writing that such material is available. Upon their failure to do so within the time allowed, the materials shall be deemed to have been abandoned and title thereto shall thereupon vest in the United States.

(b) During the course of salvaging the material, the United States assumes no responsibility for the preservation of said material.

6(a) If the cooperator(s) shall assign or transfer interest in any grazing permit, license, or other interest embracing the lands upon which the improvements are constructed or in connection with which they are constructed, the cooperator(s) may include in such assignment the transfer of his interest in this Cooperative Agreement including his right to the use of the improvements (Section 1) and to his proportionate share of the salvageable material (Section 5(a)). Before the assignor transfers his interest, the transferee will be recognized as successor to the cooperator(s)'s interest hereunder, such assignor or transferee will be required by the authorized officer to accept an assignment of this agreement and agree to be bound by the provisions respecting the use and maintenance of the improvements.

(b) Should the land upon which the improvements are constructed be included in application for acquisition and disposal under Sections 7 and 14 of the Taylor Grazing Act, or other public land law, the authorized officer agrees not to allow such application if allowance of the application or disposal is conditional upon the authorized officer until the applicant has agreed in writing to compensate the cooperator for his loss of the improvements in an amount mutually agreed upon and payable separately to the Bureau by the cooperator(s); or, if the parties are unable to agree, the District Manager will determine the reasonable value of the improvements in accordance with 43 CFR 4115.2-5(a)(6) or 4122.3-5(a), which is applicable and determine the amounts payable by the Bureau and to the cooperator(s) which shall be in proportion to the actual amount of their respective contributions.

SCANNED

MAY 2 - 2001

contributions to the initial construction of the improvement; or the Bureau, at its option, may require the removal of such improvements under the provisions of Section 5(a) of this agreement.

7. The cooperator(s) use of the improvements will be in conformity with the General Rules of the Range specified in the Federal Range Code for Grazing Districts (43 CFR 4110) if the improvements are in a grazing district, or to the special stipulations, if any, included in the grazing lease covering such area, if outside a grazing district, and to the Management Plan, if any, for the area in which the lands serviced by these improvements are located, to the extent such rules, stipulations, and plans are applicable for the conservation, protection, and proper utilization of the improvements constructed hereunder.

8. This agreement shall not accord to cooperator(s) any preference, privilege, or consideration with respect to any permit, license, or lease not expressly provided herein or in the rules and regulations governing such permit, license, or lease.

12. Special conditions

Cooperators will maintain the extension.

9. Items 2 and 3 of this agreement may be modified cancelled by written agreement of the parties, which agreement shall become a part hereof. Items 4 to inclusive may also be amended but first must approved by the State Director.

10. This contract is subject to the provisions of Executive Order No. 11246 of September 24, 1965, which set forth the nondiscrimination clauses. A copy of the order may be obtained from the signing officer.

11. This agreement shall remain in full force and effect until (indefinite) , 19 unless (1) sooner terminated by mutual written consent of the parties, or (2) is terminated by the authorizing officer after due notice in writing because of cooperator(s)'s default or violation of any of the terms or provisions of this agreement, or (3) in accordance with Section 5 or 6 of this agreement.

COOPERATOR(S):
Bruce Beake 2/23/71
(Signature) (Date)
Ray C. Beake 2/23/71
(Signature) (Date)
Herschel Beake 2/23/71
(Signature) (Date)
W E Hunter 2-23-71
(Signature) (Date)
Ernest Beake 2/23/71
(Signature) (Date)
Richard Beake 2/23/71
(Signature) (Date)
Phil Beake 2/23/71
(Signature) (Date)

THE UNITED STATES OF AMERICA

State of Idaho

District Burley

By

Robert J. Beake
(Signature)

Area Manager

(Title)

FEB 23 1971

(Date)

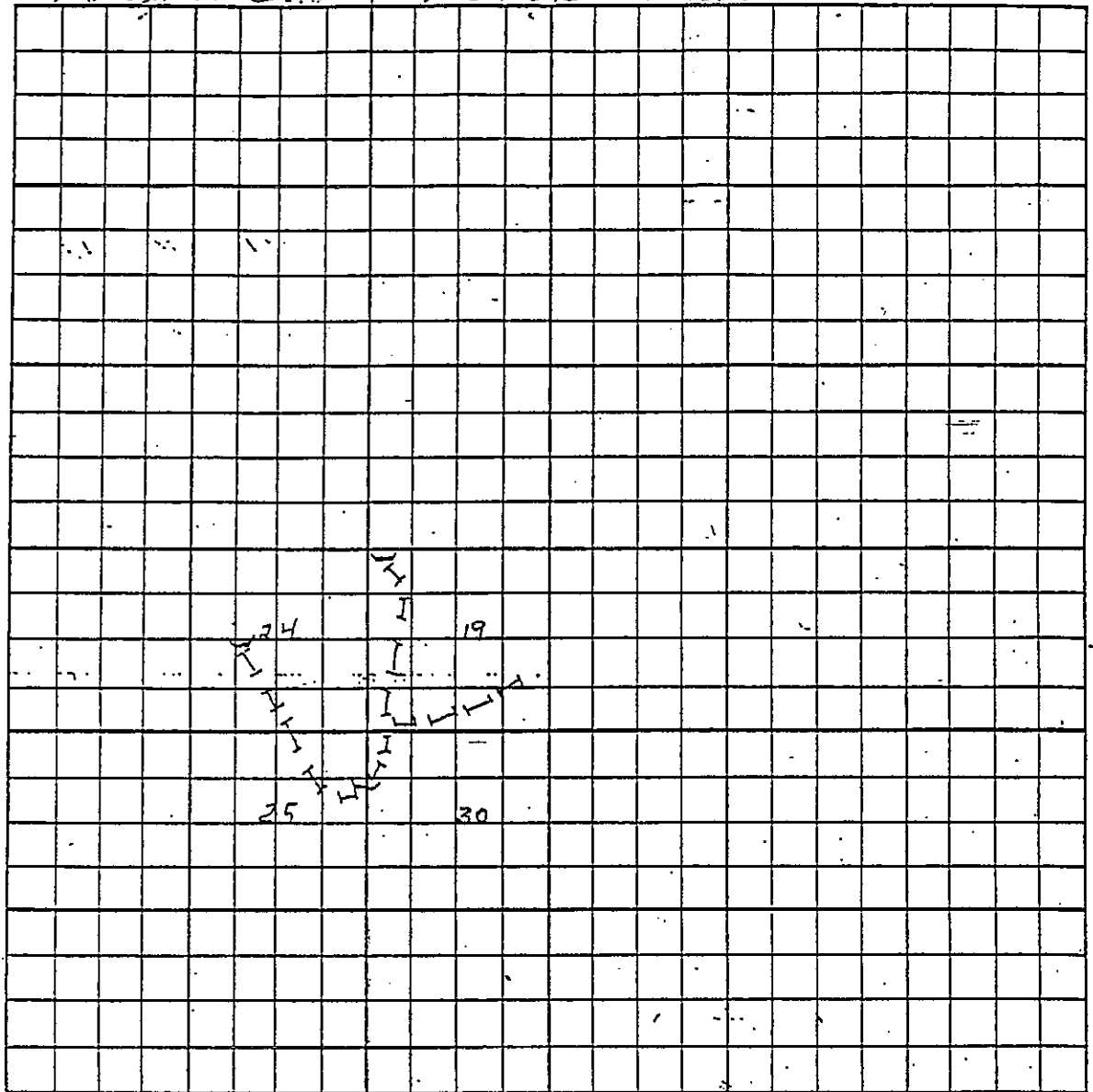
SCANNED

MAY 7 7 2001

LOCATION PLAT.

Range 21 East | Range 22 East

Township
16
South



Scale: 1" inches equals one mile.

INSTRUCTIONS - Cooperator(s) to receive original, and one copy each to the District case or lease file and District job file.

SCANNED

MAY 27 2004

There are four claims filed in the SRBA that actually described the same source and pipeline under discussion:

45-2810A	BLM	Priority 8/16/1963	Rate .005 cfs
45-2810B	IDL	8/16/1963	.005
45-10491	Bruce Bedke	4/01/1872	.230
45-11050	Jones & Hawker	4/01/1872	.230

PROPOSED RECOMMENDATIONS

Based upon the information currently available to IDWR:

45-2810A The NENW Section 33 should be deleted from recommendation 45-2810A in the name of the BLM, as that tract is Idaho State land. The balance of the POUs listed for inclusion on the Federal Objection received by IDWR on Dec 9, 1997 are consistent with the trough locations also described by Bruce Bedke and R.O Jones / Craig Hawker.

45-2810B Settlement with the Idaho Department of Lands must include amending the claim to include the NENW Section 33 in their place of use. NENW Section 33 is the only place of use that should be recommended in the name of State Dept of Lands, as all other troughs are on BLM managed lands.

45-10491 This right could be recommended for .01 cfs in the name of Bruce Bedke based upon beneficial use with a 1963 priority date subject to the limits and guidelines for all claims outlined below. Alternatively, this claim could be recommended with the 1872 priority date claimed, provided the place of use is limited to the undeveloped spring location in NENW Section 33. Claimants indicated that they were unwilling to compromise on either the place(s) of use or priority date. My preference is to recommend the place of use as claimed and have them object to the 1963 priority date.

45-11050 This right should be recommended for .01 in the name of Jones and Hawker based upon beneficial use, subject to the limits and guidelines outlined below. Conversation with claimant Jones indicate that the pipeline developed cooperatively in 1963 was the intended use claimed, and a day junior to the BLM priority date is acceptable to them to avoid objections.

The SRBA claims for use of water from the Worthington Spring pipeline represent an initial development in 1963 and a subsequent accomplished transfer of place of use in 1971.

As evidenced by the 1963 permit and cooperative agreement, private claims to the places of use served by the pipeline should be recommended with a priority date no earlier than of 8/16/1963.

As evidenced by the 1963 permit and license, all claims to the pipeline are limited to a combined total diversion rate of .01 cfs and a combined volume of 6500 gallons per day unless additional flow rate and volume can be proven to have existed prior to 5/19/1971.

If any party wishes to assert a priority date earlier than August 1963, the place of use would be limited to the location of the undeveloped spring in the NENW Section 33.



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, P.O. BOX 83720, Boise, Idaho 83720-0098

Phone: (208) 327-7900 FAX: (208) 327-7866

PHILIP E. BATT
GOVERNOR

KARL J. DREHER
DIRECTOR

July 3, 1997

Lee Leininger
P. Fritz Holleman
Dept. of Justice
General Litigation Section
Environmental and Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663

BY FAX

Dear Mssrs. Holleman and Leininger:

This letter is the response to your request for a written summary of the Department's current policy for recommending competing claims. The Department arrived at this new point after considering many possible alternatives and receiving input from several parties, including the United States. As you are aware, after Special Master Haemmerle issued the Order on Second Summary Judgment in the Joyce Livestock subcases, the Department initiated a re-evaluation of its policy for recommending water rights to the landowner when the landowner and a third party such as a lessee file competing claims to the same water right.

The Department's policy at the time it published the first five Director's Reports was to recommend the water right to the landowner and recommend the court disallow the competing claim. At the monthly informational conference on May 20, 1997, the SRBA District Court expressed strong concerns over the Department's policy in this regard. Both the Department and the court found the chief deficiency with the Department's policy was that it did not include a detailed investigation into the possibility of lesser estate owners having valid water rights on another person's land. In fact, the Department has expended very little of its resources investigating the legitimacy of either competing claim. Along the way, given the adjudication scheme of the SRBA, the Department's recommendation created an unfair advantage for landowner-claimants because their water right recommendations carried *prima facie* weight despite the lack of investigation. The Department explored alternatives with the potential to remedy this problem that also would not become a large drain on Department resources.

With these goals in mind, the Department currently is expecting to apply a new procedure when publishing Director's Reports in upcoming reporting areas. The new procedure works for *de minimis* claims as follows: If competing claims are identical with respect to every element except ownership, the Department will recommend one right identifying both competing claimants as potential owners. If a claimant files a claim where no other claims assert identical elements, the

Department normally will consider and recommend the claim independent of any other claim or claimant. This way the Department may avoid making possibly arbitrary judgments as to whether two claims are for the same water right. However, the Department will consider evidence in its possession that may indicate that claims truly are to the same water right. For example, if the United States, acting through the Bureau of Land Management, files a claim for a stock water right licensed in the name of the BLM, and a private individual files a claim to the same license, the Department may recommend the court disallow the private claim, because the license identifies the appropriator. Aggrieved parties still may work out ownership issues through the objection process, but by applying the additional evidence, the Department is spared endorsing multiple claims from one beneficial use in those situations where the Department does have sufficient information to identify when claims represent a single beneficial use.

Where claims assert some non-*de minimis* use, such as irrigation or power production, the Department may perform a more considered investigation into ownership. Because of the smaller number of these claims and the larger quantities diverted, there is greater justification for the expense. Generally, better records exist detailing the historical use of these lands, which allows the Department to make more accurate and complete recommendations.

The Department expects this new policy to produce generally more fair litigation, with each party subject to identical standards of proof before the court, which will proceed in a manner consistent with a common quiet title action. Also, the Department can produce such recommendations without excessively depleting its resources. In Reporting Area Six, (Basins 51, 55 and 61) the Department anticipates about 500 of such potentially competing claims, most of which are small domestic and stock water claims. The long term impact of this policy should be minimal. All of the other basins appear to contain significantly fewer competing claims. This means that once the small domestic and stock claims in Reporting Area 6 are completed, the new policy will have diminishing impact over the course of the SRBA.

By recommending water rights to lesser estate owners, the Department gives greater recognition to what has been long-standing law in Idaho - that lesser estate owners may hold title to water rights independent of the title to the appurtenant real estate, even in the cases of lessees and licensees on the federal public lands. The Department, however, will not prevent any potential theory of water right ownership available to the landowner-claimant. This procedure also does not appear to contravene any of the Department's obligations under Idaho Code Title 42.

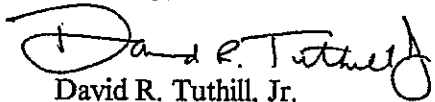
Although your suggestion to delay reporting these competing rights holds some appeal, the Department will not pursue that option at this time. After careful consideration, I do not believe that such a delay is in the best interests of the Department. One important reason with going forward with the domestic and stock water right Director's Report in Reporting Area 6 is that it allows the Department to spread out its future work load. Because the Western Region office is already committed to a reporting schedule, a delay now only will add work on top of the projects scheduled later. The Western Region office is already operating at its resource limit, and will be while producing the following non-*de minimis* report.

You should be aware that you will have an opportunity to construct pre-negotiation

settlements with claimants during the 120 day objection period after publication of the Director's Report recommendations. During this period, claimants may withdraw claims or change the listed owner to "United States," whatever your settlement entails. Regardless of how much time you have to reach these settlements, however, there could be potential hold-out claimants that will litigate the ownership issue.

As always, comments or suggestions on this process or any IDWR action may be directed to myself or Peter Anderson, at (208) 327-7929 and (208) 327-7975 respectively. Because the Department is working to meet established deadlines for the completion of the domestic and stock water recommendations for Reporting Area 6, you should submit your comments or suggestions prior to July 12, 1997 or as soon as otherwise possible. I hope this satisfies your request for a written statement.

Sincerely,

A handwritten signature in dark ink, appearing to read "David R. Tuthill, Jr.", written over a horizontal line.

David R. Tuthill, Jr.
IDWR Adjudication Bureau Chief

cc: Bill Ferry
Randy Bramer