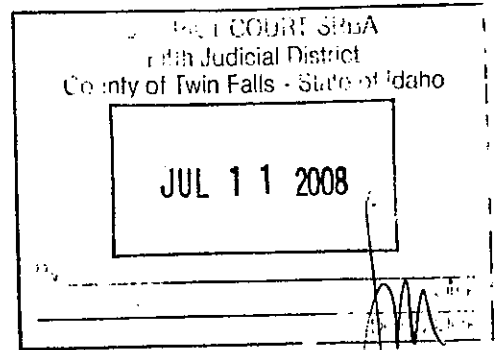




**SUPPLEMENTAL DIRECTOR'S REPORT
REGARDING SUBCASE NO. 74-10146**

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, Jr., Director
Donald V. Shaff, Adjudication Bureau Chief

July 10, 2008

I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Dolan's May 20, 2008 *Order Requesting 706 Report and Alternative Recommendation*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase number 74-10146. The Report was prepared under the supervision of David R. Tuthill, Jr., Director, and Donald V. Shaff, Adjudication Bureau Chief.

The following Department employees have knowledge of the information contained in the Report: Nathaniel Arave, Water Resource Agent; Ernest Carlsen, Water Resource Program Manager.

II. DISCUSSION

A. Background

In 1970, the Lemhi County District Court ("Lemhi Court") commenced a general stream adjudication for the Lemhi River, known as the Lemhi Adjudication. On December 30, 1982, the Lemhi Court executed a partial decree pursuant to Idaho Rule of Civil Procedure 54(b) ("Lemhi Decree"), resolving most of the issues in the Lemhi Adjudication. On October 14, 1992, the Lemhi Court ordered the Lemhi Decree be considered a final decree. Water right no. 74-10146 was not claimed in the Lemhi Adjudication.

Water right no. 74-10146 was originally claimed in the SRBA by Harry and Shirley Coleman ("Coleman"). On May 18, 2005, the Department received a change of ownership form from Thomas and Evelyn Carlson ("Carlson") stating that they were the new owners of property and various water rights held by Coleman, including water right no. 74-10146. On July 20,

2005, the Department received a claim from Carlson for water right no. 74-10146, claiming the irrigation of 158 acres with .47 cfs (.40 cfs irrigation, .07 cfs stockwater and domestic) from Adams Creek, tributary to sinks, with a priority date of November 6, 1908. According to the claim, "This small stream terminates on this Ranch and is the only source of irrigation water and livestock water." The basis of the claim was beneficial use. On January 19, 2006, the Department recommended water right no. 74-10146 disallowed because it was not claimed in the Lemhi Adjudication. The legal doctrine of *res judicata* bars reconsideration of the nature and extent of all water rights previously adjudicated. *See, e.g.*, Idaho Code § 42-1420. The Department considers itself barred in this instance from recommending elements inconsistent with the prior judicial determination.

On May 20, 2008, Special Master Dolan issued his *Order Requesting 706 Report and Alternative Recommendation*, in which he asked the Department to "prepare and file with the Court . . . a 706 Report concerning the underlying facts and data upon which it based its recommendation. In addition, the Report shall include an 'alternative recommendation' in the event the Carlsons' claim is allowed."

B. Department's Recommendation

Carlson's predecessor-in-interest was Coleman. Coleman was a party to the Lemhi Adjudication, receiving decreed water right nos. 74-33 (Little Timber Creek), 74-47 (Little Timber Creek), 74-48 (Little Timber Creek), 74-50A (Little Timber Creek), 74-380 (Milk Creek/Shenon Creek), and 74-1619 (Big Timber Creek). Adams Creek, the source claimed for water right no. 74-10146, was not a listed or decreed source in the Lemhi Adjudication.¹

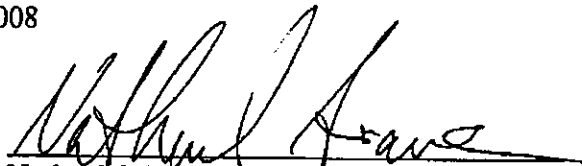
¹ Water right no. 74-381 (November 6, 1908; .30 cfs; 89.5 acres), with a source of Adams Spring, was decreed in the Lemhi Adjudication to Kenneth and Betty Kelly. Water right no. 74-381 has been split and recommended by the Department in the SRBA as water right nos. 74-381A and 74-381B. Water right no. 74-381A (.15 cfs; 158 acres)

In its investigation of the claim, the Department reviewed documents provided by Carlson regarding historic water use. Copies of the information submitted by Carlson to the Department are attached hereto as Attachment A. Based on review of the information, it is the Department's position that, but for *res judicata*, it would recommend water right no. 74-10146 as described in Attachment B. To minimize confusion, Attachment B bears a large red stamp DRAFT across its face. Given the information presented, March 15, 1934 is the earliest priority date the Department can recommend.² The basis for this conclusion is drawn primarily upon the September 19, 1972 letter written by Floyd Whittaker to Harry Coleman, Carlson's predecessor-in-interest. In that letter, Whittaker stated that his personal knowledge of the area dated to 1934. Whittaker stated that Coleman used water from Adams Creek and constructed a ditch across Whittaker's land to bring the water to the Coleman property. Carlson is presently the only user on Adams Creek.

III. CONCLUSION

But for *res judicata*, the Department's recommendation for water right no. 74-10146 is based on historical evidence of beneficial use as described in Attachment B.

Submitted this 11th day of July 2008


Nathaniel Arave
Water Resource Agent

has been recommended to Carlson. Water right no. 74-381B (.15 cfs; 90 acres) has been recommended to James and Paula Whittaker. Adams Spring appears to feed Adams Creek.

² All other elements should be recommended as claimed, along with the addition of the Department's inclusion of a combined use limitation regarding water right nos. 74-50A, 74-380A, and 74-381A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 11th day of July 2008.

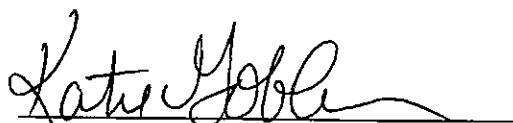
Document Served:

Supplemental Director's Report Regarding Subcase No. 74-10146

Persons Served:

Ray Rigby and Jerry Rigby
Rigby Thatcher Andrus Rigby Kam & Moller, Chartered
25 N. 2nd E.
PO Box 250
Rexburg, Idaho 83440

Thomas and Evelyn Carlson
PO Box 206
Leadore, Idaho 83464


Idaho Department of Water Resources

Attachment A

DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED _____

2007 AUG 22 AM 11 53

Thomas H & Evelyn R. Carlson
P.O. Box 206
Leadore, Id 83464

208-768-2100

SRBA

District Court
253 3rd Street
Twin Falls, Id

Regarding Case # 39576:
Please find enclosed verification of water use
on Adams Creek, water right # 74-10146, from
1906 to present date. This includes a letter from
Shirley Coleman, from whom we purchased this ranch.

Concerning water right # 74-10148, we have applied
and paid for a permit and have visited with Ernie
Carlson on this right. The permit is on file in
the Idaho Department of Water Resources. We
did this approximately a year ago.

If you need further information, please con-
tact us.

Tom & Evelyn Carlson

cc : Nate Grave

Idaho Dept. of Water Resources
900 N. Skyline Drive Suite A
Idaho Falls, Id 83402-1718

cc : Ernie Carlson
same address

SCANNED

8/22/07 11:53 AM

June 5, 1907
Salt Lake, Utah

To Whom This May Concern
I've been in the Coleman Farm
for about 50 yrs. and lived
neighbors to them before 1957
for many years - also owned
and irrigated the ground Adams
Creek is designated to until
May of 2004. To my knowledge -
it has always been used on
the "Old Coleman Ranch"

Sincerely
Arthur R. Coleman

July 15, 1926

To whom it may concern

I, Frank Phillip Prault,
Box 6, Leadore, Idaho, to the
best of my recollection know
that the water known as
the Adams Creek water was
used by the Coleman
ranch on or before the
year 1906.

Signed by

Frank Prault

Oct 27 / 1973

To whom it may concern
I had the Henry Coleman
ranch leased in 1927. I used
the Adams Creek also the Milky
Creek water for irrigation on the
Coleman ranch

Michael O. Probst

705 E. Oak St.
Willon, MT.
Oct. 29, 1973

Dear Harry,

When I talked to your mother today she asked me to write and tell you both about the use of water in Milk (or Milky) Adams, and Shenon Creeks, as I knew it when we lived right to you.

The years of my recollection are the late 1920's and the 1930's. I know that the three creeks named above head-watered in the grazing land we had. I also know that your father, Mr. Cleman, used the water from them for irrigation on his ranch. When we leased the "Gray" place, we used the waste water there. Our interest and use of the waste water sharpened our concern with the creeks providing the Cleman ranch water.

I hope this helps clarify the situation as it was then.

Sincerely,
Marion Ferris Preath

Leadore Idaho
Sept 19, 1977
Mr Harry Coleman for
Leadore, Ida

Dear Harry,

You asked me what
I knew about past use of
the Adams Creek water.
I wish to say that I
have been very familiar with
the use of this water since
1934, which is the year that
I bought 2080 acres of land
from Lemhi County, and which
I still own, and being Adams
Creek runs across this land
for over 1 mile. I know that
the Harry Colemans Ranch has
made extensive use of this
water all these years. Some
years ago Mr Kenneth Kelly made
a ditch across my land

without my permission and
has attempted to use this water
on land that has no Decree
for it. Namely Land that was
taken up by Hues Dunkin.

This water cannot be used
on any other land, without first
building a Ditch through the
Harry Coleman ranch.

About 20 years ago or longer
Mr Harry Coleman your father
dirt a Ditch to bring the Adams
Creek water down across my
land as it was most all
sinking in the old channel.

Sincerely yours

Floyd Whitaker

Attachment B

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

DRAFT

RIGHT NUMBER: 74-10146

NAME AND ADDRESS: THOMAS H CARLSON
PO BOX 206
LEADORE ID 83464

EVELYN R CARLSON
PO BOX 206
LEADORE ID 83464

SOURCE: ADAMS CREEK

TRIBUTARY: SINKS

QUANTITY: 0.400 CFS

PRIORITY DATE: 03/15/1934

POINT OF
DIVERSION: T15N R25E S15 NWSW Within LEMHI County

Right Nos. 74-50A, 74-380A, 74-381A and 74-10146 are limited to a total combined diversion rate of 3.16 cfs.

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	03/15 11/15	0.400 CFS
STOCKWATER	01/01 12/31	0.030 CFS
DOMESTIC	01/01 12/31	0.040 CFS

PLACE OF USE: IRRIGATION in LEMHI County

T15N R25E S10	SESE	38.00	T15N R25E S11	NESW	40.00
T15N R25E S11	SWSW	40.00	T15N R25E S11	SESW	40.00

STOCKWATER in LEMHI County

T15N R25E S10 SESE

DOMESTIC in LEMHI County

T15N R25E S10 SESE

158 ACRES TOTAL

USE OF THIS RIGHT WITH RIGHT Nos. 74-50A, 74-380A, AND 74-381A IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 158 ACRES IN A SINGLE IRRIGATION SEASON.

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

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use