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APR 16 2009

DEPARTMENT OF
WATER RESOURCES

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

APR 14 2009

By _____

Clerk

Deputy Clerk

**SUPPLEMENTAL DIRECTOR'S REPORT
REGARDING SUBCASE NO. 75-13718**

In Re SRBA

Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

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

April 14, 2009

Previously fax filed _____

Date: 4/14/09

I. INTRODUCTION

In accordance with Idaho Code § 42-1412(4), Administrative Order 1, and Special Master Dolan's February 11, 2009, *Order Granting Motions and Amended Trial Schedule Order*, the Director of the Idaho Department of Water Resources ("IDWR" or "Department") submits this Supplemental Director's Report ("Report") regarding subcase 75-13718; setting forth the bases for the Department's recommendation. This report was prepared under the supervision of David R. Tuthill, Jr., Director, and Donald V. Shaff, Adjudication Bureau Chief.

The following Department employee has knowledge of the information contained in the Report: Monica Van Bussum, Senior Water Resource Agent, State Office in Boise.

II. SUMMARY OF THE ISSUE

At issue is the Department's recommendation for water right 75-13718. In its Basin 75 Director's Report for Irrigation and Other Uses, filed with the SRBA District Court on January 11, 2007, the Department recommended water right 75-13718 to Brian Sopatyk. Eleven objections were filed subsequent to the Director's Report. All of the objections were against one or more of three elements: priority date, quantity, and whether the right should exist. Subsequent to the filing of the objections, most of the objectors retained Jerry R. Rigby to represent their interests in these proceedings. Mr. Sopatyk is *pro se*.

On December 30, 2008, Mr. Sopatyk filed amended claims for water rights 75-13716 and 75-13718. On February 5, 2009, Special Master Dolan granted Mr. Sopatyk's motion to amend and requested the Department file Amended Director's Reports for the at-issue subcases. On February 26, 2009, the Department issued Amended Director's Reports for water right nos. 75-13716, 75-13717 and 75-13718. Attached hereto as Attachment A are the Amended Director's Reports for 75-13716, 75-13717 and 75-13718.

Water right 75-13717 was recommended as a *de minimis* domestic right. Water right 75-13716 was recommended disallowed because the right was previously decreed in the SRBA on September 15, 2000 to the Upper Gibbonsville Water Association under water right 75-4042. Attached hereto as Attachment B is the recommendation for 75-4042, which is not contested. Water right 75-13718 was recommended disallowed because the right was previously decreed in the SRBA on November 17, 2008 to the Gibbonsville Improvement Association under water right 75-4041. Attached hereto as Attachment C is the partial decree for 75-4041.¹

On March 30, 2009, Mr. Sopatyk filed an objection to the Department's recommendation to water right 75-13718, stating, "1) Three water rights being Claimed is outside of Water Rights 75-4041 and 75-4042. 2) Everyone residing in Water Right 75-4041 has their own individual water Right, therefore I request I have the same privilege [sic]". No objections were filed to 75-13716 and 75-13717.

On April 7, 2009, responses to Mr. Sopatyk's objection were filed by Mr. Rigby behalf of the Gibbonsville Improvement Association and Jordan Stover. The responses state: "This water right should not exist. Any water claimant is entitled to is already covered and held by Gibbonsville Improvement Association."

III. BACKGROUND

Because no objections were filed against the Amended Director's Report for 75-13716 or 75-13717, the only water right that will be addressed in this Report is 75-13718.

Water right 75-13718 is a beneficial use right claimed in the SRBA by Mr. Sopatyk for irrigation and stockwater use from Anderson Creek and Dahlenega Creek. Mr. Sopatyk filed an

¹ On March 31, 2009, Mr. Rigby filed a letter with Judge Melanson regarding a possible clerical error in 75-4041. Attached hereto as Attachment D is the letter, with attachments, filed by Mr. Rigby.

amended claim to include domestic use for 15 homes on December 30, 2008. In its review, the Department did not find sufficient evidence to recommend the claim.

IV. DISCUSSION

There are several issues to address regarding 75-13718: irrigation use, stockwater use, domestic use, and priority. Due to the overlapping nature of 75-13718 with 75-4041, the Department has prepared a map to illustrate the respective places of use ("POU") and points of diversion. Attached hereto as Attachment D is the map.

Irrigation use: Mr. Sopatyk provided documentation referencing an orchard on the property, but the Department was unable to pinpoint its location. Agent Van Bussum visited the POU for 75-13718 on October 2, 2008, with Bob Rowe, a local resident, while walking the course of Anderson Creek. Agent Van Bussum found no evidence of historical irrigation of this POU. There was no irrigation or farming equipment evident and fields were overgrown and showed no signs of recent cultivation. Objections from longtime residents Bob Rowe, Wanda Sue Usher, Janet Bloemeke and Toby Friedman indicate no knowledge of irrigation on this property for 20 to 30 years. Mr. Sopatyk has not provided evidence of historic irrigation in support of this claim. Further, Janet Bloemeke filed an affidavit with the Department on March 9, 2009, stating she has been a full-time resident of Gibbonsville since 1982 and has seen no irrigation use on the property other than water being delivered under the Gibbonsville Improvement Association water right. Objections to the prior recommendation by other members of the Gibbonsville Improvement Association indicated no water use on the property for 30 years or more. Water right 75-4041 for irrigation and domestic use in the name of Gibbonsville Improvement Association was recommended in the Department's Basin 75

Director's Report for Irrigation and Other Uses. No objections were filed against 75-4041 and it was partially decreed on November 17, 2008.

Stockwater use: Agent Van Bussum also did not see evidence of stock on the property, and conversations with Bob Rowe and Janet Bloemeke indicate they have observed no stockwatering on the property. Mr. Sopatyk has not provided evidence of stock on the property in support of this claim.

Domestic use: Mr. Sopatyk provided documentation of houses existing on his property over time. All the homes and structures currently standing, whether occupied or unoccupied, are within the place of use for the Gibbonsville Improvement Association. Water right 75-4041 for the Gibbonsville Improvement Association includes both irrigation and domestic uses.

On February 26, 2009, the Department issued an Amended Director's Report recommending 75-13718 be disallowed because the water use under the right had been recommended under subcase 75-4041 in the name of the Gibbonsville Improvement Association. Agent Van Bussum was unable to locate any recent irrigation activity on lands outside the Gibbonsville Improvement Association place of use, as supported by the affidavit from Janet Bloemeke. The stockwater portion was not mentioned in the recommendation, but it was clear from the site visit that no stock had been in the area for quite some time.

Mr. Sopatyk's March 30, 2009, objection correctly states there are individuals within the Gibbonsville Improvement Association POU that have individual water rights. The rights Mr. Sopatyk references are *de minimis* and include 75-10000, 75-10487, 75-10204, 75-10577, 75-10946, 75-13719, 75-13935, 75-10487, 75-4470A, 75-10172 and 75-13934, most of which have been partially decreed. The domestic component of water right 75-4041, held by the Gibbonsville Improvement Association (see Attachment C), is *de minimis*.

The Department interprets Idaho Code § 42-111 as prohibiting “stacking” of domestic water rights for a water use that is in violation of the mandatory permit statute. In this case, there are multiple rights for surface water with priority dates before the mandatory permit statute was enacted. It is therefore permissible for individuals within the service area of the Gibbonsville Improvement Association to hold *de minimis* domestic surface water rights that predate the mandatory permit statute.

Priority date: The claimed priority date for 75-13718 was April 24, 1897. Mr. Sopatyk noted in his February 18, 2009, letter to the Department that the POU under 75-13718 was serviced by the upper ditch (Anderson Creek) with a priority date of May 4, 1927.

The Department therefore revises its recommendation of disallowal of water right 75-13718 and will instead recommend it as a *de minimis* domestic water right for one residence with a priority date of May 4, 1927, as described in Attachment E.

V. CONCLUSION

Therefore, the Department respectfully requests that water right 75-13718, as described in the February 26, 2009, Amended Director’s Report (*see* Attachment A) should not be recommended disallowed; instead, water right 75-13718 should be recommended by this Court as a *de minimis* domestic water right for a single residence, as shown in Attachment E.

Submitted this 14th day of April, 2009.



Monica Van Bussum
Senior Water Resource Agent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served a true and correct copy of the following described document on the persons listed below by United States mail with the correct postage affixed thereto on this 14th day of April 2009.

Document Served: Supplemental Director's Report Regarding Subcase No. 75-13718

Persons Served: CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVE N
TWIN FALLS ID 83303-2707

BOB ROWE
CATHLEEN R BIGELOW
DOUG & BRENDA GUPTON
IRA D TAYLOR
JORDAN J STOVER
JULIA RANDOLPH
TOBY A FRIEDMAN
WANDA SUE USHER

Represented by:
JERRY R RIGBY
25 N 2ND E
PO BOX 250
RESBURG ID 83440-0250

DIRECTOR OF IDWR
PO BOX 83720
BOISE ID 83720-0098

CATHLEEN R BIGELOW
3 ANDERSON CREEK RD
GIBBONSVILLE ID 83463

JANET BLOEMEKE
27 GIBBONSVILLE RD
GIBBONSVILLE ID 83463

MAURICE USHER
3107 N 93 HWY
GIBBONSVILLE ID 83463

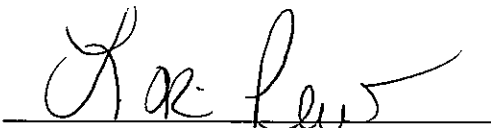
KIM HAMMITT
62 GIBBONSVILLE RD
GIBBONSVILLE ID 83463

LORNA L ANDERSON
4 SOUTH 635 WEST
BLACKFOOT ID 83221

BRIAN SOPATYK
913 S LATAH
BOISE ID 83705

CLIVE STRONG
OFFICE OF THE ATTORNEY GENERAL
PO BOX 44449
BOISE ID 83711-4449

UNITED STATES DEPT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIV
550 W FORT ST MSC 033
BOISE ID 83724


Idaho Department of Water Resources

ATTACHMENT A

COPY

AMENDED DIRECTOR'S REPORT

Subcase No. 75-13716

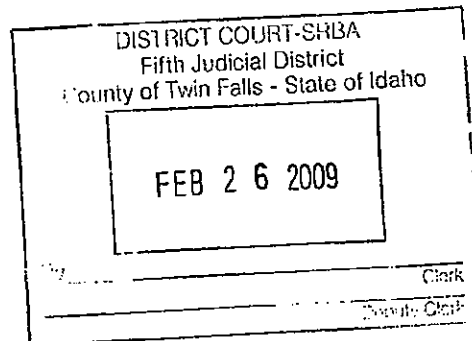
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**DEPARTMENT OF
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In Re SRBA

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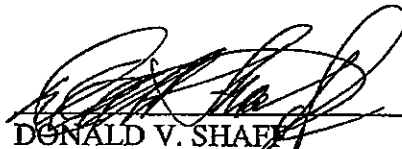
February 26, 2009

DESCRIPTIVE SUMMARY

This is an Amended Director's Report submitted by the Director of the Idaho Department of Water Resources.

DISCUSSION

Pursuant to the *Order Granting Motions and Amended Trial Schedule Order* issued by Special Master Dolan on February 11, 2009, the Director submits for filing with the Court, an Amended Director's Report for the aforementioned subcase (see attached print-out).


DONALD V. SHAFF
Adjudication Bureau Chief

CERTIFICATE OF SERVICE

I certify that on 2/26, 2009, I served the original and/or copies of this form, including all attachments, to the following persons by delivering the original and/or copies, as follows:

1. Original to:

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

☐ Overnight Mail
☒ Regular Mail
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2. Copies to:

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Represented by:
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BOISE ID 83724



Signature of person delivering form

02/25/2009

IDAHO DEPARTMENT OF WATER RESOURCES
CLAIMS / RIGHTS NOT RECOMMENDED

<u>W.R. NUMBER</u>	<u>NAME AND ADDRESS</u>	<u>CLAIM DISPOSITION</u>	<u>REASON</u>
75-13716	BRIAN SOPATYK 913 S LATAH BOISE ID 83705	Disallowed	Recommended as Right No. 75-4042.

COPY

AMENDED DIRECTOR'S REPORT

Subcase No. 75-13717

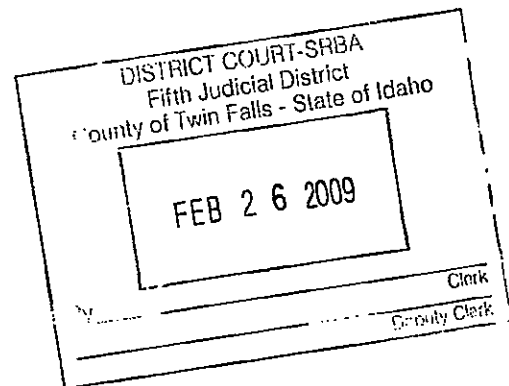
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In Re SRBA

Twin Falls County Civil Case No. 39576



Report to the SRBA District Court

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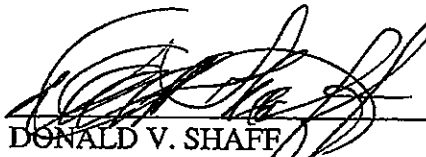
February 26, 2009

DESCRIPTIVE SUMMARY

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DISCUSSION

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DONALD V. SHAFF
Adjudication Bureau Chief

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56 GIBBONSVILLE RD
GIBBONSVILLE, ID 83463

WANDA SUE USHER
39 GIBBONSVILLE RD
GIBBONSVILLE, ID 83463

JANET BLOEMEKE
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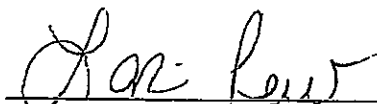
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Signature of person delivering form

02/25/2009

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

RIGHT NUMBER: 75-13717

NAME AND ADDRESS: BRIAN SOPATYK
913 S LATAH
BOISE ID 83705

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 0.040 CFS

The quantity of water under this right shall not exceed 13,000 gallons per day.

PRIORITY DATE: 01/01/1930

POINT OF
DIVERSION:

T26N R21E S25 SWNE Within LEMHI County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE

PERIOD OF USE

QUANTITY

DOMESTIC

1/01 12/31

0.040 CFS

Domestic use is for 1 home and up to one-half acre of lawn and garden irrigation.

PLACE OF USE: DOMESTIC in LEMHI County

T26N R21E S25 SWNE

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

The quantity of water decreed for this water right is not a determination of historical beneficial use.

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

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

Parcel No. RFF00520000190.

COPY

AMENDED DIRECTOR'S REPORT

Subcase No. 75-13718

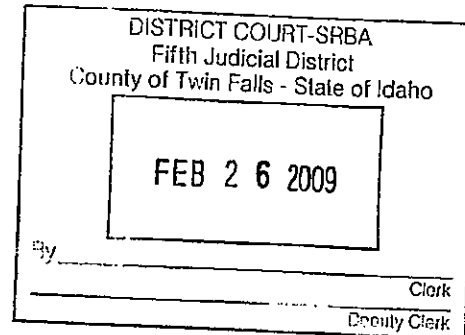
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**DEPARTMENT OF
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In Re SRBA

Twin Falls County Civil Case No. 39576



Report to the SRBA District Court

**Prepared by the Idaho Department of Water Resources
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Donald V. Shaff, Adjudication Bureau Chief**

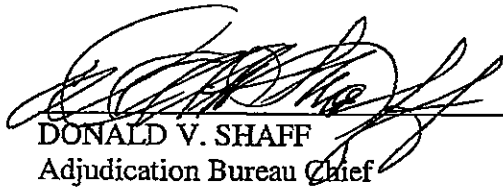
February 26, 2009

DESCRIPTIVE SUMMARY

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DISCUSSION

Pursuant to the *Order Granting Motions and Amended Trial Schedule Order* issued by Special Master Dolan on February 11, 2009, the Director submits for filing with the Court, an Amended Director's Report for the aforementioned subcase (see attached print-out).


DONALD V. SHAFF
Adjudication Bureau Chief

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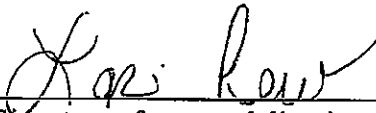
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LORNA L ANDERSON
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BLACKFOOT, ID 83221

BRYAN SOPATYK
913 S LATAH
BOISE, ID 83705
Phone: 208-342-6800

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PO BOX 44449
BOISE ID 83711-4449

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02/25/2009

IDAHO DEPARTMENT OF WATER RESOURCES
CLAIMS / RIGHTS NOT RECOMMENDED

<u>W.R. NUMBER</u>	<u>NAME AND ADDRESS</u>	<u>CLAIM DISPOSITION</u>	<u>REASON</u>
75-13718	BRIAN SOPATYK 913 S LATAH BOISE ID 83705	Disallowed	Recommended as Right No. 75-4041.

ATTACHMENT B

04/14/2009

IDAHO DEPARTMENT OF WATER RESOURCES
PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 75-4042

NAME AND ADDRESS: UPPER GIBBONSVILLE WATER ASSOC
C/O IRA D. TAYLOR
82 GIBBONSVILLE ROAD
GIBBONSVILLE ID 83463

SOURCE: DAHLONEGA CREEK TRIBUTARY: NORTH FORK SALMON RIVER

QUANTITY: 0.400 CFS

PRIORITY DATE: 10/09/1901

POINT OF DIVERSION:

T26N R21E S25 SENE Within LEMHI County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
DOMESTIC	1/01 12/31	0.400 CFS

PLACE OF USE: DOMESTIC in LEMHI County

T26N R21E S25	SWNE	T26N R21E S25	SENW
---------------	------	---------------	------

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

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

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

ATTACHMENT C

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

In Re SRBA)
) PARTIAL DECREE PURSUANT TO
) I.R.C.P. 54(b) FOR
Case No. 39576)
) Water Right 75-04041

NAME AND ADDRESS: GIBBONSVILLE IMPROVEMENT ASSN
C/O EARL KEATING
40 GIBBONSVILLE RD
GIBBONSVILLE, ID 83463

SOURCE: ANDERSON CREEK TRIBUTARY: DAHLONEGA CREEK

QUANTITY: 0.58 CFS

The quantity of water under this right for domestic use shall
not exceed 13,000 gallons per day.

PRIORITY DATE: 10/09/1901

POINT OF DIVERSION: T26N R21E S25 SENW Within Lemhi County

PURPOSE AND PERIOD OF USE:	PURPOSE OF USE	PERIOD OF USE	QUANTITY
	Irrigation	03-01 TO 10-31	0.40 CFS
	Domestic	01-01 TO 12-31	0.18 CFS

PLACE OF USE: Irrigation Within Lemhi County
T26N R21E S25 NESW 9.0 SWSW 2.0
SESW 9.0
20.0 Acres Total
Domestic Within Lemhi County
Same as Irrigation

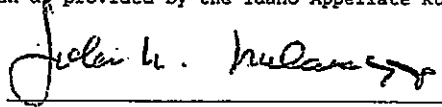
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

The quantity of water decreed for this water right for domestic
use is not a determination of historical beneficial use.

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

RULE 54(b) CERTIFICATE

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


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

ATTACHMENT D



Idaho Department of Water Resources

75-4041 and 75-13718 comparison



0 65 130 260 390 520

Meters

Legend

- 75-13718 POD
- 75-4041 PODs
- 75-13718 Proposed POU
- 75-4041_POU

Prepared by Monica Van Bussum
On April 13, 2009
2004 Aerial Photography

ATTACHMENT E

04/14/2009

IDAHO DEPARTMENT OF WATER RESOURCES
PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 75-13718

NAME AND ADDRESS: BRIAN SOPATYK
913 S LATAH
BOISE ID 83705

SOURCE: ANDERSON CREEK

TRIBUTARY: DAHLONEGA CREEK

QUANTITY: 0.040 CFS

The quantity of water under this right shall not exceed 13,000 gallons per day.

PRIORITY DATE: 05/04/1927

POINT OF DIVERSION:

T26N R21E S13 SENW Within LEMHI County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE

PERIOD OF USE

QUANTITY

DOMESTIC

01/01 12/31

0.040 CFS

Domestic use is for 1 home and up to one-half (1/2) acre of lawn and garden irrigation.

PLACE OF USE: DOMESTIC in LEMHI County

T26N R21E S25 NESW

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

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

The quantity of water decreed for this water right is not a determination of historical beneficial use.

EXPLANATORY MATERIAL: BASIS OF CLAIM - Beneficial Use

Place of use is part of Parcel No. RP99000004027M.