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MAY 06 2009

DEPARTMENT OF  
WATER RESOURCES

Richard W. Stover, ISB #6801  
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Attorneys for Claimant/Responding Party

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase Nos. 63-31194A & 63-31194B

AFFIDAVIT OF RICHARD W.  
STOVER IN SUPPORT OF SUNDANCE  
INVESTMENTS LTD'S MOTION FOR  
SUMMARY JUDGMENT

STATE OF IDAHO                    )  
                                          ) ss:  
County of Ada                    )

Richard W. Stover, being first duly sworn upon oath, deposes and says:

1. I am an attorney duly authorized to practice law before this Court and all Courts within the state of Idaho. I am one of the attorneys of record for the Claimant/Responding Party Sundance Investments LTD. and, as such, I am familiar with the facts and circumstances

surrounding this matter. The statements contained herein are made of my own personal knowledge and are true and correct to the best of my belief and information.

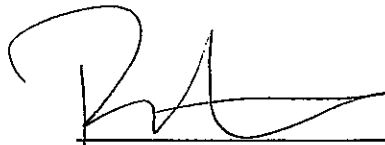
2. Attached hereto as Exhibit "A" is a true and correct copy the Idaho Department of Water Resources' Preliminary Order Correcting License, dated February 1, 2000.

3. Attached hereto as Exhibit "B" is a true and correct copy of Amended Water Right License no. 63-10666, dated February 1, 2000, issued to L. Darwin McKay.

4. Attached hereto as Exhibits "C-1" through "C-8" are true and correct copies of Idaho Department of Water Resources' water rights reports and Pedigree Search for water right 63-10666 and 63-31194.

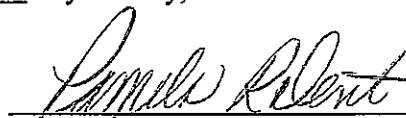
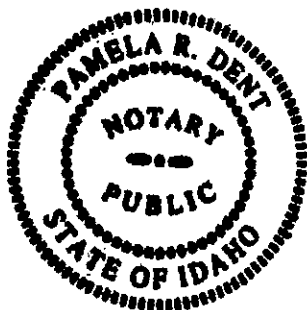
5. Attached hereto as Exhibit "D" is a true and correct copy of the transcript of the deposition of Jack Miller, taken on April 20, 2009.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.



Richard W. Stover

Subscribed and sworn to before me this 5<sup>th</sup> day of May, 2009.



Notary Public for Idaho

Residing at: Nampa ID

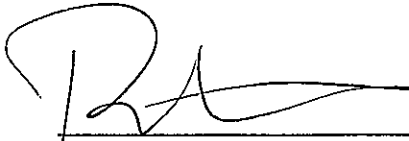
My commission expires: 10-24-2012

**CERTIFICATE OF MAILING**

I certify that a true and correct copy of the **AFFIDAVIT OF RICHARD W. STOVER IN SUPPORT OF SUNDANCE INVESTMENTS LTD'S MOTION FOR SUMMARY JUDGMENT** was mailed on May 5<sup>th</sup>, 2009, with sufficient first-class postage prepaid to the following:

John C. Gould  
Ringert Clark Chartered  
P.O. Box 2773  
Boise, Idaho 83701

Director of IDWR  
P.O. Box 83720  
Boise, Idaho 83720-0098

  
\_\_\_\_\_  
Richard W. Stover

## **EXHIBIT “A”**

BEFORE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF PETITION TO  
CORRECT WATER RIGHT LICENSE  
SUBMITTED BY DARWIN MC KAY

)  
)  
)  
)  
**PRELIMINARY ORDER  
CORRECTING LICENSE**

This matter having come before the Department of Water Resources (Department) as a result of the filing of a petition to correct a water right license, the Department makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. On January 5, 2000, Darwin Mc Kay (petitioner) filed a petition to correct Water Right License 63-10666 (license) by removing certain approval conditions.
2. On August 23, 1995, the Department issued Water Right License 63-10666 to the petitioner with Approval Conditions 4 and 5 as follows:

The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right.

This right to divert groundwater shall not be used if the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use without approval of the Department.

3. When issued on October 6, 1988, Permit 63-10666 did not have approval conditions requiring the use of surface water in conjunction with the groundwater use developed under the permit.
4. When amended on November 22, 1989, Permit 63-10666 did not have approval conditions requiring the use of surface water in conjunction with the groundwater use developed under the permit.
5. The Department field examiner who verified the water use developed under Permit 63-10666 in 1995 reported, "Other water source is Nampa-Meridian Irrigation District."
6. On January 31, 2000, Nampa & Meridian Irrigation District reported to the Department that it has not delivered water to the place of use for the license since 1989, the first irrigation season after Permit 63-10666 was issued.
7. Water Right 63-10666 was not developed for use in conjunction with surface water.

ORDER, Page 1

MICROFILMED

FEB 03 2000

EXHIBIT A

### CONCLUSIONS OF LAW

1. The Department incorrectly applied the information reported by the field examiner about the use of surface water in conjunction with the ground water use developed under Permit 63-10666.
2. The license does not accurately portray the water use developed by the petitioner in accordance with Permit 63-10666.
3. The Department should rescind Approval Conditions 4 and 5 on the license.
4. To make the license consistent with other ground water irrigation rights not supplemental to surface water, the Department should also revise Approval Condition 6 and report a maximum diversion volume for the water right.

### ORDER

IT IS HEREBY ORDERED that Water Right License 63-10666 issued by the Department on August 23, 1995, is **CORRECTED** by:

**RESCINDING** Approval Conditions 4 and 5;

**REVISING** Approval Condition 6 (Now Approval Condition 4); and

**REPORTING** a maximum diversion volume of 297.0 acre-feet of water.

An Amended Water Right License shall be prepared to incorporate the corrections hereby ordered.

Dated this 1<sup>st</sup> day of February, 2000.

  
NORMAN C. YOUNG  
Administrator, Water Management Division

## **EXHIBIT “B”**

State of Idaho  
Department of Water Resources

# Water Right License

AMENDED

AMENDED

WATER RIGHT NO. 63-10666

Priority: July 22, 1988

Maximum Diversion Rate:

0.84 CFS

Maximum Diversion Volume:

297.0 AF

This is to certify, that L DARWIN MC KAY

3220 E LAKE HAZEL RD

MERIDIAN ID 83642

has complied with the terms and conditions of the permit, issued pursuant to Application for Permit dated July 22, 1988; and has submitted Proof of Beneficial Use on August 21, 1991. An examination indicates that the works have a diversion capacity of 0.840 cfs of water from a GROUNDWATER source, and a water right has been established as follows:

| <u>BENEFICIAL USE</u> | <u>PERIOD OF USE</u> | <u>RATE OF DIVERSION</u> | <u>ANNUAL VOLUME</u> |
|-----------------------|----------------------|--------------------------|----------------------|
| IRRIGATION            | 03/15 to 11/15       | 0.84 CFS                 | 297.0 AF             |

LOCATION OF POINT(S) OF DIVERSION:

NENW , Sec. 21, Township 03N, Range 01E  
ADA County

PLACE OF USE: IRRIGATION

| <u>TWN</u> | <u>RGE</u> | <u>SEC</u> | <u>ACRES</u> | <u>ACRES</u> | <u>ACRES</u> | <u>TOTAL</u> |
|------------|------------|------------|--------------|--------------|--------------|--------------|
| 03N        | 01E        | 21         | NENW 28      | SENW 38      |              | 66           |

Total number of acres irrigated: 66

## CONDITIONS OF APPROVAL AND REMARKS

1. This water right is appurtenant to the described place of use.
2. This right is subject to all prior water rights and may be forfeited by five years of non-use.
3. Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
4. This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands above.

This license is issued pursuant to the provisions of Section 42-219, Idaho Code. Witness the seal and signature of the Director, affixed at Boise, this 15<sup>th</sup> day of FEBRUARY, 2000.

Acting for KARL J. DREHER, DIRECTOR

FEB 03 2000

## **EXHIBIT “C-1”**

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-31194

WATER RIGHT NUMBER: 63-31194

| <u>Owner Type</u> | <u>Name and Address</u>                                                                                              |
|-------------------|----------------------------------------------------------------------------------------------------------------------|
| Current Owner     | L DARWIN MC KAY<br>6100 S EAGLE RD<br>MERIDIAN, ID 83642<br>(208)888-3760                                            |
| Present Owner     | SUNDANCE INVESTMENT LTD PARTNERSHIP<br>C/O RYAN ANDERSON<br>9100 W BLACKEAGLE DR<br>BOISE, ID 83709<br>(208)322-7300 |

Priority Date: 07/22/1988

Basis: License

Status: Active

| <u>Source</u> | <u>Tributary</u> |
|---------------|------------------|
| GROUND WATER  |                  |

| <u>Beneficial Use</u> | <u>From</u> <u>To</u>   | <u>Diversion Rate</u> | <u>Annual Volume</u> |
|-----------------------|-------------------------|-----------------------|----------------------|
| IRRIGATION            | 03/15 to 11/15          | 0.620 CFS             | 218.20 AF            |
|                       | <u>Total Diversion:</u> | 0.620 CFS             | 218.20 AF            |

Location of Point(s) of Diversion

|              |            |                                 |
|--------------|------------|---------------------------------|
| GROUND WATER | NE1/4NW1/4 | Sec. 21, Twp 03N, Rge 01E, B.M. |
| ADA County   |            |                                 |

Place of Use

IRRIGATION

| Twp | Rge | Sec | NE |    |    |    | NW   |    |    |    | SW   |    |    |    | SE |    |    |    | Totals |
|-----|-----|-----|----|----|----|----|------|----|----|----|------|----|----|----|----|----|----|----|--------|
|     |     |     | NE | NW | SW | SE | NE   | NW | SW | SE | NE   | NW | SW | SE | NE | NW | SW | SE |        |
| 03N | 01E | 21  |    |    |    |    | 20.5 |    |    |    | 28.0 |    |    |    |    |    |    |    | 48.5   |

Total Acres: 48.5

Conditions of Approval:

Remarks:

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-31194

Comments:

1. PSKAGGS 3/30/2001 Ownership Splits

Comment: Right 63-31194 is the balance of Right 63-10666C following two ownership splits resulting in subsequent Rights 63-31195 & 63-31196.

2. jpeppers 11/1/2004 owner change

Comment: The owner change processed in September 2003 to Sundance Investment has been changed back to the previous owner pending additional documentation of the change. There is a dispute between the new landowner and the previous recorded owner, Darwin McKay, who maintains that the water right was developed and is owned independent of the land. This issue may need a court resolution. Any transfers involving this right will need to be held pending resolution of the ownership issue.

Water Supply Bank:

## **EXHIBIT “C-2”**

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-31195

WATER RIGHT NUMBER: 63-31195

| <u>Owner Type</u> | <u>Name and Address</u>                                                                           |
|-------------------|---------------------------------------------------------------------------------------------------|
| Original Owner    | L DARWIN MC KAY<br>6100 S EAGLE RD<br>MERIDIAN, ID 83642<br>(208)888-3760                         |
| Current Owner     | DEVELOPERS DIVERSIFIED REALTY<br>455 E 500 S STE 400<br>SALT LAKE CITY, UT 84111<br>(801)363-5555 |

Priority Date: 07/22/1988

Basis: License

Status: Abandoned

| <u>Source</u> | <u>Tributary</u> |
|---------------|------------------|
| GROUND WATER  |                  |

| <u>Beneficial Use</u> | <u>From</u> <u>To</u>   | <u>Diversion Rate</u> | <u>Annual Volume</u> |
|-----------------------|-------------------------|-----------------------|----------------------|
| IRRIGATION            | 03/15 to 11/15          | 0.060 CFS             | 22.50 AF             |
|                       | <u>Total Diversion:</u> | 0.060 CFS             | 22.50 AF             |

Location of Point(s) of Diversion

|              |            |                                 |
|--------------|------------|---------------------------------|
| GROUND WATER | NE1/4NW1/4 | Sec. 21, Twp 03N, Rge 01E, B.M. |
| ADA County   |            |                                 |

Place of Use

IRRIGATION

| Twp | Rge | Sec | NE |    |    |    | NW  |    |    |    | SW |    |    |    | SE |    |    |    | Totals |
|-----|-----|-----|----|----|----|----|-----|----|----|----|----|----|----|----|----|----|----|----|--------|
|     |     |     | NE | NW | SW | SE | NE  | NW | SW | SE | NE | NW | SW | SE | NE | NW | SW | SE |        |
| 03N | 01E | 21  |    |    |    |    | 5.0 |    |    |    |    |    |    |    |    |    |    |    | 5.0    |

Total Acres: 5

Conditions of Approval:

Remarks:

Comments:

1. PSKAGGS 3/30/2001 Ownership Split

Comment: Right 63-31195 is an ownership split of Right 63-10666C abandoned as mitigation for Permit 63-12513.

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IDAHO DEPARTMENT OF WATER RESOURCES  
Water Right Report 63-31195

Water Supply Bank:

## **EXHIBIT “C-3”**

## IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-31196

WATER RIGHT NUMBER: 63-31196

| <u>Owner Type</u> | <u>Name and Address</u>                                                                                                                                                      |
|-------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Original Owner    | L DARWIN MC KAY<br>6100 S EAGLE RD<br>MERIDIAN, ID 83642<br>(208)888-3760                                                                                                    |
| Current Owner     | CORP OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF THE<br>LATTER DAY SAINTS A UTAH CORP SOLE<br>2710 W SUNRISE RIM RD STE 200<br>BOISE, ID 83705<br>(208)342-2735 |

Priority Date: 07/22/1988

Basis: License

Status: Abandoned

| <u>Source</u> | <u>Tributary</u> |
|---------------|------------------|
| GROUND WATER  |                  |

| <u>Beneficial Use</u> | <u>From</u> <u>To</u>   | <u>Diversion Rate</u> | <u>Annual Volume</u> |
|-----------------------|-------------------------|-----------------------|----------------------|
| IRRIGATION            | 03/15 to 11/15          | 0.010 CFS             | 4.50 AF              |
|                       | <u>Total Diversion:</u> | 0.010 CFS             | 4.50 AF              |

Location of Point(s) of Diversion

|              |            |                                 |
|--------------|------------|---------------------------------|
| GROUND WATER | NE1/4NW1/4 | Sec. 21, Twp 03N, Rge 01E, B.M. |
| ADA County   |            |                                 |

Place of Use

IRRIGATION

| Twp | Rge | Sec | NE |    |    |    | NW  |    |    |    | SW |    |    |    | SE |    |    |     | Totals |
|-----|-----|-----|----|----|----|----|-----|----|----|----|----|----|----|----|----|----|----|-----|--------|
|     |     |     | NE | NW | SW | SE | NE  | NW | SW | SE | NE | NW | SW | SE | NE | NW | SW | SE  |        |
| 03N | 01E | 21  |    |    |    |    | 1.0 |    |    |    |    |    |    |    |    |    |    | 1.0 |        |

Total Acres: 1

Conditions of Approval:Remarks:Comments:

1. PSKAGGS 3/30/2001 Ownership Split  
 Comment: Right 63-31196 is an ownership split of Right 63-10666C abandoned as mitigation for Permit 63-12604.

Page 2

IDAHO DEPARTMENT OF WATER RESOURCES  
Water Right Report 63-31196

Water Supply Bank:

## **EXHIBIT “C-4”**

## IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666C

WATER RIGHT NUMBER: 63-10666C

|                   |                                                                           |
|-------------------|---------------------------------------------------------------------------|
| <u>Owner Type</u> | <u>Name and Address</u>                                                   |
| Current Owner     | L DARWIN MC KAY<br>6100 S EAGLE RD<br>MERIDIAN, ID 83642<br>(208)888-3760 |

Priority Date: 07/22/1988

Basis: License

Status: Parent

|               |                  |
|---------------|------------------|
| <u>Source</u> | <u>Tributary</u> |
| GROUND WATER  |                  |

|                       |                         |                       |                      |
|-----------------------|-------------------------|-----------------------|----------------------|
| <u>Beneficial Use</u> | <u>From</u> <u>To</u>   | <u>Diversion Rate</u> | <u>Annual Volume</u> |
| IRRIGATION            | 03/15 to 11/15          | 0.690 CFS             | 245.20 AF            |
|                       | <u>Total Diversion:</u> | 0.690 CFS             | 245.20 AF            |

Location of Point(s) of Diversion

|              |            |                                 |
|--------------|------------|---------------------------------|
| GROUND WATER | NE1/4NW1/4 | Sec. 21, Twp 03N, Rge 01E, B.M. |
| ADA County   |            |                                 |

Place of Use

IRRIGATION

| Twp | Rge | Sec | NE |    |    |    | NW   |    |    |    | SW   |    |    |    | SE |    |    |    | Totals |
|-----|-----|-----|----|----|----|----|------|----|----|----|------|----|----|----|----|----|----|----|--------|
|     |     |     | NE | NW | SW | SE | NE   | NW | SW | SE | NE   | NW | SW | SE | NE | NW | SW | SE |        |
| 03N | 01E | 21  |    |    |    |    | 26.5 |    |    |    | 28.0 |    |    |    |    |    |    |    | 54.5   |

Total Acres: 64.5

Conditions of Approval:

1. This water right is appurtenant to the described place of use.  
This right is subject to all prior water rights and may be forfeited by five years of non-use.  
Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.
2. R65 This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands above.

Remarks:

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666C

Comments:

1. VAULT 11/15/1991 Proof of Beneficial Use Rcvd

Comment: Proof of Beneficial Use Rcvd

2. PSKAGGS 7/17/2000 TRANSFER 5739

Comment: Transfer 5739 changes the point of diversion & place of use under a portion of Right 63-10666, splitting the right into Parts A & B.

3. PSKAGGS 3/28/2001 8:00:54 AM Transferred Right

Comment: This is now an approved transfer, transfer number = 68530

Water Supply Bank:

## **EXHIBIT “C-5”**

## IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666D

WATER RIGHT NUMBER: 63-10666D

| <u>Owner Type</u> | <u>Name and Address</u>                                                   |
|-------------------|---------------------------------------------------------------------------|
| Current Owner     | TURF CO INC<br>6100 S EAGLE RD<br>MERIDIAN, ID 83642                      |
| Current Owner     | L DARWIN MC KAY<br>6100 S EAGLE RD<br>MERIDIAN, ID 83642<br>(208)888-3760 |

Priority Date: 07/22/1988

Basis: License

Status: Active

| <u>Source</u> | <u>Tributary</u> |
|---------------|------------------|
|---------------|------------------|

GROUND WATER

| <u>Beneficial Use</u> | <u>From</u> <u>To</u>   | <u>Diversion Rate</u> | <u>Annual Volume</u> |
|-----------------------|-------------------------|-----------------------|----------------------|
| IRRIGATION            | 03/15 to 11/15          | 0.130 CFS             | 45.00 AF             |
|                       | <u>Total Diversion:</u> | 0.130 CFS             | 45.00 AF             |

Location of Point(s) of Diversion

|              |                 |         |          |               |
|--------------|-----------------|---------|----------|---------------|
| GROUND WATER | NE1/4NW1/4SW1/4 | Sec. 4, | Twp 02N, | Rge 01E, B.M. |
| ADA County   |                 |         |          |               |

Place of Use

IRRIGATION

| Twp | Rge | Sec | NE |    |    |    | NW |    |    |    | SW   |      |    |    | SE |    |    |    | Totals |
|-----|-----|-----|----|----|----|----|----|----|----|----|------|------|----|----|----|----|----|----|--------|
|     |     |     | NE | NW | SW | SE | NE | NW | SW | SE | NE   | NW   | SW | SE | NE | NW | SW | SE |        |
| 02N | 01E | 4   |    |    |    |    |    |    |    |    | 15.0 | 40.0 |    |    |    |    |    |    | 55.0   |

Total Acres: 55

Conditions of Approval:

1. T08 Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
2. 104 If the surface water right(s) appurtenant to the place of use is sold, transferred, leased or used on any other place of use, this right to divert groundwater shall not be used without an approved transfer pursuant to Section 42-222, Idaho Code, or approval of the Department if a transfer is not required.
3. 01Q After specific notification by the department, the right holder shall measure the diversion or shall enter into an agreement with the department to determine the amount of water diverted from power records and shall annually report the information to the Department.
4. R65 This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands above.

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666D

5. R19 The right holder shall maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works.
6. 065 The right holder shall use the full allotment of appurtenant surface water rights in conjunction with groundwater diverted under this right and shall only divert groundwater under this right when water from the appurtenant surface water rights cannot be delivered to the right holder.
7. X61 The period of use for the irrigation described in this approval may be extended to a beginning date of 3/1 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before 3/15 is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date of this approval.
8. T07 The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.

Remarks:

Comments:

1. VAULT 11/15/1991 Proof of Beneficial Use Rcvd

Comment: Proof of Beneficial Use Rcvd

2. PSKAGGS 7/17/2000 TRANSFER 5739

Comment: Transfer 5739 changes the point of diversion & place of use under a portion of Right 63-10666, splitting the right into Parts A & B.

3. PSKAGGS 3/28/2001 8:00:55 AM Transferred Right

Comment: This is now an approved transfer, transfer number = 68530

Water Supply Bank:

## **EXHIBIT “C-6”**

## IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666A

WATER RIGHT NUMBER: 63-10666A

|                   |                                                                                |
|-------------------|--------------------------------------------------------------------------------|
| <u>Owner Type</u> | <u>Name and Address</u>                                                        |
| Current Owner     | L DARWIN MC KAY<br>3220 E LAKE HAZEL RD<br>MERIDIAN, ID 83642<br>(208)888-3760 |

Priority Date: 07/22/1988

Basis: License

Status: Parent

|               |                  |
|---------------|------------------|
| <u>Source</u> | <u>Tributary</u> |
|---------------|------------------|

GROUND WATER

|                       |                         |                       |                      |
|-----------------------|-------------------------|-----------------------|----------------------|
| <u>Beneficial Use</u> | <u>From</u> <u>To</u>   | <u>Diversion Rate</u> | <u>Annual Volume</u> |
| IRRIGATION            | 3/15 to 11/15           | 0.820 CFS             | 290.20 AF            |
|                       | <u>Total Diversion:</u> | 0.820 CFS             | 290.20 AF            |

Location of Point(s) of Diversion

|              |            |                                 |
|--------------|------------|---------------------------------|
| GROUND WATER | NE1/4NW1/4 | Sec. 21, Twp 03N, Rge 01E, B.M. |
| ADA County   |            |                                 |

Place of Use

IRRIGATION

| Twp | Rge | Sec | NE |    |    |    | NW   |    |    |    | SW   |    |    |    | SE |    |    |    | Totals |      |
|-----|-----|-----|----|----|----|----|------|----|----|----|------|----|----|----|----|----|----|----|--------|------|
|     |     |     | NE | NW | SW | SE | NE   | NW | SW | SE | NE   | NW | SW | SE | NE | NW | SW | SE |        |      |
| 03N | 01E | 21  |    |    |    |    | 26.5 |    |    |    | 38.0 |    |    |    |    |    |    |    |        | 64.5 |

Total Acres: 64.5

Conditions of Approval:

1. R65 This right when combined with all other rights shall provide no more than 0.02 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands above.
2. This water right is appurtenant to the described place of use.  
This right is subject to all prior water rights and may be forfeited by five years of non-use.  
Modifications to or variance from this license must be made within the limits of Section 42-222, Idaho Code, or the applicable Idaho law.

Remarks:

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666A

Comments:

1. VAULT 11/15/1991 Proof of Beneficial Use Rcvd

Comment: Proof of Beneficial Use Rcvd

2. PSKAGGS 7/17/2000 TRANSFER 5739

Comment: Transfer 5739 changes the point of diversion & place of use under a portion of Right 63-10666, splitting the right into Parts A & B.

Water Supply Bank:

## **EXHIBIT “C-7”**

## IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666B

WATER RIGHT NUMBER: 63-10666B

| <u>Owner Type</u> | <u>Name and Address</u>                                                                                                                           |
|-------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| Current Owner     | CORP OF THE PRESIDING BISHOP<br>CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS<br>50 E NORTH TEMPLE ST<br>SALT LAKE CITY, UT 84150<br>(801) 240-4074 |
| Original Owner    | L DARWIN MC KAY<br>3220 E LAKE HAZEL RD<br>MERIDIAN, ID 83642<br>(208)888-3760                                                                    |

Priority Date: 07/22/1988

Basis: License

Status: Active

| <u>Source</u> | <u>Tributary</u> |
|---------------|------------------|
| GROUND WATER  |                  |

| <u>Beneficial Use</u> | <u>From</u> <u>To</u>   | <u>Diversion Rate</u> | <u>Annual Volume</u> |
|-----------------------|-------------------------|-----------------------|----------------------|
| IRRIGATION            | 3/15 to 11/15           | 0.020 CFS             | 6.80 AF              |
|                       | <u>Total Diversion:</u> | 0.020 CFS             | 6.80 AF              |

Location of Point(s) of Diversion

|              |                 |         |          |               |
|--------------|-----------------|---------|----------|---------------|
| GROUND WATER | NE1/4SE1/4SE1/4 | Sec. 4, | Twp 03N, | Rge 01W, B.M. |
| ADA County   |                 |         |          |               |

Place of Use

IRRIGATION

| Twp | Rge | Sec | NE |    |    |    | NW |    |    |    | SW |    |    |    | SE |    |    |    | Totals |     |
|-----|-----|-----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|--------|-----|
|     |     |     | NE | NW | SW | SE | NE | NW | SW | SE | NE | NW | SW | SE | NE | NW | SW | SE |        |     |
| 03N | 01W | 4   |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    |    | 1.5    | 1.5 |

Total Acres: 1.5

Conditions of Approval:

1. T07 The right holder shall accomplish the change authorized by this transfer within one (1) year of the date of this approval.
2. The period of use for the irrigation described in this approval may be extended to a beginning date of 3/1 provided that beneficial use of the water can be shown and other elements of the right are not exceeded. The use of water before 3/15 is subordinate to all water rights having no subordinated early irrigation use and a priority date earlier than the date of this approval.
3. T08 Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.
4. 046 Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code.

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-10666B

5. R69 This right when combined with all other rights shall provide no more than 0.03 cfs per acre nor more than 4.5 afa per acre at the field headgate for irrigation of the lands above.

Remarks:

Comments:

1. VAULT 11/15/1991 Proof of Beneficial Use Rcvd

Comment: Proof of Beneficial Use Rcvd

2. PSKAGGS 7/17/2000 TRANSFER 5739

Comment: Transfer 5739 changes the point of diversion & place of use under a portion of Right 63-10666, splitting the right into Parts A & B.

Water Supply Bank:

## **EXHIBIT “C-8”**

# **Pedigree Search (History of Water Right Number splits)**

## **Adjudication Pedigree for 63-10666A**

- Water Right Number / Status /Reason for split**
- 63-10666A /Parent /Transfer**
  - 63-10666C /Parent /Ownership Change**
    - 63-31194 /Active /Ownership Change**
    - 63-31195 /Abandoned /Ownership Change**
    - 63-31196 /Abandoned /Ownership Change**
  - 63-10666D /Active /Transfer**

## **Water Right Pedigree for 63-10666A**

- Water Right Number / Status /Reason for split**
- 63-10666A /Parent /Transfer**
  - 63-10666C /Parent /Ownership Change**
    - 63-31194 /Active /Ownership Change**
    - 63-31195 /Abandoned /Ownership Change**
    - 63-31196 /Abandoned /Ownership Change**
  - 63-10666D /Active /Transfer**

## **EXHIBIT “D”**

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA                                 ) Subcases 63-31194A and  
                                              ) 63-31194B  
Case No. 39576                             )  
\_\_\_\_\_)

DEPOSITION OF JACK MILLER

APRIL 20, 2009

REPORTED BY:

JEFF LaMAR, C.S.R. No. 640

Notary Public

| Page 2                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Page 4                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>1 THE DEPOSITION OF JACK MILLER was taken<br/> 2 on behalf of Darwin McKay at the offices of<br/> 3 Ringert Law Chartered, 455 South Third Street,<br/> 4 Boise, Idaho, commencing at 1:32 p.m. on April 20,<br/> 5 2009, before Jeff LaMar, Certified Shorthand<br/> 6 Reporter and Notary Public within and for the<br/> 7 State of Idaho, in the above-entitled matter.</p> <p>8<br/> 9 APPEARANCES:<br/> 10 For Darwin McKay:<br/> 11 RINGERT LAW CHARTERED<br/> 12 BY MR. JON C. GOULD<br/> 13 455 South Third Street<br/> 14 P.O. Box 2773<br/> 15 Boise, Idaho 83701<br/> 16 For Jack Miller:<br/> 17 BARKER, ROSHOLT &amp; SIMPSON LLP<br/> 18 BY MR. ALBERT P. BARKER<br/> 19 1010 West Jefferson, Suite 102<br/> 20 P.O. Box 2139, Boise, Idaho 83701-2139<br/> 21 ///<br/> 22 ///<br/> 23 ///<br/> 24 ///<br/> 25 ///</p> | <p>1 INDEX</p> <p>2<br/> 3 TESTIMONY OF JACK MILLER PAGE<br/> 4 Examination by Mr. Gould 5,58<br/> 5 Examination by Mr. Stover 51<br/> 6<br/> 7 EXHIBITS<br/> 8 1 - Aerial photograph with property 15<br/> 9 description<br/> 10 2 - Letter to Idaho Department of Water 29<br/> 11 Resources for J. Miller, dated<br/> 12 03/23/2000<br/> 13 3 - Conveyance to Ada County Highway 32<br/> 14 District, dated 04/20/2000<br/> 15 4 - Agreement of Co-Tenancy, dated 12/2002 34<br/> 16 5 - Purchase and Sale Agreement, dated 38<br/> 17 01/09/2003<br/> 18 6 - Action by Cotenants, dated 12/2002 39<br/> 19 7 - Memorandum from M. Ballantyne to 40<br/> 20 R. Anderson, dated 09/18/200<br/> 21 8 - Property advertisement 45<br/> 22 9 - Property advertisement 17<br/> 23 10 - Exclusive Sales Listing Agreement, 48<br/> 24 commencing 05/01/2002<br/> 25</p>                                                                                                                                                 |
| Page 3                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Page 5                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <p>1 APPEARANCES (Continued):<br/> 2<br/> 3 For The Sundance Company:<br/> 4 EBERLE, BERLIN, KADING, TURNBOW, McKLEVEEN &amp;<br/> 5 JONES, CHARTERED<br/> 6 BY MR. RICHARD W. STOVER<br/> 7 1111 West Jefferson Street, Suite 530<br/> 8 Post Office Box 1368<br/> 9 Boise, Idaho 83701<br/> 10 Also Present:<br/> 11 Darwin McKay<br/> 12 Chris Anderson<br/> 13<br/> 14<br/> 15<br/> 16<br/> 17<br/> 18<br/> 19<br/> 20<br/> 21<br/> 22<br/> 23<br/> 24<br/> 25</p>                                                                                                                                                                                                                                                                                                                                                                  | <p>1 JACK MILLER,<br/> 2 first duly sworn to tell the truth relating to<br/> 3 said cause, testified as follows:<br/> 4<br/> 5 MR. GOULD: This is the time and place for<br/> 6 the taking of the deposition of Jack Miller.<br/> 7<br/> 8 EXAMINATION<br/> 9 BY MR. GOULD:<br/> 10 Q. Would you please state your name and<br/> 11 spell your last name.<br/> 12 A. Jack Miller, M-i-l-l-e-r.<br/> 13 Q. Please let the record reflect that<br/> 14 this deposition is being conducted pursuant to<br/> 15 Idaho Rules of Civil Procedure and may be used for<br/> 16 purposes stated in the rules.<br/> 17 We are here today to discuss<br/> 18 litigation currently pending regarding the<br/> 19 ownership of a water right claimed by the parties<br/> 20 Darwin McKay and Sundance. That case is currently<br/> 21 being heard in the Snake River Basin Adjudication<br/> 22 court.<br/> 23 Mr. Miller, would you please state<br/> 24 your current address.<br/> 25 A. 940 South Ash Street, Kuna, 83634.</p> |

1 That's Idaho.

2 Q. Have you ever had your deposition  
3 taken before?

4 A. No, sir.

5 Q. Have you ever been a party to  
6 litigation?

7 A. No, sir.

8 Q. Well, just to provide you with some  
9 background, we're taking this deposition as a  
10 fact-finding mission to provide us with some  
11 information you may contain --

12 A. Okay.

13 Q. -- that will assist us in our lawsuit.  
14 As you can see, there's a court reporter  
15 transcribing everything we say. And because of  
16 that, I will ask that we all verbalize our  
17 answers. Obviously, a head nod cannot be  
18 recorded.

19 A. Sure.

20 Q. The only other rule will be that when  
21 I'm speaking, I ask that you don't speak, and vice  
22 versa, while you're giving an answer, I will try  
23 not to interrupt your answer.

24 And at some point I'm going to be  
25 asking you questions, and you'll know where I'm

1 that you bring certain documents.

2 Did you bring any documents with you?

3 MR. BARKER: Counsel, we have assembled  
4 documents that are responsive to the request in  
5 your deposition notice from the files of  
6 Mr. Miller and TCM that currently exist. We have  
7 not provided any communications between counsel.

8 And the one thing that is an addition  
9 that you'll see in this stack that we brought,  
10 there are excerpts from the water rights file.  
11 Those were documents that were assembled by  
12 counsel after we received the initial  
13 communications from you. They were not in the  
14 possession of TCM or Mr. Miller prior to that  
15 time.

16 MR. GOULD: Thank you.

17 And will we have an opportunity to  
18 review those documents?

19 MR. BARKER: They're right here.

20 MR. GOULD: Great.

21 Q. Did you do anything to prepare for  
22 this deposition?

23 A. Just reviewed documents that I had and  
24 discussed those with Mr. Barker.

25 Q. Would you provide us with information

1 going, and it's just human nature to respond. But  
2 if you could provide me the opportunity to finish,  
3 I'll do the same for you.

4 A. Okay.

5 Q. If you need a break, just let us know,  
6 and we can take a break. If you'd like me to  
7 clarify any questions, just ask me to clarify.  
8 You can also ask your counsel if needed. I only  
9 ask that if you do wish to take a break, that you  
10 answer any pending question prior to us taking a  
11 break.

12 I will assume that you understand the  
13 questions if you don't ask for clarification, and  
14 that the answer you give is your best answer based  
15 on your knowledge at this time.

16 Do you have any questions as to what  
17 I've said so far?

18 A. No, sir.

19 Q. Did you receive the deposition notice  
20 that I sent to your counsel?

21 A. Yes.

22 Q. And that was a notice duces tecum?

23 A. I didn't understand what that was,  
24 but...

25 Q. The duces tecum simply is requesting

1 on your education, beginning with high school.

2 A. What would you like to know? Like  
3 where I attended, the years, or --

4 Q. That would be adequate.

5 A. I graduated from high school, Lake  
6 Oswego, Oregon. I went to two junior colleges the  
7 next two years. I went into the service for three  
8 years, returned, and finished my undergraduate  
9 degree at the University of -- or Central  
10 Washington University in Ellensburg, Washington.  
11 Went on and got a master's degree at the  
12 University of New Mexico in communication.

13 Then worked for the next 25, 30  
14 years -- about 30 years. And then I got a degree  
15 in Bible at Boise Bible College here in Boise,  
16 where I was older than all the professors. And  
17 that's the extent.

18 Q. After your junior college education  
19 and your degrees from New Mexico, what did you do  
20 professionally?

21 A. From the University of New Mexico, I  
22 started teaching there. Academia was not what I  
23 wanted to do. Interviewed, got a job with Xerox,  
24 and was moved to El Paso.

25 Do you want to know where I went and

1 all that stuff or --

2 Q. You could just give the title of the  
3 jobs you've held.

4 A. Started out as a sales rep. Went to  
5 corporate headquarters in Rochester, New York, got  
6 a -- I taught the basic and advanced sales schools  
7 and wrote curriculum for them.

8 And what was the rest of -- state your  
9 question again.

10 Q. Professional titles that you have  
11 held.

12 A. Oh. Then I left Rochester and moved  
13 to Boise as a national account sales rep for, I'm  
14 guessing, six years. And then I joined the agent  
15 sales program where I managed as an agent manager  
16 for the next eight years.

17 Left Xerox after 25 years. Worked  
18 here for Boise Office Equipment for a year and a  
19 half, and decided I needed a career change.  
20 Bought a construction business. Did that for  
21 eight years. Then left there, basically retired  
22 at that time, which would have been about -- oh,  
23 I'm guessing about '04, somewhere in there, '05.  
24 And basically been in the ministry one way or  
25 another since then.

1 Q. Now, what was the title you held with  
2 the TCM joint venture?

3 A. I was called, I guess, a general  
4 manager.

5 Q. And --

6 A. Which didn't really mean anything. I  
7 just took care of everything.

8 Q. And how did the TCM joint venture come  
9 about existing?

10 A. You mean how did the actual -- or what  
11 do you call it? -- our law -- partnership  
12 agreement, is that what you're referring to?

13 Q. How did it start off from Day One, the  
14 idea of having the joint venture, the existence?

15 A. I worked with a good friend of mine at  
16 Xerox who bought -- formed a partnership and  
17 bought the 80 acres just west of us. It was  
18 called H.C.M. And was approached by Dennis  
19 Stover, I believe, and Dave Lewis who had that  
20 ownership of that particular 80, and with  
21 information that the next 80 adjacent to it, total  
22 of 160 acres, was up for sale and would I be  
23 interested. And it looked like a good deal after  
24 looking at the different -- you know, the cost of  
25 it.

1 And so Dave Lewis was actually kind of  
2 being the guy that ran that, but he actually kind  
3 of drifted out of it. So I stayed with it, and  
4 talked to a couple of people at Xerox that I  
5 worked with to join in with myself and the people  
6 that were already wanting to do this.

7 Once we got the dollar commitment from  
8 everybody, we then put together a partnership  
9 agreement that had, you know, all the different  
10 things we were to do as a business seeking to make  
11 a profit.

12 Q. And this was around 1978?

13 A. Yes, sir.

14 Q. And did you bring that partnership  
15 agreement with you today?

16 A. I'm sure Mr. Barker has it.

17 MR. BARKER: It's in the stack.

18 MR. GOULD: Will I have an opportunity to  
19 review that after the deposition, or will those  
20 documents be made available for review?

21 MR. BARKER: Sure. Any time you want. I  
22 mean you asked me to bring them to the deposition.  
23 I just did what you asked me. We offered to copy  
24 them and send them ahead of time, and you said  
25 just bring them.

1 MR. GOULD: No, I agree. I was just  
2 wondering if once the deposition ends if you'll be  
3 taking the documents. And if so, if I can make an  
4 arrangement to come by and only review the  
5 documents that I deem relevant.

6 MR. BARKER: Sure. Well, these are  
7 originals. I did not bring any copies. So we can  
8 talk -- you let me know what you want to do.

9 MR. GOULD: I think it will only be a  
10 handful of documents, and it seems a lot smarter.  
11 Great.

12 Q. Do you recall the original parties to  
13 that partnership agreement?

14 A. Pretty much so.

15 Do you want their names?

16 Q. If you can.

17 A. Of course, there was my wife and I.  
18 There were the Del Gadillo's, D-e-l, capital  
19 G-i-l-l-o (sic), I believe. There were three of  
20 them, each a 5 percent owner. There was Chris  
21 Kepus -- Chris and Kathy Kepus, K-e-p-u-s.  
22 They're out of state.

23 There was Al and Pat Sturr. They're  
24 out of state. There was Arch Mehrhoff and wife  
25 Irene. There were two that dropped out. Would

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p style="text-align: right;">Page 14</p> <p>1 have been Randy Grow and his wife and Mike Miller<br/> 2 and his wife. And the two men that we bought the<br/> 3 partnership from assumed their two 10 percent<br/> 4 shareholder portions.<br/> 5 How many we got there?<br/> 6 Q. One, two, three, four, five, six --<br/> 7 seven parties, but some of them are more than one<br/> 8 person.<br/> 9 A. Yeah. There's Darwin and Donna McKay.<br/> 10 Lavenders, Rich and Barbara Lavender. They're in<br/> 11 Montana. I think that's about it.<br/> 12 Q. Okay.<br/> 13 A. If you get -- when you review the<br/> 14 contract, it will have all the names in there and<br/> 15 signatures.<br/> 16 Q. Then the Grows and Mike Miller and his<br/> 17 wife, are they the only parties that didn't<br/> 18 continue with the joint venture to the time it<br/> 19 terminated?<br/> 20 A. Right. And those two were assumed by<br/> 21 the men that we bought the land originally from,<br/> 22 which would be Jim Ballantyne, who's deceased, and<br/> 23 Bruce Pickett, who is deceased.<br/> 24 Q. Did the joint venture own any other<br/> 25 real property other than the 80-acre parcel?</p> | <p style="text-align: right;">Page 16</p> <p>1 of the exhibit, there's an area marked with "Site"<br/> 2 and then an arrow from Overland Road.<br/> 3 Does this area look familiar?<br/> 4 A. Would this be Cloverdale right here<br/> 5 (indicating)?<br/> 6 Q. I believe so.<br/> 7 A. Yeah. I've driven by it a lot over<br/> 8 the last number of years, yeah.<br/> 9 Q. Okay.<br/> 10 A. This particular area here or<br/> 11 (indicating) --<br/> 12 Q. I guess my point is, the area pointing<br/> 13 to "Site," this is not the site?<br/> 14 A. Oh, no, I don't believe it is. Yeah,<br/> 15 we were -- the parcel was actually 100- -- the<br/> 16 farm was actually 160 acres, and we took the east<br/> 17 80. So the west 80 was right up against Eagle and<br/> 18 frontage on Overland. So Cloverdale would be way<br/> 19 beyond us there -- or east of us.<br/> 20 Q. Okay. If I was going to represent to<br/> 21 you that this road is Cloverdale (indicating),<br/> 22 would this then be the west 80 and this be the<br/> 23 east 80?<br/> 24 A. No. If this road was Cloverdale here?<br/> 25 Q. Yes.</p>                                                                            |
| <p style="text-align: right;">Page 15</p> <p>1 A. Homes. As far as I know, just their<br/> 2 personal homes. You mean as --<br/> 3 Q. As a joint venture.<br/> 4 A. No, we just did that one property for<br/> 5 25 years.<br/> 6 (Exhibit 1 marked.)<br/> 7 Q. (BY MR. GOULD): I'll provide you with<br/> 8 Exhibit No. 1, which is an aerial photograph with<br/> 9 a property description.<br/> 10 Can you identify the TCM Joint Venture<br/> 11 property and outline it with this Sharpie.<br/> 12 A. (Draws.)<br/> 13 Q. And so you've drawn a rectangle<br/> 14 placing an X through it off of Eagle Road and<br/> 15 that's --<br/> 16 A. Off Overland. Whoops. Did I goof?<br/> 17 Overland. Yeah, I did the wrong one. Sorry.<br/> 18 Yeah, it would have been here.<br/> 19 Do you want me to just scratch that<br/> 20 out?<br/> 21 Q. Sure.<br/> 22 A. Sorry. I misread. Right here,<br/> 23 Overland. Yeah, it would be like this<br/> 24 (indicating).<br/> 25 Q. And in the exhibit, the aerial photo</p>                                                                                                                                                                          | <p style="text-align: right;">Page 17</p> <p>1 A. Well, I don't -- I don't know how big<br/> 2 this parcel is. I think that's as an exact as I<br/> 3 can get with where we were. I don't know what --<br/> 4 now, Benafel's place is right here (indicating).<br/> 5 Yeah, that should be it. It's probably bigger<br/> 6 than that. It certainly isn't to scale.<br/> 7 (Exhibit 9 marked.)<br/> 8 Q. (BY MR. GOULD): For reference only,<br/> 9 I'm going to show you Exhibit No. 9 -- and we'll<br/> 10 come back to it later. But in essence, it's the<br/> 11 same location map, but the reference it may be<br/> 12 slightly clearer to read here.<br/> 13 A. This would be it right here, I bet.<br/> 14 That little spot right -- that rectangular right<br/> 15 there (indicating) --<br/> 16 Q. Okay.<br/> 17 A. -- would be my guess. And then this<br/> 18 would have been H.C.M. (indicating), because they<br/> 19 were right off Eagle.<br/> 20 Q. Okay. And if I make the<br/> 21 representation that this rectangle is this<br/> 22 rectangle, would you agree with that (indicating)?<br/> 23 A. No. It's close.<br/> 24 Q. Okay.<br/> 25 A. A legal description would certainly --</p> |

1 Q. And are you familiar with the legal  
2 description to that property?

3 A. Not really. I mean I got it on our  
4 different things that we've done over the years.  
5 It's in the stuff that we have.

6 Q. Okay. And pages 2 and 3 of Exhibit 1  
7 are the legal descriptions.

8 Do those look familiar?

9 A. You know, to be honest with you, I'd  
10 have to look at what our description says. I'd  
11 have to look at what I have to be accurate.

12 Q. Exhibit 1. What was the purpose of  
13 forming the joint venture?

14 A. An investment, to make a profit.

15 Q. And when you formed the joint venture,  
16 did you have any timelines for the existence of  
17 the joint venture?

18 A. Basic timelines for it were that when  
19 we sold the property, that was the end of the  
20 joint venture.

21 Q. And would it be fair to classify the  
22 purpose of the joint venture, then, solely to hold  
23 and transfer or convey that property for profit?

24 A. Yes, that could be accurate.

25 Q. And how frequently did you hold

1 A. Well, usually I would send a letter

2 out saying here's the things we need to cover, and  
3 through phone conversations they could get back to  
4 me if there's something specifically I didn't have  
5 and they wanted to talk about it, they'd let me  
6 know. And I'd have that available when they came  
7 to the meeting. So before we set anything, we'd  
8 go through kind of the agenda what we were going  
9 to look at. It was pretty freewheeling, for the  
10 most part.

11 Q. But you actually had a meeting where  
12 there would be people in person? So the meetings  
13 were not necessarily conducted over telephones or  
14 through written correspondence?

15 A. Virtually all of them, they would come  
16 to Boise. Now, if -- there were rare occasions  
17 where -- I'd say most of them they came here,  
18 almost all of them.

19 Now, I would usually -- I mean in  
20 addition to that, I would make phone calls to  
21 everybody about the meeting to make sure and see  
22 if they were or were not coming and to get any  
23 kind of data that people wanted to talk about. I  
24 saw my position as really "What issues do you  
25 have? Let's deal with them."

1 meetings?

2 A. Well, we usually had one -- not  
3 "usually." We had at least one a year. You know,  
4 if there was -- when it got down to -- we had  
5 some, you know, offers, some hard offers probably  
6 in '03, '04, those -- or '02, '03, somewhere in  
7 that time frame. So we obviously had to meet. So  
8 not all could meet because we were pretty  
9 scattered out. So "scattered out," meaning that  
10 was half the partnership was out of state. So at  
11 least once a year.

12 Q. Okay. And were there positions or  
13 titles for the members?

14 A. No. No, sir.

15 Q. Okay. And so there was -- at these  
16 meetings there was no voting for positions?

17 A. No, sir.

18 Q. And how did you come about being the  
19 general manager?

20 A. Well, Darwin wouldn't take it, nobody  
21 else would take it, so I was the -- literally,  
22 nobody else would do it. Yeah, nobody else would  
23 do it, so I kind of did it.

24 Q. And how was the communication  
25 completed at these meetings?

1 Q. And were there any notes or memoranda  
2 generated at these meetings or resulting from  
3 these meetings?

4 A. If it required a vote, I would ask  
5 them to vote on something -- well, let me back up.  
6 We had payments. So I had a memo that would go  
7 out. Initially, we had like three payments a year  
8 that had to be made, maybe four. And once we paid  
9 out some of those, cashed them out or finished the  
10 term of them, then we would have whatever was  
11 left, like two to maybe three different notes  
12 would go out per year reminding everybody they  
13 owed money, to please send it.

14 So yes, there was communiqué. I  
15 guess -- I forgot about that. But there was  
16 communiqué at least three times a year because of  
17 the payments we had.

18 Q. Okay. And outside of the meeting,  
19 these structured meetings, were there ever times  
20 when decisions were made outside of those  
21 meetings?

22 A. You mean like that I would make?

23 Q. I would classify it as a joint venture  
24 decision.

25 A. Well, yeah. For example, we had two

1 places we rented out, and we had renters that  
2 would trash the house. I would get ahold of some  
3 people locally and make a decision to get them  
4 involved to help do this, because it wasn't just  
5 me all the time.

6 When it got down to, you know, the  
7 final sale, then I had authority to sign for the  
8 sale of the property. And each of the members, in  
9 turn, signed -- gave me that authority to do it,  
10 because in our partnership nothing could happen,  
11 if you get it and read it, without at least  
12 70 percent of the vote.

13 Q. Okay. Now, the property -- you stated  
14 there are two rentals on the property?

15 A. Well, actually, we had -- yeah, two  
16 rentals and then we leased the ground rights for  
17 sod that Darwin had, Patterson's Pasture did,  
18 McGurdio, I think, grew various crops on it, but  
19 that was their business. All I cared about is  
20 that they kept the property looking kind of decent  
21 and paid on time.

22 Q. And any profits or revenues generated  
23 from these leasing, how were those distributed?

24 A. The way we did it, the way the  
25 partnership agreed to do this is we didn't care to

1 make a profit on people that would farm it. We  
2 cared that they paid enough that we didn't have to  
3 pay taxes, water taxes, that kind of thing. So it  
4 really didn't generate an income at all.  
5 Actually, we probably lost money over the years on  
6 it.

7 Q. Okay. Who was responsible for  
8 generating the lease agreements?

9 A. Well, nobody was. So I had to do it.  
10 So with each lease that I wrote on -- wrote up,  
11 whether it was for the house -- particularly for  
12 the land, was that I required that they -- two  
13 things: They pay on time, and that if they did --  
14 they could do -- that we would have the option to  
15 have a 30-day termination of that agreement if we  
16 had a buyer, because I didn't want anything to  
17 impede the sale of the property or scare off a  
18 buyer.

19 Q. Was there a typical term to your  
20 leases?

21 A. Usually there was a year.

22 Q. One year?

23 A. We renewed them every year.

24 Q. And just in general, how did the --  
25 let me strike that.

1 Were there any conveyances of the  
2 joint venture property or parcel prior to the  
3 conveyance to Sundance?

4 A. "Conveyance" meaning the sale of?

5 Q. Sale, transfer.

6 A. Idaho Power wanted to put some power  
7 lines on our property -- across our property, and  
8 the same with the people to the west of us. And  
9 they paid us to do that, yeah. We didn't seek it.  
10 They basically said "This is the way it will be."

11 We also -- they also took -- they  
12 wanted a pond for runoff when they got four lanes  
13 on there. That happened on our property. I think  
14 that was the same -- same deal, though.

15 Q. So -- I'm sorry.

16 A. But we didn't go out and look for  
17 anybody to sell off parcels of it. The  
18 partnership wanted to get rid of all of it if we  
19 sell it.

20 Q. So at some point you initiated a lease  
21 to Darwin McKay --

22 A. Uh-huh.

23 Q. -- as a turf grower?

24 A. Yes, sir.

25 Q. And when did that begin?

1 A. I think it was 1989.

2 Q. And how long did that continue for?

3 A. I'm not sure because I'm -- I believe  
4 it was '99.

5 Q. And do you have the lease agreement  
6 that you guys operated under?

7 A. Uh-huh.

8 Q. And there was a written lease  
9 agreement?

10 A. Yes, sir.

11 Q. Okay.

12 A. I don't have all of them, but I've got  
13 several.

14 Q. And this -- just in general, what did  
15 that lease include?

16 A. The name of the lessee, the name of  
17 the lessor, the dates, and then I always had two  
18 little sentences or small paragraphs, and I just  
19 mentioned one -- both of them, but one of them was  
20 the dates that the money was due. I didn't want  
21 to have to go after it. I wanted them to make  
22 sure I could get it and get it on time.

23 And the second thing is is that we  
24 reserved the right to terminate that lease at any  
25 time if we had a pending sale. And if it was in

1 the middle of a season, like Darwin and his turf  
2 or something, then we would prorate whatever it  
3 took. But we were not going to enter into a lease  
4 where, you know, they would dictate to us, because  
5 we're the ones that, you know, purchased it and  
6 wanted to sell it eventually.

7 Q. Okay. And --

8 A. And then we had a place for signatures  
9 for both.

10 Q. Okay. Darwin's lease, he was leasing  
11 the ground for agricultural purposes?

12 A. Yes, sir.

13 Q. Okay. And did the lease contain any  
14 discussion regarding water rights?

15 A. Our lease to him? No, sir.

16 Q. And were you aware that Darwin had  
17 earlier applied for a water right?

18 A. On our 80?

19 Q. Well, on a different 80.

20 A. No.

21 Q. Okay. Were you aware that he applied  
22 for a water right on your 80?

23 A. Well, this gets a little sticky.

24 Darwin came to me and asked if he could drill a  
25 well on our property. And I said to him, "I have

1 no problem with that as long as you pay the cost  
2 of it and it stays attached to TCM Joint Venture,  
3 the actual land itself."

4 And if he understood that, I had no  
5 problem at all with him putting a well on there,  
6 because it benefited him, which I wanted to help  
7 him as a lessee, and it helped us because it was a  
8 selling tool, helped keep the place green, if you  
9 will. So...

10 Q. And historically -- I guess in the  
11 years prior while you owned that land, did you  
12 have any problems with water delivery from Nampa  
13 and Meridian Irrigation District?

14 A. Not that I'm aware of.

15 Q. And did Darwin construct a well on  
16 that property?

17 A. He sure did.

18 Q. And it's your belief that then under  
19 your agreement that the well became TCM Joint  
20 Venture's well?

21 A. Correct.

22 Q. And did you discuss any water right  
23 that might be developed?

24 A. No, sir.

25 Q. And were there any discussions or

1 communication regarding a water right acquired by  
2 the lessee, who was Darwin McKay at the time?

3 A. Not that I'm aware of.

4 Q. And was there any -- when the McKay  
5 lease ran, do you know when that lease -- I guess  
6 you said you believe it terminated in 1999; is  
7 that correct?

8 A. I think it was then.

9 Q. And at the time that lease expired,  
10 did Darwin make any attempt to take the well with  
11 him?

12 A. Not that I'm aware of.

13 Q. And were there any future discussions  
14 about the well?

15 A. The well itself?

16 Q. The well itself.

17 A. No, sir.

18 Q. Were there any discussions with the  
19 other members of the joint venture regarding  
20 Darwin's constructing a well on the property?

21 A. Yes, sir, there was. In I think 1988  
22 I wrote a memo to our partnership saying he was  
23 interested in doing a well and I thought it was a  
24 good idea because once Darwin left or we sold the  
25 property, we would have the well.

1 I did it again I believe in '88,  
2 somewhere in there. And in fact, I think I had  
3 Darwin kind of discuss, as I recall, you know,  
4 what he was doing with the property as well as the  
5 well.

6 So there was no -- no push back from  
7 the partnership at all relative to the well. And  
8 probably because he trusted me to tell him, you  
9 know, what was going on. And I had no problem  
10 with it at the time.

11 Q. So outside of the two memorandums that  
12 you prepared, were there any other written  
13 documents concerning the construction or existence  
14 of this well?

15 A. Not that I'm aware of.

16 Q. And did the members of the joint  
17 venture, did they approve the construction of the  
18 well?

19 A. Yeah.

20 (Exhibit 2 marked.)

21 Q. (BY MR. GOULD): Do you recall --  
22 well, first of all, I'll ask you to look at  
23 Deposition Exhibit No. 2.

24 And do you recognize that statement?

25 A. I do.

1 Q. And is that your signature on it?

2 A. Yes, sir.

3 Q. And why was that statement created?

4 A. Well, this was in 2000; right? Why  
5 was it done? I'm not sure I know why, other than  
6 Darwin came to me and said that he wanted to  
7 transfer some of the water from that well to  
8 somewhere -- to some other locations and asked if  
9 I had any problem with that.

10 And I said, "Well, how do you do that?  
11 Do you run a pipe to the different locations?"

12 And he said, "No, I can just transfer  
13 it."

14 And I said, "Well, again, as long as  
15 it doesn't affect the sale of our property, I  
16 don't really have a problem with that."

17 But there was -- there was -- so that  
18 was his intent, from what he told me. So with  
19 that understanding of it, I said, "Sure. You  
20 could do that."

21 But nothing was mentioned about money  
22 would transfer on that. So, you know -- and  
23 again, trying to help Darwin, I didn't have a  
24 problem with it.

25 Q. At any time did the joint venture pay

1 money to Mr. McKay for the development of a water  
2 right on that land?

3 A. No, sir, not that I'm aware of.

4 Q. And were there ever any discussions  
5 over control of any water right that might be  
6 developed on that land?

7 A. No, sir.

8 Q. And were there any communications with  
9 Mr. McKay about development of a water right on  
10 that land?

11 A. You mean from the joint venture to him  
12 or from me to Darwin, or what do you mean?

13 Q. From the joint venture to Darwin.

14 A. About developing the well?

15 Q. Developing a water right.

16 A. No. No one -- let me clarify that.  
17 The intent of the well was to assist Mr. McKay in  
18 watering his crop. There was nothing discussed or  
19 even mentioned until after it was sold that he had  
20 perfected a water right on that -- on TCM Joint  
21 Venture. So there would be no correspondence  
22 because nobody knew about it, not even me.

23 Q. So you didn't know that he had  
24 perfected a water right on that piece of property?

25 A. No, sir. Now, let me just add this:

1 I just farm a little 5-acre piece of ground. And  
2 if I -- during a year when there's not a lot of  
3 water, I can buy some water from somebody and use  
4 it on my property. And then once I've used that  
5 up, it's over with. So none of us had  
6 knowledge -- or I should say understanding of what  
7 perfecting a water right was. None of us were  
8 farmers except Darwin.

9 Q. Next I want to talk about conveyance  
10 of some of the joint venture property to Ada  
11 County Highway District.

12 A. Okay.

13 Q. Do you recall that?

14 A. Uh-huh.

15 (Exhibit 3 marked.)

16 Q. (BY MR. GOULD): And do you recognize  
17 this document? It's Deposition Exhibit No. 3.

18 A. I think this is the one. I remember  
19 this. I don't remember what the -- what it was  
20 actually for. This is for the telephones or  
21 telephone poles that Idaho Power put on our  
22 property? Yeah, I believe that's what it is.

23 What was your question again?

24 Q. With this document, it looks like the  
25 transfer occurred during the year 2000, I guess.

1 Does that sound right?

2 A. Yeah. Pretty close.

3 Q. And you signed on behalf of all the  
4 joint venture members, with the exception of your  
5 wife, it appears?

6 A. Well, it's got everybody's signature  
7 on it.

8 Q. Yeah. Strike my last statement.

9 You signed under authority for the  
10 other joint ventures?

11 A. Yeah, probably. Yes, I would have.

12 Q. And was that conveyance to Ada County  
13 Highway District discussed with the joint venture?

14 A. All the joint venturers? Probably  
15 through letters from me and conversations over the  
16 telephone. And the reason we did it that way is  
17 that most of them didn't want to take off -- what  
18 day of the year was this? April 2000. Is that  
19 what it is?

20 Most of the joint venturers didn't  
21 want to come in and sign personally for it, so  
22 they gave me the right to do that on their behalf,  
23 which made it easier for me, and them, actually.

24 Q. And did the joint venture receive  
25 compensation for this conveyance?

1 A. If this is the one we got paid -- I  
2 think it was like \$30,000 for it. Yeah, everybody  
3 got paid their percent.

4 Q. And when compensation's distributed,  
5 how was it distributed?

6 A. I had authority -- I kept the books,  
7 so I had authority given to me by them to write  
8 checks on their behalf.

9 Q. And then each member was paid a  
10 pro rata share as to their ownership in the joint  
11 venture?

12 A. Yes, sir.

13 Q. And Darwin's water right, did ACHD  
14 acquire a portion of that water right?

15 A. I don't know. You'd probably have to  
16 ask them.

17 (Exhibit 4 marked.)

18 Q. (BY MR. GOULD): Okay. Deposition  
19 Exhibit No. 4, do you recognize this document?

20 A. Uh-huh, I do. That's when we changed  
21 from a joint venture to co-tenants in common.

22 Q. And why did you make that change?

23 A. Well, our attorney -- well, it started  
24 by some of the -- in our joint venture, a lot of  
25 the partners were older than I was. They were in

1 their 60s and 70s. Not a lot, but probably four  
2 or five of them.

3 And they wanted to pay cash and pay  
4 their taxes at the time they received their cash  
5 or when tax season came around. There were others  
6 of us that wanted to do a 1031 and transfer that  
7 income that we received to another like property,  
8 which is how the I.R.S. words that.

9 So in order to do that -- you couldn't  
10 do it in a joint venture because a joint venture  
11 owns percentages and not specific quantity of  
12 ground. So once we did that, then both parties  
13 got what they wanted. If you wanted to pay your  
14 taxes now, you could do that. If you wanted a  
15 1031 -- and we got advice actually through I can't  
16 remember the guy's name, but Pioneer Title, they  
17 have a special 1031 arm of their business, and  
18 that's all they do is help people do it legally so  
19 you don't get tangled up with the I.R.S.

20 Q. And so is it fair to say the only  
21 reason you terminated the joint venture and formed  
22 the co-tenancy was to provide the former joint  
23 venture members the opportunity to utilize a 1031?

24 A. Correct. Keep in mind that the object  
25 of our joint venture was to make a profit and to

1 do -- do whatever it took, you know, legally, to  
2 sell the property. If there was something that  
3 would impede the sale of the property, then, you  
4 know, we weren't going to allow that to happen.

5 Q. And is it also correct to say that  
6 whatever the joint venture owned, that's what the  
7 co-tenancy owned?

8 MR. BARKER: I'm going to object to the  
9 extent you're asking him to call for a legal  
10 conclusion.

11 THE WITNESS: Yeah, I don't -- state your  
12 question again, please.

13 Q. (BY MR. GOULD): I'll rephrase the  
14 question.

15 Did the joint tenancy acquire anything  
16 that the tenant -- that the joint -- did the  
17 co-tenancy acquire anything that the joint venture  
18 didn't hold?

19 MR. BARKER: I'm going to object on the  
20 same grounds. You're asking him to draw a legal  
21 conclusion about the effect of the transfer.

22 Q. (BY MR. GOULD): Were there any  
23 purchases made by the -- you don't have to answer  
24 that previous question. I'm going to go on with a  
25 new question.

1 Did the co-tenancy make any  
2 acquisitions?

3 A. As I stated earlier, no.

4 Q. Okay.

5 A. I mean we bought paint to paint one of  
6 the farm houses. But, you know, that's just minor  
7 things.

8 Q. And in this agreement of co-tenancy,  
9 in the background section, paragraph 1.1 gives a  
10 real concise overview of what the joint venture  
11 was transferring to the co-tenants.

12 A. Okay.

13 Q. Is that true?

14 A. I believe it to be true.

15 Q. Who prepared this document?

16 A. I believe it was Bosch. I don't know  
17 the names of the attorneys there.

18 Q. Was the document prepared under your  
19 authorization?

20 A. Actually, it was prepared by the joint  
21 vote of the -- of TCM.

22 Q. And what position did you hold with  
23 the co-tenancy?

24 A. I don't know if I had one. I just did  
25 what I always did, you know, collect rents and

1 that sort of thing.  
 2 (Exhibit 5 marked.)  
 3 Q. (BY MR. GOULD): All right. We're  
 4 getting through this. Next we have Deposition  
 5 Exhibit No. 5, Purchase and Sale Agreement.  
 6 Do you recognize that document?  
 7 A. Yes, sir, uh-huh.  
 8 Q. And who prepared that document?  
 9 A. This would have come from Thornton,  
 10 Oliver & Keller. Mike Ballantyne was our broker.  
 11 Q. And who retained Mike Ballantyne?  
 12 A. Again, the joint venture probably did  
 13 a vote on it and hired him. I remember he wrote  
 14 us some notes saying he'd be interested. And I  
 15 got lots of guys who were interested, but we  
 16 decided to go with Mike.  
 17 Q. And again, selling what the joint  
 18 venture held?  
 19 A. Yes, sir.  
 20 Q. And compensation was to be paid in  
 21 accordance with the pro rata ownership  
 22 proportions?  
 23 A. The compensation for what?  
 24 Q. From the sale --  
 25 A. Yes.

1 Q. -- proceeds.  
 2 A. Yeah, if you were a 10 percent -- if I  
 3 understand your question, if you were a 10 percent  
 4 shareholder, you got 10 percent of whatever the  
 5 property sold for. If you were 5, you got  
 6 5 percent. And that was done by, I believe, the  
 7 title company.  
 8 (Exhibit 6 marked.)  
 9 Q. (BY MR. GOULD): All right. Here we  
 10 have Deposition Exhibit No. 6, Action by  
 11 Cotenants.  
 12 Do you recognize that document?  
 13 A. Yes, sir.  
 14 Q. And what was the purpose of that  
 15 document?  
 16 A. Well, this document, the purpose of it  
 17 was -- again, there's a 70 percent vote that said  
 18 the joint venture wanted to become co-tenants in  
 19 common. And -- and then it lists -- I don't know  
 20 what else was on that. But yeah, I recognize it.  
 21 Yeah, it's just what it says here. It  
 22 says "that the individual identified," which was  
 23 me, "will" -- it says "that the individual  
 24 identified below is hereby authorized and  
 25 empowered in name and on behalf of the Cotenants

1 to execute and deliver to the Buyer (and any  
 2 closing or escrow agent involved in the closing of  
 3 the Sale Agreement) any instruments or agreements  
 4 of this Co-Tenancy which may be required by the  
 5 closing of the sale in accordance with the Sale  
 6 Agreement." And I signed it.  
 7 (Exhibit 7 marked.)  
 8 Q. (BY MR. GOULD): All right. Now I'm  
 9 going to hand you Deposition Exhibit No. 7, which  
 10 is a memorandum apparently prepared by Mike  
 11 Ballantyne.  
 12 Are you familiar with that?  
 13 A. Uh-huh. Yes.  
 14 Q. It states that Mr. Ballantyne has  
 15 outlined the pertinent information on the  
 16 property?  
 17 A. Right.  
 18 Q. And it's dated September 18th, 2000.  
 19 A. Right.  
 20 Q. Do you recall when you retained  
 21 Mr. Ballantyne?  
 22 A. I think probably somewhere around  
 23 1995, somewhere in there.  
 24 Q. And how did Mr. Ballantyne come about  
 25 this information in the memorandum?

1 A. I really don't know. You'd probably  
 2 have to ask Mike.  
 3 Q. Do you remember having conversations  
 4 with Mr. Ballantyne regarding the information?  
 5 A. On this?  
 6 Q. On this.  
 7 A. I probably talked to him, sure.  
 8 Q. Would you have discussed the  
 9 irrigation that's on page 2 of this document?  
 10 A. Yeah, probably.  
 11 Q. And there's a statement that -- the  
 12 second statement in that irrigation paragraph  
 13 says, "In addition, there's a beneficial use water  
 14 right in the name of Darwin McKay, part of the TCM  
 15 Joint Venture."  
 16 Would you have provided Mr. Ballantyne  
 17 with that information?  
 18 A. No, sir. Well, I told Mike. We used  
 19 that as -- the well as a selling feature for the  
 20 property. Darwin was in those meetings where we  
 21 agreed to do that. And -- but none of us  
 22 understood what that really meant because we were  
 23 under the assumption that that was appurtenant to  
 24 the property, that it was part of it; and  
 25 therefore when we sold it, it would go with the

1 property.

2 Q. And you're talking about the well now?

3 A. Yes. See, to us the well and this  
4 water right are like one and the same because --  
5 so -- and we discussed it openly several times in  
6 our meetings. So we didn't know what Darwin's  
7 intent was on that water right. It was never  
8 mentioned. And our intent was not to allow  
9 anything to impede the sale of that property.

10 Q. The third sentence states, "This water  
11 right allows the owner to draw water from the  
12 underground aquifer for agricultural purposes."

13 A. Yeah.

14 Q. Would you have supplied that  
15 information to Mr. Ballantyne?

16 A. Well, how else would he get water out  
17 of the well? Yes, I'm sure that we did, as I did  
18 to our partnership.

19 Q. So in 2000, you had some knowledge of  
20 the water right?

21 A. Well, how do I say this? You don't  
22 know what you don't know. So I didn't -- none of  
23 us had any idea, because we had discussed it  
24 several times to make sure everybody kind of  
25 understood what was going on. There was no

1 Darwin and all the lessees, that, you know, this  
2 is not -- whatever you do here, pay on time and --  
3 what was the second one? If we sell it, you know,  
4 we'll give you 30 days' notice.

5 Q. And so when you wrote the statement to  
6 the Department --

7 MR. BARKER: I'm going to object. I think  
8 you're misstating his testimony. He never said he  
9 wrote it.

10 THE WITNESS: This statement here?

11 MR. GOULD: No. Let's go back.

12 Q. Going back to Deposition Exhibit 2,  
13 the statement submitted to the Department of Water  
14 Resources dated the 23rd day of March, 2000, did  
15 you write that statement?

16 A. No, I didn't write the statement. I  
17 signed my name to it.

18 Q. Who wrote that statement?

19 A. I assume Darwin did, because he handed  
20 it to me.

21 Q. Did you guys have a discussion  
22 regarding that statement?

23 A. Like I mentioned before, I asked  
24 Darwin, "So what do you do when you transfer a  
25 water right?" because I found it kind of

1 information given to any of us that his intent was  
2 to procure that water right. It didn't make sense  
3 to us. It wouldn't have made sense. It didn't  
4 make sense to me, for sure.

5 So to me, this is a great selling  
6 tool. That's what I did for a living. This is a  
7 great selling tool that if somebody could get  
8 water out of that aquifer down there, that would  
9 help them out to hopefully sell the property to  
10 them.

11 Q. And the well existed?

12 A. And the well existed there.

13 Q. And going back to conversations, did  
14 you ever have any conversations with Darwin about  
15 the ownership of the water right?

16 A. Not really.

17 Q. And by "not really," can you expand on  
18 that?

19 A. To my knowledge, I don't recollect  
20 Darwin saying to me "I now own that water, and I  
21 can sell it." He never mentioned anything like  
22 that.

23 Our understanding was the well that  
24 took the water out of that aquifer went with the  
25 land. And the intent was, as I discussed with

1 interesting he wanted me to sign something.

2 And he said, "Well, I can transfer  
3 water to different locations where I have sod or I  
4 farm."

5 And I said, "Well, as long as it  
6 doesn't affect the property, I don't see any  
7 problem with signing that."

8 But there was no intent as to what he  
9 was going to do with that water. Because we  
10 entered into it to make a profit, so if he takes  
11 something and then sells it, that goes against the  
12 basics of our TCM Joint Venture. But that wasn't  
13 mentioned, so, you know, to help him, I said,  
14 "Sure."

15 Q. So you signed the statement saying  
16 that he could transfer the water right?

17 A. Uh-huh.

18 (Exhibit 8 marked.)

19 Q. (BY MR. GOULD): Okay. Now, looking  
20 at Exhibit No. 8, do you recognize that?

21 A. I do.

22 Q. And would it be fair to classify that  
23 as a property advertisement?

24 A. Yes, sir.

25 Q. And do you know when that was

1 generated?

2 A. That, I -- there's not a date on it,  
3 so I'm really not sure. I would assume it  
4 probably would have been when things really  
5 started heating up in that area. I think probably  
6 around 2000, 2001, maybe '99, somewhere in there.

7 Q. Okay. And in that document it states  
8 under the listing comments that there's a  
9 500-gallon per minute well on site?

10 A. Yeah.

11 Q. And it states a sale price of  
12 \$6,642,000?

13 A. Correct.

14 Q. And just as to the property, over time  
15 did the asking price of the property increase or  
16 decrease?

17 A. Decreased.

18 Q. And why is that?

19 A. Market conditions.

20 Q. Okay. I'm going to have you look at  
21 Deposition Exhibit No. 9 now.

22 Are you familiar with that?

23 A. Yeah, it looks like something that  
24 Thornton Oliver put out.

25 Q. And do you see the date in the lower

1 A. I would have told him -- if I would  
2 have seen this one (indicating), I would have  
3 probably reminded Mike that it had a well on the  
4 property that went with the property.

5 Q. But you don't recall ever having a  
6 conversation regarding that?

7 A. I could have. I mean the best person  
8 to ask would be Mr. Ballantyne.

9 (Exhibit 10 marked.)

10 Q. (BY MR. GOULD): All right. We've  
11 covered this. I'm handing you Deposition Exhibit  
12 No. 10, Listing Agreement.

13 Do you recognize that document?

14 A. Uh-huh.

15 Q. And do you know who prepared that?

16 A. I presume Mr. Ballantyne.

17 Q. And that document just states that  
18 Mr. Ballantyne will be representing the joint  
19 venture in their transfer of the property?

20 A. I don't know if it does. This was  
21 usually his agreement that we had to sign saying  
22 we, in fact, would use him as a real estate agent.

23 Q. Okay. And what is the date on that?

24 A. This has 10/4/99.

25 Q. Okay. And does that sound about

1 left-hand corner?

2 A. '02.

3 Q. Does that seem about right?

4 A. I think so.

5 Q. And the sale price is decreased  
6 approximately --

7 A. A million.

8 Q. -- \$1 million; is that correct?

9 A. (No audible response.)

10 Q. And now in the listing comments it  
11 doesn't include any reference to the well.

12 A. Correct.

13 Q. Do you know why that occurred?

14 A. I think you'd probably have to ask  
15 Mr. Ballantyne. I didn't -- you know, we don't  
16 make these up. They did. That's one of the  
17 reasons we hired them is because, you know, they  
18 did this sort of thing and it goes out nationally,  
19 and sometimes internationally.

20 Q. Did you have any consultation with him  
21 before this was put out?

22 A. I'm sure I did.

23 Q. But you don't recall asking him to  
24 modify the earlier version with an updated  
25 version?

1 right?

2 A. I guess so. I'm really not sure.

3 Q. 10/4/99.

4 A. This would be -- maybe that coincides  
5 with this other one where we lowered our price.  
6 '02. This was October '99. No, I -- I don't  
7 know.

8 Q. In the first paragraph this discusses  
9 a period commencing May 1, 2002, ending  
10 April 30th, 2003.

11 A. Okay.

12 Q. Does that sound approximately right?

13 A. Yeah, we usually did it every year  
14 around that -- those time frames.

15 MR. GOULD: Okay. Could we go off the  
16 record.

17 (Recess.)

18 MR. GOULD: Back on the record for the  
19 resumption of the deposition of Jack Miller.

20 Q. Mr. Miller, I'm just going to have you  
21 review Deposition Exhibit No. 3 again, transfer  
22 conveyance to Ada County Highway District.

23 Prior to the execution of that  
24 document, had the members of the joint venture  
25 granted you power of attorney?

1 A. I don't remember specifically, but  
 2 I'm -- my guess would be yeah, they probably did.  
 3 Q. Do you recall ever executing a power  
 4 of attorney?  
 5 A. Yes.  
 6 Q. Do you recall when that would have  
 7 been?  
 8 A. That would have been -- Bosch, Alan  
 9 did our co-tenancy agreement, and we sent out  
 10 beforehand, I'm sure, a P.O.A. plus whatever other  
 11 documents we would have sent at that particular  
 12 time.  
 13 Q. Do you recall executing a power of  
 14 attorney back in 2000?  
 15 A. You know, I don't know. Doesn't mean  
 16 I didn't, but I don't remember doing that.  
 17 Q. And if you did execute a power of  
 18 attorney, would that be in the documents that you  
 19 brought with you today?  
 20 A. You know, I don't know. I don't have  
 21 it so -- I'm sure Bosch might have it. I don't  
 22 remember, to be honest.  
 23 MR. GOULD: I don't have any questions at  
 24 this time. Mr. Stover may have some questions.  
 25 MR. STOVER: Thanks.

1 EXAMINATION  
 2 BY MR. STOVER:  
 3 Q. Mr. Miller, do you recall ever having  
 4 any discussions with Mr. McKay about the water  
 5 right at issue in this case being excluded from  
 6 the sale of the property to Sundance?  
 7 A. No, sir.  
 8 Q. Do you recall ever having any  
 9 discussions with any representatives from Sundance  
 10 that the water right was excluded from the sale to  
 11 Sundance?  
 12 A. After the sale, I did. Not with them.  
 13 Through their -- Jankowski, whatever it was, the  
 14 lawyer that represented them, after the sale.  
 15 Q. And what was the nature of that  
 16 discussion, or those discussions?  
 17 A. Well, two of them. The water right  
 18 and all appurtenances attached to the 80 acres he  
 19 did not receive at closing. And he tried to file  
 20 for that and found out that Mr. McKay had done  
 21 that.  
 22 Q. Okay. But prior to the closing of the  
 23 transaction, did you have any discussions with  
 24 Sundance regarding the exclusion of the water  
 25 right from the sale?

1 A. I did not.  
 2 Q. Do you know if anybody from the former  
 3 TCM membership did?  
 4 A. No, sir.  
 5 Q. Okay. Do you know if there --  
 6 MR. BARKER: Put your hands down so the  
 7 court reporter can hear you.  
 8 THE WITNESS: Sorry.  
 9 Q. (BY MR. STOVER): Do you have any  
 10 knowledge of any documents referencing the  
 11 exclusion of the water right or having that as the  
 12 subject matter?  
 13 A. No, sir.  
 14 Q. So then was it your understanding that  
 15 the purpose of the sale of the property was to  
 16 convey all of the rights the individual -- any of  
 17 the individuals had in the property to Sundance?  
 18 A. Yes, that's what we all signed.  
 19 Q. Was anything supposed to be excluded?  
 20 A. No, sir.  
 21 Q. Okay. Was it your understanding that  
 22 the well that we've been discussing and the water  
 23 right were one and the same?  
 24 A. Yes, sir.  
 25 Q. And was it, to your knowledge, the

1 members' intent to convey that to Sundance?  
 2 A. Yes, sir.  
 3 Q. Will you take a look, please, at  
 4 Exhibit No. 6. I'll hand you mine. Under  
 5 section 1 there entitled "Approval of Sale," will  
 6 you go ahead and just read to yourself the first  
 7 two paragraphs, which are really just a couple of  
 8 sentences.  
 9 A. (Reviews.)  
 10 Q. Okay. Ready? Would you agree that  
 11 that references the co-tenant's approval of an  
 12 agreement for the purchase of sale?  
 13 A. Yes, sir.  
 14 Q. Effective sometime in December 2002?  
 15 A. Correct.  
 16 Q. Okay. Do you know what agreement for  
 17 purchase of sale that's referring to?  
 18 A. The one done by -- put together by  
 19 Thornton, Oliver, Keller.  
 20 Q. I'll have you take a look at  
 21 Exhibit No. 5. You can look at mine.  
 22 Is that the Purchase and Sale  
 23 Agreement that is being referenced in the Action  
 24 by Cotenants, Exhibit No. 6?  
 25 A. Yes.

1 Q. Thank you.

2 Now, if we go back to No. 6, looks  
3 like there are signature lines for some of the  
4 members.

5 A. Correct.

6 Q. Am I correct in assuming that there's  
7 another page or two?

8 A. You know, we may have had -- Mr. Bosch  
9 may have had each of us sign our separate ones.  
10 I -- I don't know, to be honest with you.

11 MR. STOVER: Okay.

12 MR. GOULD: If we go off the record, I'll  
13 represent that there are multiple -- and I wasn't  
14 trying to mislead, but there are -- I know there  
15 are signature pages for all parties.

16 THE WITNESS: I mean everything we did,  
17 that was an issue with us, is how to get it done  
18 in an appropriate amount of time.

19 Q. (BY MR. STOVER): Okay.

20 A. So I'm sure that -- everything else  
21 has everybody signing it, so I'm fairly certain  
22 that we did that as well.

23 Q. Okay. So do you know whether  
24 Mr. McKay signed the Action by Cotenants?

25 A. I'm sure he did. Everybody had to do

1 never was a comment about selling -- reselling it.

2 Q. Okay. Did Darwin ever tell you what  
3 he intended to do with the water right?

4 A. His intent was to water, you know, the  
5 properties that he was leasing from -- the  
6 property that he was leasing from us.

7 Q. And what was your agreement with him  
8 with respect to that?

9 A. You mean the actual lease agreement?

10 Q. No. What was your agreement with him  
11 with respect to use of the water?

12 A. Oh, I'm sorry. I misunderstood you.  
13 Like everything that we did is that it was fine to  
14 put the well on there, it was to draw water from  
15 the well, but it was -- I don't know how -- let me  
16 explain it this way.

17 When I lease -- when I went out and  
18 bought water when mine ran out, it's something  
19 that you do and it transfers to the water  
20 district. I go down and sign for it, write a  
21 check to the guy that's selling it, and I use it,  
22 and it's over with.

23 And when we talk about water right and  
24 well, I and the partnership see them as one thing.  
25 It's -- I mean why do you drill a well? Obviously

1 it.

2 Q. Okay. Thank you.

3 Did any of the TCM members or the  
4 co-tenants ever object to you acting as general  
5 manager? Excuse me. I think that was the title  
6 you said you were. General manager?

7 A. If anyone objected to me doing it?

8 Q. To having that job. Did anyone ever  
9 object to you having that job?

10 A. No, sir. There might have been  
11 somebody got mad, but not that I know of.

12 Q. Okay. But there was never anybody  
13 objecting to your exercising that power?

14 A. No, sir.

15 Q. Okay. And I want to go back to  
16 something you said earlier.

17 Did I hear you correct, did you  
18 testify that you never had a discussion with  
19 Darwin about the water right until after the  
20 conveyance to Sundance?

21 A. Well, I'm not sure how to answer that.  
22 We never had a discussion of the intent to own  
23 that water right, no.

24 Q. Okay.

25 A. There never was an intent. There

1 to get water.

2 And so in our eyes there was no  
3 problem with that, none at all, because it was --  
4 we were told it was going with the -- you know,  
5 when he left the lease or we sold the property,  
6 then that well and whatever his costs were go in  
7 the partnership.

8 Q. Mr. McKay agreed to that?

9 A. Yes, sir.

10 Q. Thank you. That's all.

11 A. I never --

12 Q. You can finish your thought. Go  
13 ahead.

14 A. Well, I wouldn't do something like  
15 that to the partnership. That's crazy. We were  
16 in this to make a profit. Why would I allow  
17 somebody to take profit away from the partnership?

18 MR. STOVER: Thank you. That's all I've  
19 got.

20 THE WITNESS: You bet.

21 MR. GOULD: I have two questions to follow  
22 up on.

23 ///

24 ///

25 ///

## FURTHER EXAMINATION

BY MR. GOULD:

Q. Regarding the well, did the joint venture ever make a claim to the well pump?

A. No. Well, let me answer a little different. I don't know if the pump's in there right now. To my way of thinking and what Darwin and I discussed, when he left, that all should stay there. But I never checked it. I'm not even sure I'd know how to do it unless I got somebody that had a well to come and tell me it was still in there.

Q. And going back to Deposition Exhibit No. 2, when you stated that you wouldn't object to Darwin's transfer of his water right to other lands, what were you agreeing not to object to?

A. When I read it and he handed me that, I thought, This isn't -- I'm not seeing Darwin do something like that. Well, he knows what he's doing so I didn't -- I never had an objection to helping him out on our lease. We needed somebody to take care of the ground. I was glad that Darwin did it.

And so I was willing to help him here because my thought was when we sell this piece of

property, the well and everything with it goes with the property. That's what -- in fact, Darwin's wife, Sandy, and my wife ironically signed all the agreements together down at Pioneer Title where it says we give up all our rights, all our rights, below the ground, above the ground, mineral rights, the whole thing.

MR. GOULD: All right. I don't have anything further.

MR. STOVER: Nothing.

MR. GOULD: Thank you.

(Deposition concluded at 3:03 p.m.)

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