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SEP 10 2009

DEPARTMENT OF
WATER RESOURCES

**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 No. 45-14182
)
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)
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**MEMORANDUM IN SUPPORT OF
MOTION TO FILE LATE NOTICE OF
CLAIM**

COMES NOW, MOO VIEW COW PALACE ("Moo View"), the claimant in the above subcase, by and through counsel of record, and hereby files this *Memorandum in Support of Motion to File Late Claim*. Moo View's *Motion* is further supported by the *Affidavit of Orin Woodbury* and the *Affidavit of Travis L. Thompson* (hereinafter "*Thompson Aff.*") filed together herewith.

INTRODUCTION

This motion concerns a previously appropriated and decreed water right which has been diverted and put to beneficial by Moo View and its predecessors. Unfortunately, this water right was not properly recommended when the Director's Basin 45 Report was submitted to this Court

in 2004. Accordingly, once Moo View researched the history of the water right and learned of the omission and mistake, Moo View made a “good faith” effort to correct the problem by filing this motion and late claim.

FACTUAL BACKGROUND

The water rights from Dayley Creek, Lunch Creek, and Antelope or Summit Springs (aka unnamed stream) in Basin 45 were originally decreed by the Cassia County District Court on March 11, 1916, *Robinson v. Matthews et al.* (“*Robinson Decree*”). See **Exhibit A** to *Thompson Aff.* In that proceeding the Court decreed Heber C. Dayley (original patentee of Moo View’s property) the following:

... the right to divert and use all and the whole of the flow of the waters of Dayley Canyon, Cassia County, Idaho, for the irrigation of his tract of land described in the findings of fact herein, and for stock and domestic purposes, said right to date from the First of May, 1882.

... the right to divert and use all and the whole of the flow of the waters of Lunch Creek, Cassia County, Idaho, for the irrigation of his tract of land described in the findings of fact herein and for stock and domestic purposes, said right to date from the First day of May, 1882.

... the right to divert and use all and the whole of the flow of the waters of Antelope, or Summit Springs, Cassia County, Idaho, for the irrigation of his tract of land described in the findings of fact herein and for stock and domestic purposes, said right to date from the First day of May, 1882.

See *Robinson Decree* at ¶¶ 1-3. **Exhibit A** to *Thompson Aff.*

The above water rights later became consolidated and known as water right no. 45-690 in the records of the Idaho Department of Water Resources (“IDWR”). See **Exhibit B** to *Thompson Aff.* The chain-of-title for the subject property originally patented by Heber Dayley is as follows:

August 10, 1907 United States to Heber C. Dayley (land patent)¹

June 16, 1916 Dayley to J. Howard Allen (deed)²

¹ **Exhibit C** to *Thompson Aff.*

September 30, 1918 Allen to J.W. Harris (deed)³
 September 10, 1926 Harris to Valentine Wenk (deed)⁴
 August 15, 1927 Wenk to S.H. Kunau (deed)⁵
 March 21, 1938 Kunau to Leland R. Woodbury (deed)⁶
 April 1, 1980 Leland R. Woodbury to Orin Woodbury (deed)⁷
 March 9, 2006 Orin Woodbury to Moo View Cow Palace (deed)⁸

The water right decreed in the *Robinson Decree* was conveyed with the property in all deeds described above. Specifically, the deeds from Dayley, Harris, Wenk, and Kunau indicate that the water rights were being conveyed and that the decreed uses (including stockwater) were “consisting of all the water at all seasons of the year . . .” See **Exs. D, E, F, H** to *Thompson Aff.* (emphasis added).

Mr. Orin Woodbury, Moo View’s immediate predecessor, filed a claim in the SRBA for water right no. 45-690 on May 30, 1989. See **Exhibit K** to *Thompson Aff.* The claim was recommended in the Basin 45 Director’s Report issued to the Court on January 16, 2004. Later, this Court issued a partial decree for water right 45-690 on May 6, 2005. Mr. Woodbury claimed a year-round period of use for the winter stockwater use that was previously decreed in the *Robinson Decree*. See *Woodbury Aff.* at 2, 6.

As described above, Moo View did not become the owner of the property and the water rights appurtenant to the property (including 45-690) until March 9, 2006, almost a year after water right 45-690 was partially decreed. See **Exhibit L** to *Thompson Aff.* Since that time, Moo

² **Exhibit D** to *Thompson Aff.*

³ **Exhibit E** to *Thompson Aff.*

⁴ **Exhibit F** to *Thompson Aff.*

⁵ **Exhibit G** to *Thompson Aff.*

⁶ **Exhibit H** to *Thompson Aff.*

⁷ **Exhibit I** to *Thompson Aff.*

⁸ **Exhibit J** to *Thompson Aff.*

View recently became aware that the water rights appurtenant to the property and previously decreed in the *Robinson Decree* were not completely recommended in the SRBA.

STANDARD OF REVIEW

Under this Court's *AOI*, a motion to file a late notice of claim is determined pursuant to I.R.C.P. 55(c). *See AOI* § 4d(2)(d)(late claims reviewed under I.R.C.P. 55(c) criteria). The Court, therefore, applies a "good cause" standard to motions to file late notices of claim. The "good cause" standard is a more lenient threshold than the Rule 60(b) standard. *McFarland v. Curtis*, 123 Idaho 931, 935 (Ct. App. 1993). The Rule 55(c) "good cause" standard takes into account the following factors:

- 1) whether the default was willful;
- 2) whether setting aside the judgment would prejudice the opponent.
- 3) as with a Rule 60(b) motion, whether a meritorious position has been presented.

McFarland, 123 Idaho at 936; *see also Order Granting Motions to File Lat Notices of Claim* at 1 (Subcase No. 71-10886 et al., July 27, 2005).

Other jurisdictions apply similar criteria, such as: (1) proof that the default was not willful or culpable; (2) prompt action by the defaulting party to correct the default; (3) the existence of a meritorious defense; (4) an absence of prejudice to the opponent; (5) whether the default resulted from a good faith mistake in following a rule of procedure; (6) the nature of the defendant's explanation for defaulting; (7) the amount in controversy; (8) the availability of effective alternative sanctions; and (9) whether entry of a default would produce a harsh or unfair result. *See Memorandum Decision and Order on Challenge; Order of Recommitment* at 6 (Subcase No. 47-14633 et al., March 22, 2005).

Finally, in determining whether to grant a motion under Rule 55(c), the Idaho Court of Appeals has instructed courts to “examine each case in light of the unique facts and circumstances presented.” *Baldwin v. Baldwin*, 114 Idaho 525, 527 (Ct. App. 1988). In addition, “[j]udgments by default are not favored, and the general rule in doubtful cases is to grant relief from default in order to reach a judgment on the merits.” *Johnson v. Pioneer Title Co. of Ada County*, 104 Idaho 727, 732 (Ct. App. 1983).

ARGUMENT

I. MOO VIEW MEETS THE “GOOD CAUSE” STANDARD FOR FILING A LATE NOTICE OF CLAIM

The central question in Moo View’s *Motion* concerns a previously decreed water right, and whether that right should have been recommended and ultimately decreed in the SRBA. As described in greater detail below, it is apparent that Moo View’s predecessor, Mr. Woodbury, mistakenly failed to recognize that the year-round stockwater use for water right no. 45-690 was not recommended in the 2004 Director’s Report. *See Woodbury Aff.* at 2-3, ¶¶ 9-10. Mr. Woodbury believed the period of use was recommended year-round as claimed. *See id.* Moreover, due to the mistake, it is apparent that the winter stockwater right, previously decreed by the Cassia County District Court in the 1916 *Robinson Decree*, has gone unrecommended in the SRBA, despite its present diversion and use by Moo View, and the acknowledged historical use by Moo View’s predecessors-in-interest. *See id.* at 3, ¶ 11. Accordingly, Moo View seeks an order from this Court granting its motion to file a late notice of claim.

This Court requires a movant to meet the “good cause” standard set forth in I.R.C.P. 55(c) in order to file a late notice of claim in the SRBA. The standard into account three factors: (1) whether the default was willful; (2) whether setting aside the judgment would prejudice the opponent; and (3) as with a Rule 60(b) motion, whether a meritorious position has been

presented. *See Order Granting Motions to File Lat Notices of Claim* at 1 (Subcase No. 71-10886 et al., July 27, 2005). Moo View meets the standard required by this Court.

First, Mr. Woodbury's affidavit establishes that the failure to file a separate claim for water right no. 45-14182 to cover the previously decreed winter stockwater use was not "willful." Mr. Woodbury originally filed a claim for water right no. 45-690 on May 30, 1989. However, he inadvertently failed to notice the winter stockwater use (season of use November 16th through March 14th) that was appurtenant to and used on his property was not recommended by IDWR in 2004. *See Woodbury Aff.* at 2-3, ¶ 9. In addition, the facts demonstrate that Moo View did not become aware of this unfiled claim until after it had purchased the property in 2006 and conducted research and a review of the history of the property and its prior decree (*Robinson Decree*). *See id.* Such a mistake of fact may be recognized as the type of "excusable neglect" required to set aside a default judgment under Idaho's rules of procedure. *See Stirm v. Puckett*, 107 Idaho 1046, 1049 (Ct. App. 1985) ("under some circumstances the failure to file a proper pleading may be treated both as a mistake and as excusable neglect.").

Once Moo View learned of the mistake that the water decreed by this Court in May 2005 did not completely cover the winter stockwater right that was decreed under the *Robinson Decree* and what had historically been diverted and used on the property, Moo View took the necessary steps to file this present motion with the Court. In other words, Moo View made a "good faith" effort to correct the prior mistake by filing a separate claim for water right no. 45-14182. Accordingly, based upon the facts and circumstances surrounding the prior mistake in IDWR not recommending the entire season of use, and Moo View's predecessor not correcting the error, it is clear that the default was not "willful."

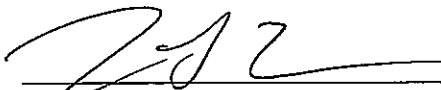
In addition to meeting the “good cause” standard, Moo View has a “meritorious defense” in that the stockwater right decreed by this Court for water right 45-690 does not include the winter stockwater use, previously decreed, and that has been used on the property. Accordingly, since the winter stockwater use (as originally decreed and historically used) remains unclaimed and decreed by this Court, Moo View has a “meritorious defense” in filing its *Motion for Late Notice of Claim*.

CONCLUSION

Moo View seeks to file a late notice of claim for water right no. 45-14182. The evidence set forth in the *Affidavit of Orin Woodbury* and the *Affidavit of Travis L. Thompson* demonstrates that the winter stockwater use for water right no. 45-14182 was not properly recommended in 2004 and that this mistake was not “willful.” Moreover, the evidence demonstrates that the winter stockwater right, previously decreed in the *Robinson Decree*, has not been recommended by IDWR in SRBA. Therefore, Moo View meets the “good cause” and “meritorious defense” standard required under *AOI* and I.R.C.P. 55(c) and respectfully requests this Court grant its *Motion to File Late Notice of Claim*.

DATED this 4th day of September 2009.

BARKER ROSHOLT & SIMPSON LLP



Travis L. Thompson

Attorneys for Moo View Cow Palace

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September, 2009, I served a true and correct copy of the foregoing document(s) on the person(s) listed below, in the manner indicated:

Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 3rd Ave North
P.O. Box 2707
Twin Falls, Idaho 83303-2707

Copies to:

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

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort St., MSC 033
Boise, Idaho 83724


Travis L. Thompson

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SRBA Form No.42-1409-1 (Internet 1/09)

DEPARTMENT OF
WATER RESOURCES**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS****IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM****CIVIL CASE NUMBER: 39576**

Ident. Number _____

Date Received: _____

Receipt No: _____

Received By: _____

**NOTICE OF CLAIM
TO A WATER RIGHT
ACQUIRED UNDER STATE LAW****Please type or print clearly**1. Name of Claimant (s) Moo View Cow Palace Phone (208) 312-2464Mailing Address 474 E. 550 S. Burley ID ZIP 83318
Street or Box City State2. Date of Priority (Only one (1) per claim) May 1, 1882
Month Day Year (YYYY)3. Source of water supply (Check one) Ground Water () or Other (✓) (a) See Remarks
which is tributary to (b) _____4. a. Location of Point of Diversion is: Township See Remarks, Range _____, Section _____,
_____, 1/4 of _____, 1/4 Govt. Lot _____, BM., County of _____

Parcel (PIN) no. _____

Additional points of diversion if any: See Remarks

If available, GPS Coordinates _____

b. If instream flow, beginning point of claimed instream flow is:

Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4

Govt. Lot _____, BM., County of _____

ending point is: Township _____, Range _____, Section _____, _____, 1/4 of _____, 1/4

Govt. Lot _____, BM., County of _____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates, Etc),
including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed
and as enlarged and the depth of each well. See water right 45-690

6. Water is claimed for the following purposes:

(both dates are inclusive MM-DD)

(cfs)

(acre feet)

For Stockwater purposes from 11/16 to 3/14 amount 0.05 or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

For _____ purposes from _____ to _____ amount _____ or _____

7. Total quantity claimed (a) 0.05 (cfs) and/or (b) _____ (acre feet)

8. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock, Etc.) _____

9. Description of place of use:

a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.

b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

Twn	Rng	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	

Parcel (PIN) no(s) See Remarks

Total number of acres irrigated _____

10. In which county (ies) are lands listed above as place of use located? Cassia

11. Do you own the property listed above as place of use? Yes (✓) No ()

If your answer is No, describe in Remarks below the authority you have to claim this water right.

12. Describe any other water rights used at the same place and for the same purposes as described above.

45-690 (for stockwater use during the irrigation season only 3/15 to 11/15) or None ()

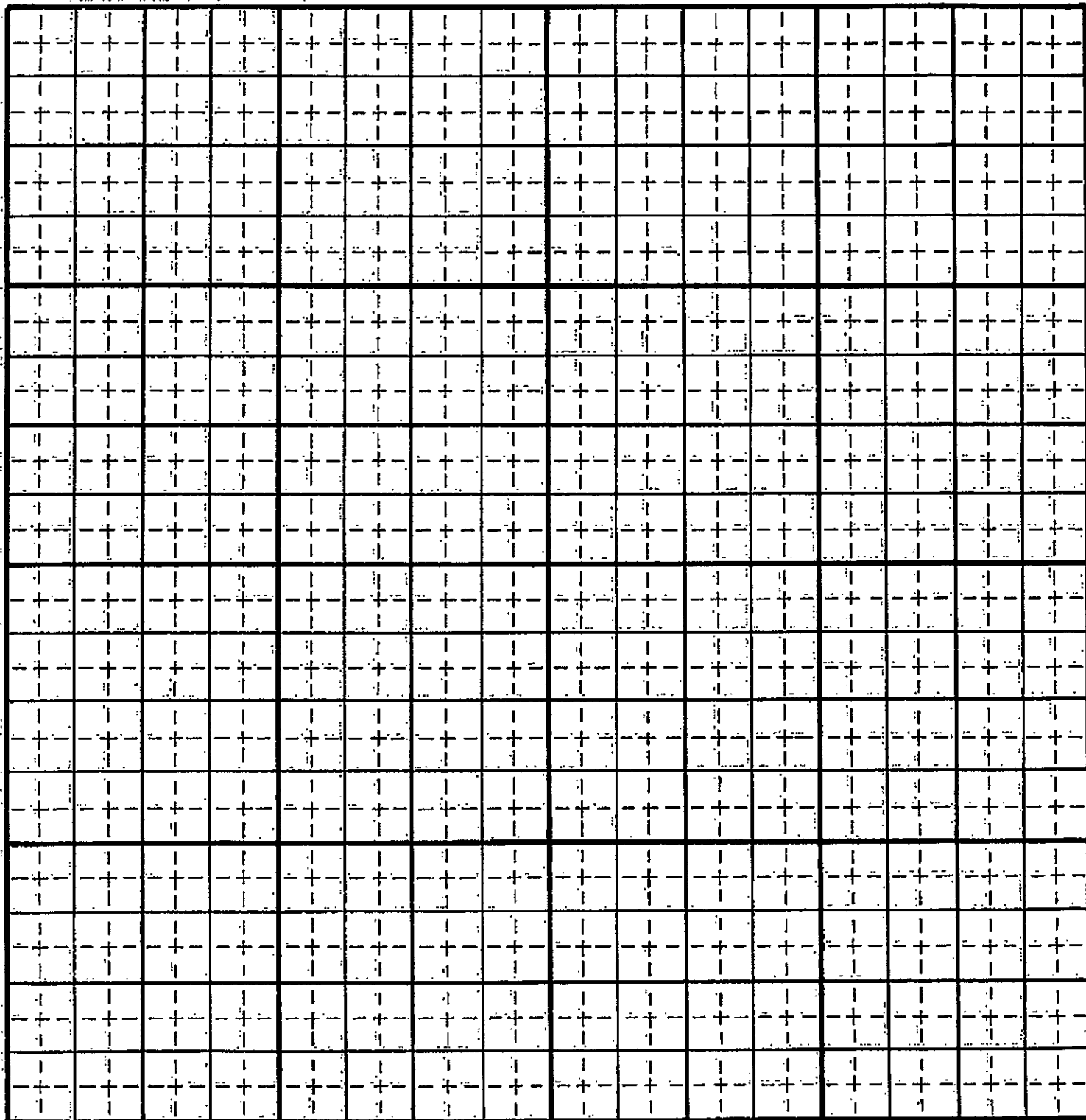
13. Remarks: The source, points of diversion, and place of use for this water right claim are the same as right no.

45-690 (per approved transfer no. 71925). The "unnamed stream" is also known as Antelope Spring Creek. This
water right claim covers stockwater use for the non-irrigation season 11/16 to 3/14 since water right 45-690 only
covers stockwater use during the irrigation season only.

Last Name _____ Identification No. _____

Map of Project: Attach aerial photograph or topographic map showing clearly the point of diversion, place of use, section number, township, and range number, unless unavailable. Otherwise sketch the elements above on the grid below.

Scale: 2 Inches equals 1 mile



Last Name _____ Identification No. _____

14. Basis of Claim (Check One) Beneficial Use () Posted Notice () License () Permit () Decree (✓)

Court Cassia Decree Date March 11, 1916 Plaintiff v. Defendant Robinson v. Matthews et al.

If applicable provide IDWR Water Right Number _____

15. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notices in the Coeur d'Alene-Spokane River Basin Adjudication." (b.) I/We do () do not (✓) wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals: I/We do solemnly swear or affirm under penalty of perjury that the statements contained in the foregoing document are true and correct.

Signature of Claimant (s) _____ Date: _____

_____ Date: _____

For Organizations: I do solemnly swear or affirm under penalty of perjury that I am

General Partner of Moo View Cow Palace
Title Organization

that I have signed the foregoing document in the space below as

General Partner of Moo View Cow Palace
Title Organization

and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent [Signature] Date Sept. 7, 2009

Title and Organization General Partner, Moo View Cow Palace

16. Notice of Appearance:

Notice is hereby given that I, Travis L. Thompson, will be acting as attorney at law of behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature [Signature] Date 9/4/09

Address P.O. Box 485
Twin Falls, Idaho 83303-0485

Last Name _____ Identification No. _____