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DEPARTMENT OF
WATER RESOURCES

Attorneys for Brent Rocky LLC

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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.: 78-4084A, 78-4084B,
78-4084C

AFFIDAVIT OF MATTHEW J. MCGEE

STATE OF IDAHO)
) ss.
County of Ada)

Matthew J. McGee, having been duly sworn upon oath, deposes and states as follows:

1. I am an attorney duly licensed to practice law in the state of Idaho. I am one of the attorneys representing Brent Rocky, LLC in the above-referenced matter. I have access to the client's files in this matter, and make this affidavit based upon personal knowledge, and in support of Brent Rocky, LLC's Rule 60(b) Motion for Relief from Judgment.

2. Attached hereto as Exhibit A is a true and correct copy of the warranty deed executed by Boar's Nest Ranch, LLC on May 28, 2008, conveying the Boar's Nest ranch property to Brent Rocky, LLC.

3. Attached hereto as Exhibit B is a true and correct copy of the backfile maintained by Idaho Department of Water Resources regarding beneficial use water right no. 78-4084.

4. Attached hereto as Exhibit C is a true and correct copy of the letter dated March 7, 1977, and maintained by the Idaho Department of Water Resources in the water right backfile for water right no. 78-4084. The letter is signed by John Carrey, Pearl Carrey, and Loy Hollenbeak. It describes the priority date and the beneficial use on the Boar's Nest ranch property.

5. Attached hereto as Exhibit D is a true and correct copy of IDWR's recommendation of water right no. 78-10348 to Dolina C. Gill.

6. Attached hereto as Exhibit E is a true and correct copy of a Notice of Error Reply received by IDWR from Pearl Carrey indicating that John Carrey had passed away.

7. Attached hereto as Exhibit F is a true and correct copy of the selection from the Basin 78 Director's Report recommending disallowance of water right nos. 78-4084A, 78-4084B, and 78-4084C for the following reason: "No beneficial use found."

8. Attached hereto as Exhibit G is a true and correct copy of selections from IDWR's Claims Investigation Handbook, dated February 16, 2000.

9. Attached hereto as Exhibit H is a true and correct copy of a Policy of Title Insurance for the Boar's Nest ranch property, dated March 18, 2002, which describes in ¶ 20 of

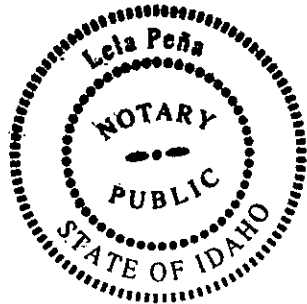
the Exceptions from Coverage section a water line easement between Mr. Carrey and Mr. Russell Morrell.

10. Attached hereto as Exhibit I is a true and correct copy of two land patents held by Loy Hollenbeak, which patents are for land in the same geographic area as the Boar's Nest ranch property.

Further your affiant sayeth naught.


Matthew J. McGee

SUBSCRIBED AND SWORN to before me this 5th day of October, 2009.




NOTARY PUBLIC FOR IDAHO
Residing at Boise
My Commission Expires 5-31-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5 day of October, 2009, I caused a true and correct copy of the foregoing **AFFIDAVIT OF MATTHEW J. MCGEE** to be served by the method indicated below, and addressed to the following:

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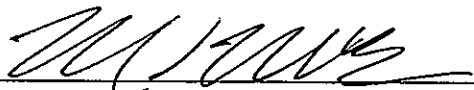

Matthew J. McGee

EXHIBIT A

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

461281

Instrument # 461281

IDAHO COUNTY, IDAHO,

5-30-2008 01:06:38 No. of Pages: 4

Recorded for : INLAND TITLE

ROSE E. GEHRING

Fee: 12.00

Ex-Officio Recorder Deputy

21288 4881

WARRANTY DEED

For Value Received **BOAR'S NEST RANCH, L.L.C.**, a Georgia Limited Liability Company, Hereinafter called the Grantor, hereby grants, bargains, sells and conveys unto **BRENT ROCKY LLC**, a Georgia Limited Liability Company, whose address is: 270 North Jeff Davis Drive, FAYETTEVILLE, GA 30214, Hereinafter called the Grantee, the following described premises situated in IDAHO County, Idaho, to-wit:

Township 23 North, Range 1 East, Boise Meridian, Idaho County, Idaho

Section 6: SE $\frac{1}{4}$

Section 7: E $\frac{1}{2}$

Section 8: NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, that portion of the W $\frac{1}{2}$ NE $\frac{1}{4}$ West of old US Highway 95 Right-of-Way, that portion of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ West of old US Highway 95 Right-of-Way;

AND a parcel of land in the S $\frac{1}{2}$ NE $\frac{1}{4}$, more particularly described as follows:

Commencing at a brass cap marking the Center-East 1/16 of said Section 8;

Thence S. 51°52'08" W., 76.28 feet to a $\frac{1}{2}$ " rebar;

Thence N. 31°01'28" W., 366.78 feet to a $\frac{1}{2}$ " rebar;

Thence N. 00° 53'38" W., 201.26 feet to a $\frac{1}{2}$ " rebar, the REAL POINT OF BEGINNING;

Thence N. 51°46'02" E., 47.04 feet;

Thence 44.18 feet along a non-tangent curve left, whose delta angle is 63°17'18", radius is 40.00 feet, and whose long chord bears S. 88°30'39" E., 41.97 feet;

Thence N. 59°50'42" E., 114.03 feet;

Thence 59.58 feet along a curve to the right, whose delta angle is 85°20'36", radius is 40 feet, and whose chord bears S. 77°29'00" E., 54.22 feet;

Thence, S. 34°48'42" E., 69.58 feet;

Thence N. 69°19'22" W., 69.36 feet to a $\frac{1}{2}$ " rebar;

Thence S. 78°43'35", W., 209.30 feet to the REAL POINT OF BEGINNING.

LESS: The following described tracts:

A parcel of land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, said Township and Range, sometimes referred to as Idaho County Assessor's Tax #52, more particularly described as follows: BEGINNING at the North quarter corner of said Section 8;

Thence N 89°56' W, 64.59 feet along the North line of said Section 8 to a 5/8 x 30 inch rebar;

Thence S 26°53' E, 244.70 feet to a 5/8 x 30 inch rebar;

Thence S 38°09' E, 166.12 feet to a 5/8 x 30 inch rebar;

Thence S 55°03' E, 445.61 feet to a 5/8 x 30 inch rebar;

Thence S 25°49' E, 170.10 feet to a 5/8 x 30 inch rebar;

Thence S 21°37' E, 235.87 feet to a 5/8 x 30 inch rebar;
Thence S 56°40' E, 152.29 feet to a 5/8 x 30 inch rebar;
Thence S 53°04' E, 184.65 feet to a 5/8 x 30 inch rebar;
Thence N 75°12' E, 410.00 feet to a 5/8 x 30 inch rebar set on the Westerly Right-of-Way of old US Highway 95;
Thence N 25°27' W, 365.40 feet along said Westerly Right-of-Way;
Thence N 35°11' W, 900.22 feet to a 5/8 x 30 inch rebar set at the intersection of said Westerly Right-of-Way with the North line of said Section 8;
Thence N 89°56' W, 870.41 feet along the North line of said Section 8 to the PLACE OF BEGINNING.

AND

A parcel of land in the SE¼NE¼ of Section 8, said Township and Range, sometimes referred to as Idaho County Assessor's Tax #199, more particularly described as follows:
Commencing at an aluminum cap marking the CE 1/16 Corner of said Section;
Thence N 89°48'15" E, 290.76 feet to a 5/8" rebar on the Westerly Right-of-Way of old US Highway 95;
Thence 105.01 feet along a non-tangent curve to the right whose long chord bears N19° 23'42" W, 104.99 feet, whose radius is 1,465.00 feet and delta angle is 04°06'20" along said right-of-way;
Thence N 17°20'32" W, 83.05 feet along said Right-of-Way to the center line of an existing road, the REAL POINT OF BEGINNING;
Thence S 84°32' 30" W, 62.38 feet along said road center line;
Thence 90.67 feet along a curve to the right whose radius is 60.00 feet and delta angle is 86°34' 48" along said road center line;
Thence N 08°52' 42" W, 110.06 feet along said road center line;
Thence 68.70 feet along a curve to the left whose radius is 300.00 feet and delta angle is 13° 07' 15" along said road center line;
Thence N 80° 30' 00" E, 90.41 feet to a 1/2" rebar on the Westerly Right-of-Way of old US Highway 95;
Thence S 17° 20' 32" E, 245.43 feet, to the POINT OF BEGINNING.
Bearings based on a Record of Survey recorded as instrument Number 351469.

AND

A parcel of land situate in the NE¼ and the NW¼SE¼ of Section 8, said Township and Range, sometimes referred to as Idaho County Assessor's Tax #177, more particularly described as follows:
Commencing at an aluminum cap marking the CE 1/16 Corner of Section 8, said Township and Range, the REAL POINT OF BEGINNING;
Thence S 51°52'08" W, 76.28 feet to a 1/2 inch rebar;
Thence N 31°01'28" W, 366.78 feet to a 1/2 inch rebar;
Thence N 0°53'38" W, 201.26 feet to a 1/2 inch rebar;
Thence N 51°46'02" E, 47.03 feet to the centerline of an existing road;
Thence along said road centerline 44.18 feet along a non-tangent curve to the left whose long chord bears S 88°30'36" E, 41.97 feet, whose radius is 40.00 feet and delta angle is 63°17'18";
Thence N 59°50'42" E, 114.03 feet;
Thence 59.58 feet along a curve to the right whose radius is 40.00 feet and delta angle is 85°20'36";
Thence S 34°48'42" E, 102.85 feet;
Thence 135.79 feet along a curve to the right whose radius is 300.00 feet and delta angle is 25°56'00";
Thence S 8°52'42" E, 110.06 feet;
Thence 90.67 feet along a curve to the left whose radius is 60.00 feet and delta angle is 86°34'48";
Thence N 84°32'30" E, 62.38 feet to the Westerly Right-of-Way of Old US Highway 95;
Thence S 17°20'32" E, 83.05 feet along said highway right of way to P. C. Station 1521+66.30, marked by a 1/2 inch rebar;
Thence 105.01 feet along a curve to the left whose radius is 1465.5 feet and delta angle is 4°06'20" along said Highway Right of Way to a 5/8" rebar;
Thence S 89°48'15" W., 290.77 feet, to the POINT OF BEGINNING.

AND

A parcel of land in the S½NE¼ of Section 8, said Township and Range, more particularly described as follows:

Commencing at a brass cap marking the Center-East 1/16 of said Section 8;

Thence S. 51°52'08" W., 76.28 feet to a ½" rebar;

Thence N. 31°01'28" W., 366.78 feet to a ½" rebar;

Thence N. 0° 53'39" W., 201.26 feet to a ½" rebar;

Thence N. 78°43'35" E., 209.30 feet to a ½" rebar;

Thence S. 69°19'22" E., 84.85 feet to a ½" rebar, the REAL POINT OF BEGINNING;

Thence S. 31°19'46" E., 95.48 feet to a ½" rebar;

Thence S. 79°04'59" W., 12.26 feet;

Thence 70.46 feet along a non-tangent curve to the left, whose delta angle is 13°27'29", radius is 300.00 feet, and whose long chord bears N. 28°04' 58" W., 70.30 feet;

Thence N. 34°48'42" W., 33.27 feet;

Thence S. 69°19'22" E., 15.49 feet, to the REAL POINT OF BEGINNING.

SUBJECT TO all easements, right of ways, covenants, restrictions, reservations, applicable building and zoning ordinances and use regulations and restrictions of record, and payment of accruing present year taxes and assessments as agreed to by parties above.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee and to the Grantee's heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that the Grantor is the owner in fee simple of said premises; that said premises are free from all encumbrances except current years taxes, levies, and assessments, and except U. S. Patent reservations, restrictions, easements of record, and easements visible upon the premises, and that Grantor will warrant and defend the same from all claims whatsoever.

Dated: May 28, 2008

BOAR'S NEST RANCH, L.L.C.

BY: 
Michael Kilgallon, Manager

STATE OF GEORGIA)
COUNTY OF Fulton)

On May 28, 2008, Michael Kilgallon, Manager of Boar's Nest Ranch, LLC, personally appeared before me, SANDY H. KIDD a Georgia Notary Public, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity, and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the law of the State of Georgia that the foregoing paragraph is true and correct.

Witness my hand and official seal

Sandy M. Kidd
Sandy M. Kidd, Notary Public
printed name

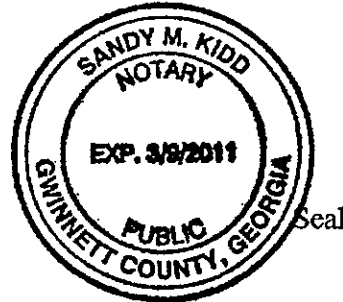


EXHIBIT B

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

Close

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommended Right Report

10/5/2009

WATER RIGHT NO. 78-4084
Status: Parent

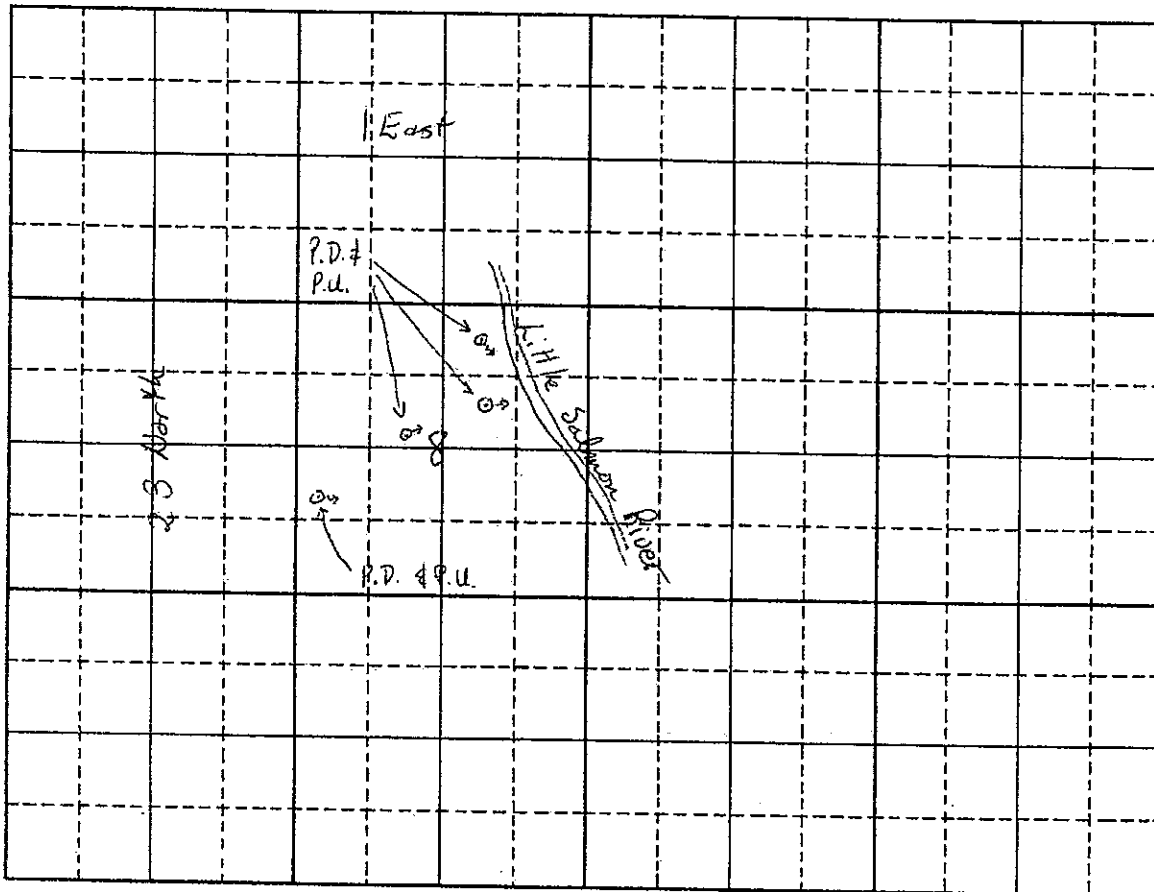
Owner Type	Name and Address
Current Owner	JOHN H CARREY RIGGINS, ID 83549 (208)628-3393

Conditions of Approval:

1.	N13	THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.
2.		PARCEL NO. 23N01E087960
3.	N11	THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

Water Right 78-4084

(8) Remarks _____



Scale: 2 inches equal 1 mile.

Map should show the location of the point of diversion and the place of use of the water by 40-acre subdivisions, section, township and range of the public land survey system.

State of Idaho)
County of Ada) ss.

Be it known that the undersigned, being duly sworn, deposes and says that he, she, they subscribed the foregoing claim to a water right, together with all attached information, and that the matters and facts therein are true to the best of the affiants knowledge.

Sworn to before me this 3rd day of May

John F. Carey
(Claimant), 19 77
John F. Carey
Notary Public
Residing at Boise, ID

My commission expires March 8, 1980

For Department Use Only

Received by <u>WHM</u>	Date <u>5/3/77</u>	Exception filed by:	Forwarded to	Date
Prelim. check by <u>GLS</u>	Date <u>5/4/77</u>		claimant by:	
\$10.00 fee received by <u>WHM</u>	Date <u>5/3/77 #7678</u>			
Approved for publication by <u>CS</u>	<u>May 5, 1977</u>			
Published in <u>Idaho County Free Press</u>				
Dates <u>May 11, 1977 & May 18, 1977</u>				

NOTICE OF CLAIM
TO A WATER RIGHT
NO. 78-4084

Notice is hereby given that John H. Carrey Box 168, Riggins, ID has filed a claim to a water right established by diversion and application to beneficial use of 0.14 cubic feet per second of water from unnamed springs tributary to Salmon River with the point of diversion in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Sec. 8, T23N-R1E B.M., Idaho County.

The water is claimed to be used from Jan. 1 to Dec. 31 for domestic and stockwater purposes with a priority date of June 1, 1900; the place of use is within the W $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 8, T23N-R1E B.M.

Any exception to this claim of water right may be filed with the Director of the Idaho Department of Water Resources, 92 South Cole Road, Boise, Idaho 83705.

C. STEPHEN ALLRED
Director
Published in the Idaho
County Free Press,
Grangeville, ID on May 11,
1977 and May 18, 1977.

M11-18

AFFIDAVIT OF PUBLICATION

Nona Donaldson

being first duly sworn, says he is the Office Manager of the IDAHO COUNTY FREE PRESS, a weekly newspaper which is published and issued weekly at Grangeville, Idaho County, State of Idaho, and which is of general circulation in said county and state; that the said notice, of which the one hereto attached is a true copy, was published in said paper for 2 weeks, being published 2 times, the first publication being on the 11th day of May, 1977, and the last publication on the 18th day of May, 1977; and that the said notice was published in the newspaper proper and not a supplement; that said newspaper has been continuously and uninterruptedly published in said county during a period of more than seventy-eight consecutive weeks prior to the first publication of said notice or advertisement.

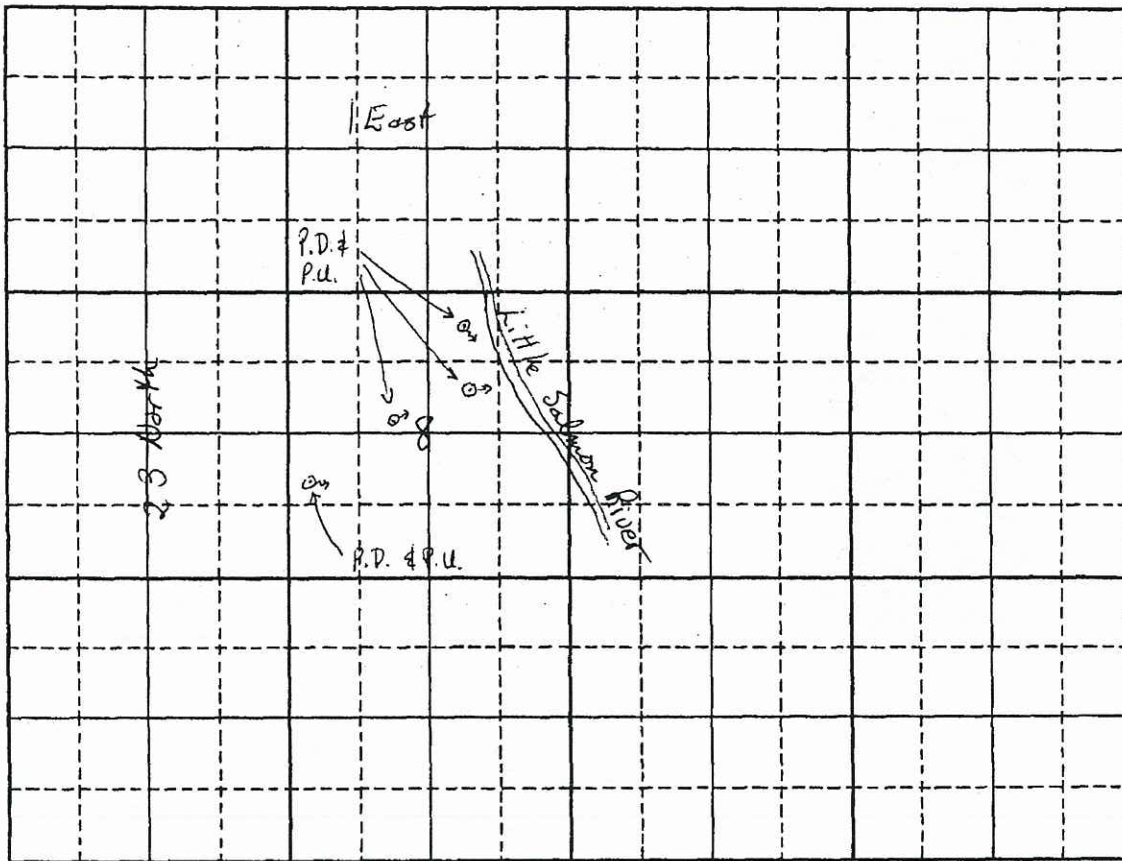
Nona C. Donaldson

Subscribed and sworn to before me this 18th day of May, 1977

Marilyn J. Kelly, Notary Public
for State of Idaho, residing at Grangeville, Idaho.

OK
5-20-77

(8) Remarks _____



Scale: 2 inches equal 1 mile.

Map should show the location of the point of diversion and the place of use of the water by 40-acre subdivisions, section, township and range of the public land survey system.

State of Idaho)
) ss.
County of Ada)

Be it known that the undersigned, being duly sworn, deposes and says that he, she, they subscribed the foregoing claim to a water right, together with all attached information, and that the matters and facts therein are true to the best of the affiants knowledge.

Sworn to before me this 3rd day of May

John H. Carey
(Claimant), 19 77
Pete Bunde
Notary Public
Residing at Boise, ID

My commission expires March 8, 1980

For Department Use Only

Received by <u>WHM</u>	Date <u>5/3/77</u>	Exception filed by:	Forwarded to	Date
Prelim. check by <u>GLS</u>	Date <u>5/4/77</u>		claimant by:	
\$10.00 fee received by <u>WHM</u>	Date <u>5/3/77</u> # <u>7678</u>			
Approved for publication by <u>CS</u>	<u>May 5, 1977</u>			
Published in <u>Idaho County File No. 1000</u>				
Dates <u>May 11, 1977 & May 18, 1977</u>				

AFFIDAVIT OF PUBLICATION

Nona Donaldson being first duly
sworn, says he is the Office Manager
of the IDAHO COUNTY FREE PRESS, a weekly newspaper which
is published and issued weekly at Grangeville, Idaho County,
State of Idaho, and which is of general circulation in said county
and state; that the said notice, of which the one hereto attached
is a true copy, was published in said paper for 2 weeks,
being published 2 times, the first publication being
on the 11th day of May, 1977,
and the last publication on the 18th day of
May, 1977; and that the said notice
was published in the newspaper proper and not a supplement;
that said newspaper has been continuously and uninterruptedly
published in said county during a period of more than seventy-
eight consecutive weeks prior to the first publication of said
notice or advertisement.

Nona C. Donaldson

Subscribed and sworn to before me this 18th day
of May, 1977

Marilou J. Stelly, Notary Public
for State of Idaho, residing at Grangeville, Idaho.

OK
5-20-77
JF

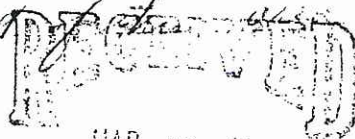
March 7 - 1977

Ray Jones Sta

to Askew St
May Carson -

The water on this property has been
used continuously on this property since
1900 for domestic and livestock use -

I have been a resident of this area
since 1898



MAR 10 1977

Ray Jones Sta
John H. Carey
Pearl E. Carey

Department of Water Resources
Western Regional Office

RECEIVED

10/05/79

WATER RIGHTS EDIT REPORT

WATER RIGHT NUMBER 78-4084

ACT
TON

OWNER LAST NAME - CARRLEY
ADDRESS LINE 1 - P.O. BOX 168

FIRST NAME - JOHN H.

SOURCE - SPRINGS
STAGE - STAIRY CEM

STATE - ID ZIP CODE - 83549

DIVERSION POINT - AWS# 08 23# 01E

CITY - HIGGINS

COUNTY - IDAHO

.1400CFS

FROM - 01-01 TO - 12-31 USE - STOCKWATER

USE DIV. RATE - .0600CFS

USE - STOCKWATER

USE DIV. RATE - .0600CFS

PLACE OF USE - 100 218 R40 01E SEC 04 TRACT 888W

TRACT 888W

NON IRRIG USE - S/200 HEAD 10/2 AUNES.

3/79

IDENT. NO. 78-41084

I D A H O D E P A R T M E N T O F W A T E R R E S O U R C E S

WATER RIGHT
DATA ENTRY LOG

<u>Initials</u>	<u>Date</u>	<u>Item</u>
_____	_____	Original form entered
_____	_____	Edit Report Correct
_____	_____	Date Protested
_____	_____	Date of Hearing
_____	_____	Date Approved/Denied (Proof due date, stage and/or status, conditions of approval, water district)
_____	_____	Record Verified
_____	_____	Amendment Approved
_____	_____	Extension Approved
_____	_____	Partial Proof
_____	_____	Proof Complete
_____	_____	Field Exam Received
_____	_____	Field Exam Accepted and changes entered
_____	_____	License Signed
_____	_____	Transfer Approved
<u>CWA</u>	<u>10-5-79</u>	Key punched by State Office
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

WATER RIGHT ANALYSIS FORM

- DATA ENTRY -

Identification No. _____

Old No. _____

New No. _____

178-4084

Record

1. Original Owner: John H. Carrey

Present Owner: _____

2. Address: P.O. Box 1683. City: Riggins State: Id Zip: 835494. A. Source of Water: Spring
B. Tributary of: Salmon River5. A. Stage (A,P,L,D,S,J): S

B. Status (D,L,R,C,A,I,F - leave blank if valid):

C. Priority Date: 6-1-1900D. County: 49E. Total Diversion Rate: .14

F. Total Diversion Volume:

G. Transfer/Amendment (P,T of A or blank):

H. Water District:

I. DLE/Carey Act (D,C or blank):

J. Right Basis (for adjudication claims A,B,C only):

	Tract	Sec.	Twp.	Rge.	Gov't Lot	Rediv.
6. A. Point of Diversion	<u>NWSW</u>	<u>8</u>	<u>23N</u>	<u>1E</u>		
	<u>SENW</u>	<u>8</u>	<u>23N</u>	<u>1E</u>		
	<u>SWNE</u>	<u>8</u>	<u>23N</u>	<u>1E</u>		
	<u>NWNE</u>	<u>8</u>	<u>23N</u>	<u>1E</u>		

7. Period of Use, Use, Diversion Rate/Volume:

from 1-1 to 12-31 for S purposes. Amount .06
(cfs or AG-ft/yr)from 1-1 to 12-31 for D purposes. Amount .08

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

from _____ to _____ for _____ purposes. Amount _____

8. Use Code: S

[illegible]

9. A. Decree Name:

B. - Decree Date:

10. Remarks: A.
B.
C.
D.
E.

11. Other Uses (Non-irrigation explanatory information):

S/200 head 0/2 homes

12. Other Rights for Same Use:

13. A. Proof Due Date:

B. Date Permit Approved or Denied:

C. Protested Date:

D. Hearing Date:

E. Old Number:

F. Proof Made (P or blank):

G. Field Exam Made (P,R,F or blank):

H. Conditions of Approval: _____

14. Diversion Means (brief narrative):

DEPARTMENT OF WATER RESOURCES
- STAFF ANALYSIS -

Item Initial Date

Claim
Application No. 78-4084

☒ Source
☒ Point of Diversion
☒ County
☒ Quantity of Water and Period of Use
☒ Description of Diverting Works
☒ Time required for B/U of water
☒ Place of Use or Acres Irrigated
☒ Map
☒ Signature
☒ Fee

(1) 6/5 5/9/77

In form to receipt

(2) _____

Send Copies to:

Idaho State Health Department

Idaho Fish and Game Department

Bureau of Land Management

(3) _____

Request Special Use Permit from U.S.F.S.

Request Easement from B.L.M.

Request Information from Applicant

Request Dam Safety Information

(4) 6/5 5/9/77

In form for advertising

(5) _____

Platted on Map No. _____

(6) _____

Located within Water District No. _____

(7) _____

Critical groundwater area: yes _____ no _____

(8) _____

Groundwater levels:

_____ Declining, _____ Stable, _____ Increasing

(comment) _____

(9) _____

Other rights on the same place of use

(10) _____

Comments: _____

(11) sf OK

Affidavit of Publication received (date) 5-20-77

(12) _____

Final date for protests N/A

Protests received: yes _____ no ☒

(13) _____

All requested information received from agencies or applicant: yes _____ no _____

(14) _____

Action recommended:

Approve _____ Deny

Proposed Priority

Reason for Reduction

Measuring device required

See attached sheet for other conditions of approval

No special conditions for approval

(15) District W

By LLA

Date 5-31-77

RECEIVED



STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
WESTERN REGION

Cecil D. Andrus
Governor

R. Keith Higginson
Director

92 South Cole Road
Boise, Idaho 83705
(208) 384-2190

June 1, 1977

Re: Claim to a Water Right No. 78-4084

John H. Carrey
Box 168
Riggins, ID 83549

Dear Mr. Carrey:

The Department of Water Resources has completed the advertising of your claim to a water right, and no further action is authorized under Section 42-225a and 42-225b, Idaho Code. Your claim will be retained in our files and will be available at any time for use by you or the court.

The filing and advertising of the claim does not confirm the water right claimed, but will serve to record and preserve the information and the evidence which you included in your claim.

If, at a later date, you find that you have additional information or supporting evidence that you would like to have included with the claim, you may have that information or evidence added at any time. Please refer to the claim identification number when corresponding with this office.

We are enclosing a copy of your claim for your records. If you have questions, or if this office may be of further assistance, please feel free to contact us.

Sincerely,

L. GLEN SAXTON, P.E.
Western Regional Supervisor

LB: rf

Enclosure



STATE OF IDAHO

DEPARTMENT OF WATER RESOURCES

WESTERN REGION

Cecil D. Anderson
Governor

R. Keith Higginson
Director

92 South Cole Road
Boise, Idaho 83705
(208) 384-2190

May 6, 1977

RE: Notice of Claim to a Water Right No. 78-4084 - John H. Carrey

Idaho County Free Press
Box 267
Grangeville, ID 83530

Gentlemen:

Enclosed you will find a legal notice which we wish to have published on the dates indicated (once a week for two consecutive weekly issues) in your newspaper. If you cannot publish the notice on the proposed dates, please contact us immediately.

An affidavit of publication must be submitted to the Department along with the publication bill. In order to receive payment, the following certification must appear on the bill:

"I hereby certify that the foregoing account is just and correct, that the amount claimed is legally due after allowing all just credits and that no part of the same has been paid."

(Signature of Claimant)

Please send the affidavit of publication and publication billing to this office before May 30, 1977.

Sincerely,

Bill submitted
5-20-77
y

RECEIVED

NOTICE OF CLAIM TO A WATER RIGHT

NO. ~~78-4084~~

Notice is hereby given that JOHN H. CARREY

Box 168, Riggins, ID

has filed a claim to a water right established by diversion and application
to beneficial use of 0.14 cubic feet per second ~~acre feet~~ of water

from Unnamed Springs tributary to Salmon River

with the point of diversion in the NW 1/4 SW 1/4, SE 1/4 NW 1/4, SW 1/4 NE 1/4, NW 1/4 NE 1/4,

Sec 8, T23N R1E B.M., Idaho County

The water is claimed to be used from Jan 1 to Dec 31

for domestic and stockwater purposes

with a priority date of June 1, 1900;

the place of use is within the NW 1/4, SE 1/4 NW 1/4, NW 1/4 SW 1/4, Sec 8, T23N R1E B.M.

Any exception to this claim of water right may be filed with the Director of the Idaho Department of Water Resources, 92 South Cole Road, Boise, Idaho 83705.

C. STEPHEN ALLRED

Director

Published in the Idaho County Free Press, Grangeville, ID

on May 11, 1977 and May 18, 1977

March 11, 1977

John H. & Pearl E. Carrey
P. O. Box 168
Riggins, Idaho 83549

Dear Mr. & Mrs. Carrey:

We are returning your claim form and check number 1241 in the amount of \$10.

We could not cash your check because it is made payable to the Department of Reclamation and we are now the Department of Water Resources.

Before you return your claim on the new form enclosed, please complete the items 1 through 8 and complete a map showing the location of the springs and places of use on the grid provided. Each small square represents 40 acres; you need to show only the acres which are irrigated.

I will be in your area later this month. If you need any assistance in the preparation of this claim, please let me know.

Sincerely,

ERVIN E. BALLOU
Senior Water Resource Agent

EB:lp
enclosure

RECORDED

EXHIBIT C

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

March 7 - 1917
Raymond S. De

to William J.
May Carson -

The water on this property has been
used continuously on this property since
1906 for domestic and livestock use -

I have been a resident of this area
since 1878

RECEIVED

MAR 10 1917

Department of War Resources
Western Regional Office

Long 0244444444
John H. Carey
Pearl E. Carey

RECEIVED

EXHIBIT D

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

AJ5856NP

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

DATE: MAR-3-1999
PAGE: A-613

RIGHTS FROM: SOURCE: SPRINGS TRIBUTARY: SINKS

RIGHT NUMBER: 78-10348

NAME & ADDRESS: DOLINA C GILL
PO BOX 2
RIGGINS ID 83549

SOURCE: SPRINGS TRIBUTARY: SINKS

QUANTITY: 0.08 CFS
THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000
GALLONS PER DAY.

PRIORITY DATE: 05/31/1902

POINT OF DIVERSION: T23N R01E S08 NWNE Within IDAHO County
SWNE

PURPOSE AND PERIOD OF USE: PURPOSE OF USE PERIOD OF USE QUANTITY
STOCKWATER 01-01 12-31 0.07 CFS
DOMESTIC 2 HOMES 01-01 12-31 0.08 CFS

PLACE OF USE: STOCKWATER Within IDAHO County
T23N R01E S08 NWNE
DOMESTIC Within IDAHO County
T23N R01E S08 NWNE

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.

EXPLANATORY MATERIAL: BASIS OF CLAIM - BENEFICIAL USE
STOCKWATER, 300 RANGE CATTLE
PARCEL NO. 23N01E080620

EXHIBIT E

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

RECEIVED

NOV 24 2006

DEPARTMENT OF
WATER RESOURCES

NOTICE OF ERROR
REPLY

11/15/2006

Please type or print clearly, fill out this form completely and mail.

Return this reply form to IDWR by the deadline date printed below if you want IDWR to change your recommendation or you want to let IDWR know that you agree with its recommendation.

YOUR DEADLINE FOR RETURNING A NOTICE OF ERROR REPLY IS: December 8, 2006

Water right number: 78-4084A

~~JOHN H. CARREY~~ *John passed away February 11, 2002*

PO BOX 168

RIGGINS ID 83549

Telephone Number: (208) 628-3393

1. Describe the portion of the proposed recommendation with which you disagree (e.g. priority date, period of use, source);
2. Describe the changes you wish to make in the proposed recommendation;
3. Give a brief explanation as to why you disagree with these portions:

☐ I AGREE with this proposed recommendation: no changes need to be made.

DATE: _____ SIGNATURE: _____

Please print your name: Pearl E. Carrey wife of 68 yrs.

IDWR State Office, 322 E Front St
PO Box 83720, Boise, ID 83720-0098, 2082874800

EXHIBIT F

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

IDAHO DEPARTMENT OF WATER RESOURCES
CLAIMS / RIGHTS NOT RECOMMENDED

W.R. NUMBER	NAME AND ADDRESS	CLAIM DISPOSITION	REASON
78-4034A	JAMES E EAVENSON 41 E PROSPECTORS DR CASCADE ID 83611 LAURA D EAVENSON HC 2 BOX 644 POLLOCK ID 83547	Disallowed	No beneficial use found.
78-4035	JOSEPH R YOUNG 720 W 23RD ST SPOKANE WA 99203 ROBERT A YOUNG E 2306 48TH AVE SPOKANE WA 99203 BEATRICE E YOUNG HC 2 BOX 640 POLLOCK ID 83547	Disallowed	No beneficial use found.
78-4073	FALL CREEK MOUNTAIN RANCH INC ATTN DON GARNER PO BOX 100309 BIRMINGHAM AL 35210	Disallowed	No beneficial use found.
78-4075	DONALD G CARLOCK PO BOX 277 NEW MEADOWS ID 83654 NEOMA CARLOCK PO BOX 277 NEW MEADOWS ID 83654	Disallowed	No lawful appropriation shown.
78-4084A	JOHN H CARREY PO BOX 168 RIGGINS ID 83549	Disallowed	No beneficial use found.
78-4084B	A C RANCHES INC PO BOX 416 PLAISTOW NH 03865	Disallowed	No beneficial use found.
78-4084C	A C RANCHES INC PO BOX 416 PLAISTOW NH 03865	Disallowed	No beneficial use found.
78-4096	CHESTER W HUBBARD PO BOX 377 NEW MEADOWS ID 83654 SARAH B MC DANIEL HUBBARD PO BOX 377 NEW MEADOWS ID 83654	Disallowed	No lawful appropriation shown.
78-4126	DERL HOLLENBEAK PO BOX 39 RIGGINS ID 83549 JUNE HOLLENBEAK PO BOX 39 RIGGINS ID 83549	Disallowed	No beneficial use found.
78-4268B	MICHAEL BOLOPUE PO BOX 362 NEW MEADOWS ID 83654 IDA E BOLOPUE PO BOX 362 NEW MEADOWS ID 83654	Disallowed	No lawful appropriation shown.
78-4272	CIRCLE C RANCHES HOMEOWNERS ASSN INC PO BOX 737 NEW MEADOWS ID 83654	Disallowed	No lawful appropriation shown.

EXHIBIT G

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

CLAIM INVESTIGATION HANDBOOK

CHAPTER 1

INTRODUCTION

The Idaho Department of Water Resources plays a key role in the Snake River Basin Adjudication. IDWR receives all claims for state law based water rights and investigates them before they are considered by the SRBA District Court. IDWR investigates them to determine how it believes each water right should be described, and then submits its recommendations to the SRBA District Court in the form of a Director's Report. Experience in the Test Basins shows that over 90% of the time IDWR's recommendation to the SRBA District Court is accepted and decreed without objection. Even when objections are filed conversations with IDWR often result in agreements between the claimant and IDWR regarding how the water right should be described. In other words, in most cases the water rights in the SRBA will be decreed in the way that IDWR recommends.

This fact illustrates that IDWR bears a major responsibility to ensure that the water rights decreed in the SRBA accurately describe the water uses that the rights authorize and protect. This revised Claim Investigation Handbook has been developed to assist you in investigating the water right claims in the SRBA. Although it is not possible to provide you with a "cookbook" that describes how every individual claim should be recommended, the guidelines in this manual are designed to assist you in exercising and developing your good judgment regarding water right recommendations. It also explains to you the process that will occur from the time you are assigned a claim until that claim is decreed as a water right.

Examinations of claims and preparation of recommendations is complex work. On one hand there is a temptation to be extremely thorough in this process. On the other, the public cannot afford to pay for a "Cadillac" inspection of every water right. We are seeking a "Chevrolet" inspection, maximizing the use of technology to enhance efficiency and accuracy, while developing a speedy and cost-effective product. We are always open to new ways of doing business to achieve this end.

Remember, this Handbook cannot answer every question. Use your common sense; talk with your co-workers; talk with your supervisor and consult with your regional Deputy Attorney General when you deal with a situation not quite answered by this Handbook. In the end, the State is counting on your diligence, hard work and good judgment to complete the SRBA fairly and efficiently.

Copies of this manual may be provided to the public when specifically requested, subject to payment of mailing and/or copying charges. "Subscriptions" for updates will not be available.

THIS CLAIM INVESTIGATION HANDBOOK REMAINS SUBJECT TO REVISION WITHOUT NOTICE TO ANYONE OUTSIDE OF IDWR.

II. CLAIMS INVESTIGATION AND RESOLUTION PROCEDURE

This Handbook applies primarily to the investigation, reporting and decreeing of irrigation and other water rights. Most of the small domestic and stockwater claims were reported by early 1999. The following flow chart lays out the procedure for the processing of these claims from the time of initial investigation until the water right is decreed.

As you look at the flow chart, be aware that investigation/error correction is in IDWR's hands. IDWR determines how it will investigate water rights and conduct error correction. Any deviations from the investigation/error correction flow chart must be approved by the Adjudication Bureau Chief.

Following the submission of the Director's Report to the SRBA District Court, processing of claims is within the Court's jurisdiction and conducted pursuant to Administrative Order No. 1. The SRBA District Court and IDWR cooperated in defining IDWR's involvement in subcases following the objection procedure. However, those procedures were established by the Court, and IDWR cannot deviate from them if it wishes to provide meaningful information to the Special Masters during subcase processing. If you have questions regarding the processing of subcases, contact legal staff with your questions.

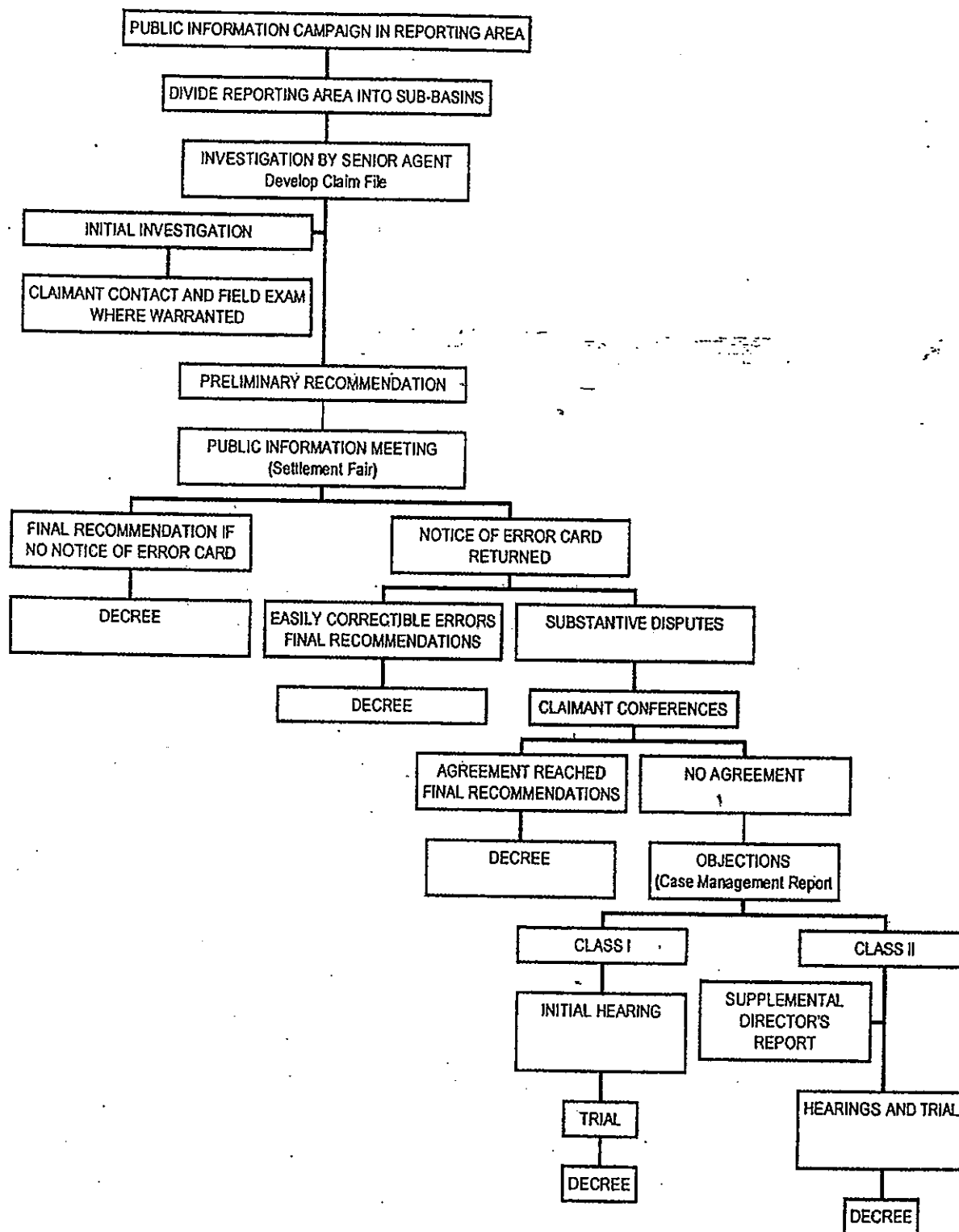
Before IDWR's investigation in a basin begins, contractors will provide GIS shape files and layouts for claims within that basin.

Additionally, a public information campaign may be conducted to inform the citizens of that basin. The State Office will inform the Regional Offices if such a campaign commences in their region.

Claims will be distributed by the regional supervisor to the agents within the region in discrete groups, based upon distinct hydrologic sub-basins. The division of basins into sub-basins is crucial. It allows for the staging of work efforts by the agents both during the investigation/error correction process and during the court process. Regional supervisors will direct comparing the electronic claim inventory with the paper file to ensure that all claims are assigned to an agent.

The agent will want to organize the claims within the sub-basin in a fashion that highlights the inter-relationships between the rights, sources, and ownerships. For instance, the first rights to be investigated could be at the top of the drainage and then the rights moving downstream. The agent must compile a GIS shapefile for all irrigation water rights in the sub-basin. Groupings

SHAPE FILES AND LAYOUTS CREATED BY CONTRACTOR



should allow for a reasonable grasp of the entire group, and reasonable time for field examinations within the group.

After the agent organizes the group of rights for investigation, the steps for investigation follow:

A. INITIAL IN-OFFICE INVESTIGATION.

1. Reviewing Claim--Electronic Record and Claim Investigation File.

For each claim, an electronic record was created with an "A" prefix. The "A" record should be proofed to make sure that it is the same as the written claim and properly coded, including all amended claims.

A duplicate record with an "R" prefix will then be computer generated for each claim. When the manual indicates that the appropriate action is to change the claim, it is the "R" record that is to be changed. The "R" records for a basin will generally not be available to the public until the proposed recommendations for a basin are distributed. The "R" prefixes will be stripped from the "R" records when the director's report is filed with the court.

Under this procedure, the "A" record will continue to reflect the right as claimed, and data-entry during the review stage will be limited to those situations where the claim is going to be recommended differently than it was claimed, or where an amended claim or notice of change in address/ownership is filed after the "R" record is created.

Every claim also should have a "claim investigation file". This file should contain all pertinent information regarding a claim. Care should be taken to ensure that all Notices of Completed Administrative Proceeding (NCAP's), changes in ownership and all other documents relating to a claim are filed in the claim investigation file. When the partial decree is issued for the water right a copy will be placed in this file and it will be maintained in the vault in the state office in Boise. The claim investigation file becomes the basis of IDWR's permanent record regarding that water right.

A claim verification report (CVR) should be included in each claim investigation file. The "quick-look" page of the CVR will be used to indicate the extent of the review that needs to be done and the status of that review. The claimant contact checklist may be attached to indicate the type of claimant contact to be made.

The claim file for each claim should indicate the basis for the recommendation - NOT just the basis for recommendations that are different than the claim. This may be done in the manner that is convenient for the water agent, but should be appropriate to the degree of complexity. It might, for example, be a remark on the CVR or a separate, more detailed, memo to the file. Comments in the electronic record are recommended and should reference relevant information. In

all situations where the recommendation differs from the claim, a brief narrative summary should be given explaining the reason for the difference.

2. GIS Evaluation

The first step of your investigation ordinarily will be to either digitize the water rights or review the digitized water rights provided by the contractor for your sub-basin. This digitizing should be conducted pursuant to IDWR standards. GIS Edits & GIS Guidelines

3. Second Round Service.

Once all claims have been digitized for a group or sub-basin, those irrigated acres where a claim has not been filed should be identified and second round service conducted if necessary.

During investigation of the claims, if IDWR discovers an unclaimed water use (other than small D&S), IDWR is required to serve a commencement notice by certified mail on all persons with a record interest in the property on which water appears to be used. Service is not required to be made to such persons who have already filed a claim in the adjudication, even if for a different use. This is known as second round service, which is described in more detail by an order issued by the district court. [Click here to see the plan.](#)

The state office will prepare a list of the parcels and persons previously marked for second round service in a basin. The list should be useful for resolving questions as to whether service has already been made to a particular person or for a particular parcel. Completion of second round service will continue to be primarily a state office effort, supported by regional office input.

4. Review of IDWR records.

The agent needs to review IDWR's records regarding a water use. These records will often assist the agent in determining the water user's intent when the water use commenced, the historical use of the water, how the water use has been transferred and changed, and such basic items as priority date, point of diversion, place of use and so on. Copies of the records, or precise references to them should be maintained in the claim investigation file.

The following is a basic list of records that IDWR may have regarding a water right and the statutory citation for how the record is developed. All agents should be familiar with these records, where and how they are maintained and the information that is found within them.

Posted Notices

Applications to Lease Water

Approved Applications to Lease Water

Applications to Appropriate Water

Water Right Permits

Idaho Laws 1881, p. 267, 1899, p. 380

Idaho Code § 42-108B

Idaho Code § 42-108B

Idaho Code § 42-202

Idaho Code § 42-204

Reports of Beneficial Use Investigation	Idaho Code § 42-217
Water Right Licenses	Idaho Code § 42-219
Applications to Change Water Right	Idaho Code § 42-222
Approved Water Right Changes(Transfers)	Idaho Code § 42-222
Extensions of Time Extending Time for Forfeiture	Idaho Code § 42-222/42-223
Emergency Transfers During Drought Conditions	Idaho Code § 42-222A
Well Drilling Permits	Idaho Code § 42-235
Well Drillers Reports	Idaho Code § 42-238
Consent Orders	Idaho Code § 42-238b(3)/351(3)
Water Right Claims	Idaho Code § 42-243
Permit Cancellations	Idaho Code § 42-310
Orders Revoking Licenses	Idaho Code § 42-350
BLM Stockwatering Permits, Licenses, Certificates	Idaho Code § 42-501
Reports of Watermasters	Idaho Code § 42-606
Reports of Water Diversions	Idaho Code § 42-701(5)
Reports of District Hydrographers	Idaho Code § 42-708
Water Measurement Reports	Idaho Code § 42-706/708
Water Right Decrees	Idaho Code § 42-1403/1413
Approved Minimum Stream Flows	Idaho Code § 42-1503
Dam Plans, Drawings and Specifications	Idaho Code § 42-1712
Supplementary Dam Drawings or Descriptive Matters	Idaho Code § 42-1716
Carey Act Proposals	Idaho Code § 42-2002/2003
Carey Act Contracts	Idaho Code § 42-2009
Applications to Enter Carey Act Lands	Idaho Code § 42-2014
Certificates of Location of Entry on Carey Act Lands	Idaho Code § 42-2014
Proofs of Reclamation and Settlement of Carey Act Lands	Idaho Code § 42-2019
Carey Act Land Patents	Idaho Code § 42-2022
Carey Act Contractors Annual Reports	Idaho Code § 42-2037
Transfers of Water Right in Carey Act Projects	Idaho Code § 42-2504
Petitions to Establish Flood Control Districts	Idaho Code § 42-3105
Reports of Aquifer Recharge Districts	Idaho Code § 42-4212

When you have completed the review of IDWR documents, the GIS information and other photography in IDWR's possession you should have an initial impression of whether the right claimed is consistent with IDWR's in-office records. If IDWR's information is consistent with the claim, then the agent may prepare the preliminary recommendation without further investigation or claimant contact. If the IDWR information is incomplete or does not match the claim, the next step in the investigation is the initial claimant contact and field examination.

B. INITIAL CLAIMANT CONTACT AND FIELD EXAMINATION.

1. Claimant Contact.

During the field investigation process, there needs to be some claimant contact in all cases where the in-office review makes it look likely that IDWR's recommendation will significantly change or reduce any element of the claim. The agent should develop a schedule of field exams for rights within the sub-basin needing further investigation. The schedule should allow the agent to concentrate the field work to minimize the number of times the agent is required to visit an area. The schedule should be developed in cooperation with the claimants to be visited. The agent may use discretion in the means of contacting the claimant, but the following information should be conveyed:

- explain the investigation process;
- identify the agent conducting the investigation;
- set an appointment time for the field exam;
- explain that if the claimant cannot be at this appointment, he/she should call to reschedule the exam within a reasonable amount of time; and
- explain that the claimant should gather all evidence in his/her possession regarding their water use to show the agent during the field exam.

When arranging for the field exam, conducting the exam, and putting the final recommendation together you will likely speak with the claimant often. A written or taped record **MUST** be made and included in the file, which states the name of the person with whom the water agent spoke, the name of the agent, the date of the conversation, notes of the relevant portions of the conversation, and notes of any other relevant information the agent has about the issue.

2. Field Examination.

The agent should try in as many cases as possible to do the field exam with the claimant present to the full extent the claimant wants to participate. Whenever possible the field exam should be done per an appointment the agent has made with the claimant. The following procedures should be followed during the exam:

- (a.) The agent should always take a copy of the GIS map to the field exam. (Two copies may be preferable in cases where it appears likely that the claimant will be asked to mark locations of POD, POU, etc. on the map. The agent should also have a copy for the agent's own use, since a major purpose of the field exam will be to determine on the ground the truth and accuracy of the GIS map itself.) If available, the agent should also take a copy of the ASCS map covering that POU wherever it appears that the claimant may be able to orient himself to the map better than to the GIS map file.

(b.) The agent should communicate to the claimant during the field exam what the agent is observing/ what problems the agent is seeing at that time. The agent should also note comments made or information provided by the claimant--especially numbers repeated by the claimant (such as acres or inches), information on previous/historical use, crop rotation, previous owners, or conflicts with neighbors. The agent should communicate with the water user regarding the appearance or existence of previous diversion systems that may have served the property.

(c.) The agent should have the claimant draw or mark on the GIS map (or the ASCS map if appropriate) the particulars of the water right (e.g. point of diversion, location of ditches, and especially the boundaries/location of the acres irrigated). If the claimant cannot draw the particulars on the map the agent should do so and ask the claimant if he/she agrees. This copy of the map should be clearly identified for the claim file as the claimant's representation of the particulars of the water right. The agent subsequently will prepare the agent's own map, which also should be clearly identified in the claim file.

(d.) The agent should try to reach general consensus with the claimant on the big points during the field exam, but the agent must base recommendations on findings and in some instances agreement may not be possible.

(e.) The agent should take care to photograph land which the claimant asserts is being used or irrigated, but as to which the agent has doubts--especially areas which the claimant asserts are irrigated but which do not appear to the agent to have been irrigated. Notes should be prepared documenting the time, location, orientation, photographer, other persons present, and content of photographs.

(f.) The agent should ask to examine any documentary evidence the claimant might have regarding any element of the water right (e.g. date of priority of a beneficial use right). The agent should make notes (see section (h.) below) as to what these documents are and what they purport to show. The agent should ask the claimant to send copies of whatever documents the agent believes are necessary for retention in the claim file to support the recommendation of any particular element of the right. If--based upon the field exam and the evidence the agent has seen up to that point--the agent believes there is at least an initial disagreement between the claimant and the agent as to any element of the water right, the agent should specify to the claimant either orally or in writing what that initial disagreement is and specify what additional information the claimant might provide the agent in order for the agent to be able to recommend that element as the claimant wants it.

(g.) The agent should leave a business card or field exam card at the conclusion of the exam, and should ask the claimant to call if the claimant thinks

of any additional information about any aspect of the exam or the water right that the claimant thinks the agent should know about. The agent should emphasize and encourage further communication from the claimant.

(h.) Immediately following the field exam the agent should make oral notes of the conversation and his/her observations on a hand-held tape recorder. That recording should then be placed and noted in the claim file. The hand-held tape recorder may not be used to record the agent's conversation with the claimant, unless the claimant knows that the recorder is being used and the recording is made with their full permission. This should be done in rare circumstances, but may be useful to memorialize the observations of an elderly or sickly witness, or one who may leave the jurisdiction.

If the accuracy of the GIS map can be determined during a "drive by" field examination--where the agent would not otherwise meet with the claimant and walk the property--this type of exam should be done if the parcel to be viewed is near other parcels that are to be investigated and would not require a special or time-consuming trip. The "ground-truthing" of the GIS map should be noted on the map by date and time, and the agent's name.

C. PREPARATION OF PRELIMINARY RECOMMENDATION

Following the field exam and the review of the claimant's evidence the agent should be in a position to make IDWR's preliminary recommendation. If the claimant's information has not been provided, the preliminary recommendation should be made as if that information does not exist. The claimant will have another opportunity during the notice of error process to provide the information.

Generally, a right should not be preliminarily recommended substantially "in excess" of the right claimed. This includes a priority earlier than the priority claimed, amounts in excess of the amount claimed, purposes of use in addition to purposes of use claimed, or a total number of irrigated acres greater than the number claimed. An amended claim (or additional claim) is required before the excess may be recommended. An amended claim is generally not required to recommend a different place of use, a different point of diversion, additional points of diversion, or a longer season of use for irrigation.

The agent should generally assume that the claimant claimed everything the claimant wanted to claim. The agent may contact the claimant to inquire whether this assumption is correct or whether they wish to claim the remainder. This contact generally should not be made unless the water right is clearly underclaimed. "Clearly underclaimed" means that there is a significant difference between the claim and a general adjudication decree, license, or the field exam for a beneficial use claim. What is a significant difference requires an exercise of judgment on the part of the agent. For example, a difference of an acre or two on a forty acre claim might not be significant, whereas a difference of an acre or two on a claim to a few acres might be.

1. Proof Of Facts.

In many instances the question of what is to be recommended depends on whether a fact has been sufficiently proven. Absolute proof of every essential fact is never required for making a recommendation. It is impossible to describe to you what evidence is "enough" to prove a fact. The amount of proof that is required to make a recommendation of a water right depends upon your good judgment as well as common sense, with an eye towards the legal burden of proof. The question you must answer in your own mind is whether you feel reasonably certain that your opinion regarding how a water right should be recommended is based upon reasonable facts, assumptions and analyses.

The claimant seeking to have a water right confirmed bears the burden of proof to establish every element of his or her water right. You should feel free to ask the claimant what information they have or could submit at trial that supports their water right. Consider what the Court would do if presented with a certain piece of evidence or testimony. Remember that because this is a civil case the standard of proof the Court will apply is whether a certain element is more likely than not correct.

A good example is proof of priority of beneficial use claims. The claimant submits some information supporting the priority date claimed. Absent contradictory information, the claimant's information would likely be accepted by the Court as meeting the claimant's burden of proof. In this situation the claimed priority date could be recommended. If IDWR has other information which contradicts the claimant's information, then the claimant may be asked to clear up the confusion, if they can, and then all of the relevant information should be "weighed" to determine if the claimed priority is correct.

In determining the facts for purposes of recommending claims, the water agents will have to make some close calls. Make a reasonable attempt to gather the relevant evidence; exercise good judgment in evaluating that evidence; and document the evidence for the file in case it is needed in court later. All the available information should be documented for the file, not just the information supporting the recommendation; for the file to justify the recommendation it must also show the contradictory information that was considered in making the recommendation.

Documentation of information upon which the facts are determined is very important. The more complicated the claim, or the more likely the claim is to be contested, the more important the documentation is. "Documentation" does not necessarily mean that the water agent has to find written evidence before a fact can be determined; it does mean that if a determination is based on information that is not in writing, the agent should prepare written or taped notes for the file.

It is important to remember that once a recommendation is made it is not locked in stone. The claimants will have an opportunity to file notices of error with IDWR to IDWR's proposed recommendation, and will have the opportunity to file objections with the district court to the director's report. More information may become available as part of these processes.

2. Proof of Ownership

IDWR will generally not require proof that the claimant is the owner of the water right claimed or that the right was not initiated in trespass for purposes of preparing the recommendation. Ownership issues should be investigated, however, in the following circumstances:

(a.) Duplicative claims - different claimants file claims to the same water right or the same portion of a water right (See page 2 of Chapter 12);

(b.) There is reason to believe, from information already available to IDWR, that there is an ownership or trespass problem.

3. Disallowal Recommendations.

A claim recommended for disallowal should have a status of "T". The claim should include a GENeral remark indicating the basis for disallowal. Adjudication Memo #32 lists standard remarks for basis for disallowal (the "P" prefix remarks). If none of the standard remarks seem appropriate, then the water agent should contact legal staff.

The recommendation should also include a standard condition that offers a brief explanation of the basis for disallowal and additional explanation should be provided in the comment field. Adjudication Memo #32 lists the conditions for the standard bases for disallowal (the "P" prefix conditions, which are numbered the same as the "P" prefix remarks to which they correspond) and see Chapter 11 for disallowals based upon forfeiture and abandonment. [The disallowal conditions will print only in the proposed recommendations, and not in the report (see Adjudication Memo #32 as to the proposed recommendation/notice of error procedure). It is not necessary to delete any other conditions in the claim record, because the computer will ignore other remarks in a claim record with an "T".

4. Applications For Transfer.

Generally, the agent should consider an approved transfer in the same fashion as a water right license. Conditions of approval should be carried forward in the recommendation if they modify an element of the right or are necessary for the administration of the right. However, because transfers may be ongoing, care must be taken to be sure that the transfer process is coordinated with the recommendation process. Questions should be directed to legal counsel.

(a.) Application approved after claim filed but before recommendation is final.

The adjudication statute requires the claimant to amend a claim consistent with an approved transfer. An approved transfer will be deemed to amend the claim without the claimant having to file an amended claim. Allocations staff will send copies of the approved transfer to the region, and regional adjudication staff should include it in the claim file and data-enter the changes in the "A" record (and the "R" record, if one has been created).

(b.) Application pending at time recommendation prepared.

If an application for transfer has been filed for a change in use that was made prior to commencement of the adjudication, then it may be possible to recommend the change as an accomplished transfer, in which case the administrative transfer proceeding is unnecessary. If the change is to be recommended in the report, then allocations staff should be informed of the recommendation.

If the transfer applied for may not be recommended as an accomplished transfer, then the right should not be recommended with the changes proposed in the transfer application until the transfer has been approved and the order approving the transfer has become final.

5. Permits For Which Proof of Beneficial Use Was Filed Prior to Commencement.

There are some permits on file with IDWR for which a proof of beneficial use was filed prior to commencement but for which a license will not have been issued at the time the permit is investigated for purposes of preparing the director's report. Water allocations staff will be coordinating with adjudication staff to ensure that licenses are issued for these rights prior to filing the director's report to the extent possible. Once the license is issued, then the claim should be recommended as based on a license, and an enlargement or accomplished transfer should be reviewed in generally the same manner as any other enlargement or accomplished transfer of a licensed right.

There is, however, one important caveat. For various reasons, there has in some cases been a substantial period of time between the filing of the proof of beneficial use, completion of the licensing field exam, and the issuance of the license. An enlargement or accomplished transfer must have occurred prior to commencement of the adjudication to be claimed in the adjudication, but cannot be claimed based on a permit. The problem that arises from the lapse of time is that a claimant could be prevented from claiming an expansion or change in use that occurred prior to commencement because the water use was still based on a permit at that time.

This problem will be resolved, for purposes of the enlargement and accomplished transfer analysis, by treating the right as if the license were issued when the proof of beneficial use was submitted. The result of this policy is that 1) an enlargement should not be recommended with a priority date earlier than the date the proof of beneficial use was submitted, 2) the date of change for

purposes of the injury analysis will be deemed to be no earlier than the date the proof of beneficial use was submitted, and 3) an enlargement and accomplished transfer should not be recommended for a right for which the proof of beneficial use was submitted after commencement of the adjudication.

There is another situation where coordination of the efforts of adjudications and allocations staff will be very important. In some cases, the extent to which beneficial use has been made of a permit pending action by the allocations staff is dependent on the nature and extent of other water rights, the use of which is combined with the permitted right. Where the claim to be investigated is pending action in the water allocations section, or overlaps with another right pending action in the water allocations section, adjudications staff should coordinate with allocations staff, in a timely manner that allows both sections to meet their schedules.

6. Enlargement claims.

Before any enlargement claims may be recommended pursuant to Idaho Code § 42-1426 they must be published. Prior to completing the preliminary recommendations for a sub-basin the agent should identify all enlargement claims. Type II enlargements will be easy to identify. Type I enlargements are more problematic.

Under Idaho Code § 42-1416(1) holders of previously adjudicated water rights were presumed to have validly applied all of the water being used at the time of the SRBA with no change in priority. This allowed holders of adjudicated water rights to claim all of their water use under their previously adjudicated right under one claim, even if there was an enlargement in use. These claimants claimed, and in the test basins were recommended, one water right with one priority date. These are Type I enlargements.

Under Idaho Code § 42-1416(2) holders of unadjudicated water rights who expanded their use in violation of the mandatory permit requirements were presumed to have created an additional water right with a priority date as of the completion of the expansion. These claimants claimed, and in the test basins were recommended, two water rights with differing priority dates. These are Type II enlargements.

During the initial investigation and claimant contact the agent should solicit any additional claims for Type I enlargements that claimants wish to file. See [LINK TO the Memo of October 27, 1997] Enlargement Memo, that is designed to assist you in identifying these situations. After the filing of any additional claims the agent should arrange for publication of all enlargement claims at the same time the preliminary recommendations are sent to the claimants. This starts the 120 day period for the filing of petitions to assert injury. During this time period the notice of error process will be conducted.

D. NOTICE OF ERROR PROCESS

1. Overall Approach.

1. Goals of Notice of Error Process: The Notice of Error (NOE) process is to be implemented to achieve the following goals:
 - (a). To ensure that each water right recommendation in future director's reports is as accurate as possible;
 - (b). To resolve all disagreements between IDWR and the claimant--that possibly can be resolved--before the recommendation of the claimant's water right is included in the director's report, so that most objections filed to recommended water rights are third party objections;
 - (c). To identify as early as possible those disagreements between IDWR and the claimant that cannot be resolved through negotiation or alternative dispute resolution prior to the filing of the director's report, to prioritize those issues by degree of complexity per IDWR's case management system, and to direct them onto the appropriate track for resolution by the SRBA Court.

2. Notice of Error Procedures.

Once the agents have investigated all claims in a basin the agents prepare the preliminary recommendations. Each claimant within the basin will then be sent the preliminary recommendations of each of that claimant's claims from the State Office. The NOE mailing will consist of:

- (i) An introductory letter from the Director
- (ii) an introductory letter from the SRBA District Court urging people to participate;
- (iii) one page of instructions and explanatory material;
- (iv) the preliminary recommendation with the GIS map, and
- (v) the NOE form
- (vi) a return envelope for the NOE.

The NOE forms will be due to the regional office within 30 days of the NOE mailing.

1. The introductory information will set a time for a public meeting which will be conducted as a "settlement fair." The public meeting will be held in the evening at a central location in the reporting area. At that meeting IDWR and Attorney General's Office personnel will be available to answer questions and settle disputes. Claimants will also have the opportunity to set an appointment to discuss their rights. NOE form will be collected at this meeting. If claimants do not attend the public meeting, they will be able to mail their NOE forms to IDWR.

2. Sorting of NOE Return Forms: The NOE forms will be sent back directly to the regional offices. The agent who prepared the preliminary recommendations will receive the NOE forms for those recommendations for placement in the claim file. At that point the agent will sort all water right **recommendations** into one of three categories:

- (a.) Recommendations for which no NOE form is returned will be considered to be completed and that recommendation is ready to be sent to the state office for inclusion in the director's report. Presumably (hopefully) no objection will be received and this right will be decreed as recommended unless a third party objection is received.
- (b.) Recommendations for which a NOE form is returned indicating minor concerns such as changes of address, clerical errors, and other changes that the agent feels can be corrected. The agent should make the changes and document the reasons in the claim file. Time permitting, the amended preliminary recommendation should be sent to the claimant with a form letter indicating that the requested change had been made as shown on the revised preliminary recommendation. These recommendations will then be ready to be sent to the state office for inclusion in the director's report. Presumably (hopefully) no objection will be received and this right will be decreed as recommended unless a third party objection is received.
- (c.) Recommendations for which a NOE letter is returned which indicate that a meeting should be held with the claimant to review the basis for the recommendation and the basis of the claimant's concerns. Claimant conferences should be set up for these claimants.

3. Claimant Conferences: For NOEs requiring more than form letter response, the agent, legal counsel, and, if necessary, a State Office technical staff person should meet to discuss the NOEs. Based upon this review they should cooperatively develop a schedule of claimant conferences for all NOE claimants. When a workable schedule has been developed, contact should be made with the claimants to set up a conference.

The claimant contact should:

- acknowledge IDWR's receipt of their NOE card;
- set an appointment time for the claimant conference;
- explain that if the claimant cannot be at this appointment, he/she should call to reschedule the appointment within a reasonable time; and
- explain that the claimant should bring all evidence in his/her possession regarding their NOE to discuss at the conference.

IDWR should bring all information upon which it relied in preparing the recommendation to the NOE conference. IDWR will be represented by the investigating agent and legal counsel

with authority to enter into a settlement agreement on the spot. The conference will be primarily an information sharing meeting. The agent should explain--and show to the claimant--all information the agent relied upon in making the proposed recommendation. The claimant in turn should show the agent all information in the claimant's possession that supports the claimant's position. The agent should make for the claim file copies of all documents provided by the claimant. If possible, agreement should be reached as to each element of the water right to be recommended in the director's report. The agent should draft all changes to the proposed recommendation at the conference (e.g. by writing the changes on the face of a copy of the proposed recommendation.). The agent and the claimant should then sign a brief written agreement that this is how the water right will be recommended in the director's report. These recommendations will then be ready to be sent to the state office for inclusion in the director's report after the agent has completed any necessary data entry. Presumably (hopefully) no objection will be received and this right will be decreed as recommended unless a third party objection is received.

The agent and legal counsel should review all claims for which an agreement on IDWR's recommendation was not reached in the claimant conference. This should be the only category of recommendation that might be objected to by the claimant. The nature of the dispute should be classified as Class I or Class II under Administrative Order No. 1. The claim investigation file should be reviewed to ensure that the necessary exhibits are contained in the file. The agent's next involvement with this matter, if any, will be in the context of a subcase proceeding.

E. SUBCASE PROCEEDINGS

If an objection is filed to a recommendation the final decision regarding that water right claim will be made by the SRBA district court. The level of involvement by the agent will depend on whether the case is a Class I or Class II case. The following is a quote from the Administrative Order No. 1 which describes the difference and IDWR's involvement in each type of case:

2. DEFINITIONS

* * *

y. *Subcase - A water right which is the subject of any post-Director's Report pleading.*

(1) *Class One Subcase - Subcases where the difference between the Director's Report and the claim is less than 40 acres and/or the difference in quantity is less than 0.80 cfs and all claims where the objection relates only to owner identification, priority date, source or point of diversion.*

(2) *Class Two Subcase - Subcases not included in the definition of Class One Subcase.*

NOTE: The purpose of separating subcases into two classifications is to expedite the SRBA and provide claimants a speedy and cost-effective method to litigate cases where the difference between the Director's Report and the claim is less significant, as in the Class One Subcases. This allows the court, the parties and IDWR to focus more time and resources on resolving the more significant issues associated with Class Two subcases.

10. PROCEDURE FOR WATER RIGHTS WHERE AN OBJECTION HAS BEEN FILED

a. *When the first objection to a recommendation or abstract is filed, a subcase file shall be opened and separately docketed on IWATRS. The water right number becomes the subcase number. All subsequent filings for that water right, including objections and responses, will be docketed under that subcase.*

b. *Subcases will generally be referred to a Special Master by an Order of Reference.*

c. *Unless otherwise ordered by the Presiding Judge or a Special Master, each subcase shall proceed separately from other subcases or matters at issue in the SRBA.*

d. *No later than 30 days after the objection period has expired, IDWR shall file a case management report with the court dividing each reporting area into Class One and Class Two Subcases.*

e. **Scheduling**

(1) **Class One Subcases -**

(a) *At the end of the objection period, the court may hold an Initial Hearing for each subcase. At the Initial Hearing, each claimant and/or objector shall be given an opportunity to meet with IDWR in an attempt to reconcile the difference between the Director's Report, the claim and the objection(s) for each subcase. If the objection(s) cannot be reconciled, the court shall set the matter for trial. The claimant and objecting party, if any, must be present at the Initial Hearing.*

(b) *The trial should be held within 45 days of the Initial Hearing unless otherwise ordered by the Special Master.*

(2) *Class Two Subcases - At the end of the objection period, the court shall hold a Scheduling Conference under I.R.C.P. 16(b). These subcases shall proceed under the court's scheduling or pre-trial order.*

(3) *Discretion of the Presiding Judge or Special Master - On motion of any party to the subcase or as ordered by the Presiding Judge or Special Master, a subcase may be reclassified and proceed accordingly.*

f. *Amendment of Claims*

(1) *Class One Subcases - Absent leave of court, claims shall be amended at or before the Initial Hearing except for the name and address of the claimant which may be amended at any time.*

(2) *Class Two Subcases - Absent leave of court, claims shall be amended no later than 14 days after the Scheduling Conference except for the name and address of the claimant which may be amended at any time.*

(3) *IDWR investigation of amended claim - The court may request that IDWR prepare an Amended Director's Report for any amended claim, including claims amended at trial to conform to the evidence. The claimant may be ordered to pay all necessary costs associated with investigating and reporting the amended claim.*

g. *IDWR Involvement*

(1) *Class One Subcases - Except where a party calls a representative of IDWR as its own witness, the role of IDWR will be limited to presenting geographic information (GIS) in the form of an illustration depicting the place of use and point of diversion. IDWR may also provide any documents such as permits, licenses, decrees or transfers which may be relevant to a claim. A party calling IDWR as its own witness must notify IDWR, in writing, 7 days prior to trial.*

(2) *Class Two Subcases -*

(a) *Within 14 days following the Scheduling Conference, IDWR shall serve on each party an affidavit setting forth the factual basis of IDWR's recommendation on the disputed element(s). IDWR shall file the affidavit with the court. The court*

may consider the affidavit for any pre-trial matter or in lieu of any direct testimony by the IDWR affiant at trial.

(b) IDWR must be notified, in writing, at or before the pre-trial conference, should any party choose to cross-examine the IDWR affiant or call a witness from IDWR at trial.

(3) Discretion of the Presiding Judge or Special Master - Nothing herein shall prevent the Presiding Judge or Special Master from calling a representative of IDWR as its own witness consistent with I.R.E. 706 or 614 for Class One or Class Two Subcases.

The SRBA attorneys will be establishing case files, especially in the Class II cases, before the objection period has closed. During that time you will be contacted to assist in the development of the necessary evidence to be filed by IDWR. In IDWR's case management report to the SRBA district court subcases will likely be grouped in the sub-basin format under which claims were assigned to you. This should assist you in scheduling discrete time periods when you will need to be in court. Your assigned counsel will keep you informed of the progress of your case.

F. THE OBJECTION SETTLEMENT PROCESS

When an objection has been filed to IDWR's recommendation, "settlement" negotiations often commence between the objectors, any parties filing a response and IDWR. IDWR's role in the negotiations is to ensure that any settlement that is reached reflects a reasonable description of the water right(s) at issue based upon the information brought to it by the parties. After reviewing a proposed settlement IDWR either concurs by signing a Standard Form 5, or recommends that the settlement not be adopted by the SRBA District Court. If IDWR does not concur in a settlement, the subcase will go to hearing.

The settlement process is a collaboration between IDWR staff and their legal counsel. The Regional Supervisor will identify who the responsible agent will be for subcases in that region. This should occur as legal staff is preparing the case management report for a basin. In the event that due to other assignments the regional agent responsible for the water right does not have sufficient time to actively support the objection resolution process, the Regional Supervisor for the agent should seek assistance from the State office for a proxy agent to conduct these duties. Generally, the legal counsel for a region will be the responsible attorney for subcases arising in that region.

The original claim file should be pulled and placed with the responsible agent. Documents in the claim file will be copied and provided to legal staff as they prepare the case management report. Copies of claim files should be provided to legal staff within two weeks of the close of the objection period. Upon settlement of the case, or following trial, and issuance of the partial decree, the original claim files should be forwarded to the State office for storage.

Counsel will take the lead in communicating with the parties or their attorneys in the settlement process. The agent responsible for that water right must work closely with counsel to be sure counsel is fully informed regarding the basis for IDWR's recommendation, and to set the factual framework within which IDWR would be willing to agree to a modification of its recommendation. The agent should not be "locked in" to a recommendation and should have an open mind regarding information provided in the settlement process. All Standard Form 5 agreements must be approved by the agent and approved as to form by their legal counsel.

Settlement negotiations can often begin immediately after the filing of the objection, but typically the negotiations commence after the filing of IDWR's case management report. The negotiations can be informally structured before any action by the SRBA District Court, can be driven by the setting of initial hearings or status conferences, or can be formally commenced by the scheduling of a court ordered settlement conference. Legal counsel will ensure that agents are kept informed and involved in all settlement negotiations. Staff must make time to ensure that the negotiation process moves quickly to resolution.

III.

BASIC IDAHO WATER LAW

A. Water Rights.

1. Basic Legal Regime.

The appropriation doctrine of water rights has prevailed in Idaho since before statehood. *Malad Valley Irrig. Co. v. Campbell*, 2 Idaho 411, 18 P. 52 (1888). The state constitution approved by Congress on July 3, 1890, endorses the appropriation system of water rights. IDAHO CONST. art. 15, § 3 (26 Stat. 215). The Idaho Supreme Court held at an early date that a prior appropriator has a superior right over a riparian water user who subsequently applies the waters to a beneficial use. *Drake v. Earhart*, 2 Idaho 750, 23 P. 541 (1890). The appropriation doctrine governs the use of both surface and ground water in Idaho. IDAHO CODE §§ 42-103 and 42-229.

A water right in Idaho is defined by the historic beneficial use of the water. This historic use is generally described by the following elements or descriptors: date of priority, amount, season of use, purpose of use, point of diversion, source and place of use. *Id.* § 42-1411; *Olsen v. Idaho Dep't of Water Resources*, 105 Idaho 98, 666 P.2d 188 (1983). A water right holder may use water up to the limits of that historic use so long as such use is both beneficial and has not been lost by transfer, forfeiture, abandonment, or adverse possession.

a. Beneficial Use.

An appropriation of water must be for a useful or beneficial purpose. IDAHO CODE § 42-104. There is no statutory limitation on what uses are beneficial. The state constitution recognizes

agriculture, mining, manufacturing, milling, power and domestic purposes as beneficial. IDAHO CONST. art. 15, § 3. The Idaho Supreme Court has held that the beneficial uses set out in the constitution are not exclusive. *State Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974) (commonly referred to as the *Malad Canyon* decision). The court found recreation and scenic beauty to be beneficial uses of water under appropriate circumstances. *Id.*

The legislature in 1996 approved statutory changes recognizing as a beneficial use of water the acquisition and holding of water rights by a municipality to provide for future growth. 1996 IDAHO SESS. LAWS 967, codified at IDAHO CODE §§ 42-202, 42-202B, 42-217, 42-219, 42-222. The changes provide that a license may be issued to a municipal provider for an amount up to the capacity of the system constructed provided that the director of the Department of Water Resources determines that the amount is reasonably necessary to provide for the existing uses and reasonably anticipated future needs within the service area of the municipality. *Id.* § 42-219. The director is required to condition the license to prohibit any transfer of the place of use outside the service area, or to allow for a change in the nature of use for amounts held for reasonably anticipated future needs. The law defines "municipal providers" to include (1) cities, counties and state institutions; (2) corporations or associations holding a franchise to supply water for municipal purposes; and (3) corporations and associations supplying water through a regulated "public water supply" system. *Id.* § 42-202B.

b. "Public" Waters Subject to Appropriation.

Idaho Code §42-101 declares, "All the waters of the state, when flowing in their natural channels, including the water of all natural springs and lakes within the boundaries of the state are declared to be property of the state...." All natural springs and lakes are therefore public waters, subject to appropriation, subject to the laws that establish the procedures for making an appropriation, subject to the laws that govern the distribution of water, and subject to the laws that govern the adjudication of water rights.

A natural channel is "a stream of water flowing in a definite channel, having a bed and sides or banks." *Hutchinson v. Watson Slough Ditch Co.*, 16 Idaho 484, 101 P. 1059 (1909). The flow of water need not be constant, so an intermittent stream that has a flow only in springtime is still a natural channel. *Id.* The channel must have some element of permanence, but proof of ancient age is not required. *Scott v. Watkins*, 63 Idaho 506, 122 P.2d 220 (1942). A stream does not lose its character as a natural channel just because it flows through a marsh that lacks definite sides. *Bachman v. Reynolds Irrigation District*, 56 Idaho 507, 55 P.2d 1314 (1936). Nor does a stream lose its character as a natural channel just because part of the channel has been artificially created. *Poole v. Olaveson*, 82 Idaho 496, 356 P.2d 61 (1960).

Ground water has also been declared public property by statute. Idaho Code § 42-226. A permit must now be obtained to appropriate ground water. Idaho Code § 42-229. The Idaho Supreme Court held that the statute did not deprive the overlying landowners of their property without just compensation. *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968).

c. **Water Not Subject to Appropriation.**

Some uses of water do not need to be authorized by a water right and do not receive water right protection. These uses are rare and their existence has little or no practical impact on the SRBA. The statutory provisions regarding so-called "private waters" do not really describe water that is not subject to the water rights laws.

i. Diffused Surface Water

Use of diffused water does not require a water right. A landowner has the right to use diffused surface water occurring upon the landowner's property before it joins a natural stream, lake, or other public source. *King v. Chamberlain*, 20 Idaho 504, 118 P.2d (1099). Diffused, surface water is water on the surface of the land "from rains and melting snow, but is in no way fed from any natural stream or regular flow of water"; before it enters a natural channel. *King*. Diffused surface water does not include percolating water from springs, or flood flows, because such waters are fed by a regular (albeit intermittent) flow of water. Whether a particular source is diffused surface water is a question of fact, and the answer may involve difficult issues as to the source of water, when it enters a natural channel, and whether it is a significant source of water to a public water source.

There may also be a question as to when there has been a "capture of diffused surface water". For example, terracing is a common practice of dryland farmers in eastern Idaho. The terracing enables the farmer to make better use of the rainfall. This is a "capture of diffused surface water". The damming of natural swales to collect surface water is a common practice in northern Idaho. This is a capture of diffused surface water if the water has not formed into a definite natural channel at the time of capture.

ii So-Called "Private Waters"

Idaho Code §§42-212 and 42-213 use the term "private waters" in their headings. The actual text of these sections does not, however, describe private water that is not subject to appropriation. Idaho Code §42-212 provides:

Diversion of private waters. - The department of water resources is hereby prohibited from issuing or granting permits to divert or appropriate the waters of any lake not exceeding five (5) acres in surface area at high water mark, pond, pool or spring in this state, which is located or situated wholly or entirely upon the lands of a person or corporation, except to the person or corporation owning said land, or with his or its written permission, executed and acknowledged as required for the conveyance of real estate.

Idaho Code §42-213 provides:

Diversion of private waters - Applicants must show right of way. - All applicants to the department of water resources or permits to divert or appropriate the waters of any lake, pond, pool, or spring shall state whether such lake, pond, pool or spring is wholly or entirely located upon the land of any person or corporation other than the applicant, and, in the event that it is, such application shall state that the applicant has the written permission from such owner, executed and acknowledged as required by the provisions of the preceding section to divert or appropriate such water.

The only unique attribute of water bodies that qualify as the "private" waters described in Idaho Code §§42-212 and 42-213 is that an applicant for a permit must have a written right of way from the owner of the land where the source is located, and that the application must state whether the application is for private water and whether the applicant has a written right of way. The waters described in those sections continue to be "public" waters subject to appropriation.

iii. Practical Considerations in the SRBA.

Whether or not water is subject to appropriation has no practical consequences for IDWR's activities in the SRBA. In claims taking the claimant must determine whether or not they need a water right for their water use. If they file a claim they are protecting their water right. If they do not file a claim they are gambling that their water use does not need a water right. If it later turns out that the water use does require a water right, the water user would be barred by the provisions of Idaho Code § 42-1420 from claiming a pre-SRBA water right. The assessment of the risk of not filing a claim must be made by the claimant, not the claims-taker, no matter how insistent the claimant's demands for advice.

The department does not investigate whether the claimant of an existing right to the use of water rights of way for the point of diversion or the rest of the water delivery system at the time the appropriation was established. The adjudication deals with existing rights, and where a party has an otherwise valid water right, the water user must have had rights of way for the water delivery system. Otherwise, the landowner would have denied the water user access and thereby prevented the completion of the appropriation. Where a party has an established use, the issue of whether the water user has a right of way is appropriately litigated by the water user and the owner of the land who claims that the water user lacked the necessary rights of way. The landowner would presumably raise this issue by filing an objection to the director's report.

d. Instream Uses.

Water rights for instream uses are recognized in Idaho. The common understanding has been that such uses are recognized only when acquired by a state agency pursuant to statute. See IDAHO CODE §§ 67-4301 to -4312 (Department of Parks and Recreation) and *id.* §§ 42-1501 to -1505 (Water Resource Board). A recent decision by the SRBA District Court holds that a diversion is not necessary to create a water right. This potentially would allow for others to hold instream flow rights. This decision is being appealed to the Idaho Supreme Court. In addition, the

Idaho Supreme Court has held that the Department of Water Resources has a duty to consider the need for instream flows for fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation and water quality before approving an appropriative water right. *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

e. Measure of the Right.

The rate of flow of a water right is measured in cubic feet per second (c.f.s.), and the volume of stored water is measured in acre-feet. IDAHO CODE §§ 42-102 and 42-202. One c.f.s. is equal to fifty miner's inches in Idaho. When water is used for irrigation, no license or court decree may allot more than one c.f.s. of water for each fifty acres of irrigated land unless it can be shown that a greater amount is necessary. *Id.* § 42-220. When flood or winterflow waters are stored for later irrigation use, no more than five acre-feet of water may be stored for each acre of land to be irrigated. *Id.* § 42-202.

The amount of water that may be diverted under a water right is limited to the historical beneficial use and further limited, at the time of use, to the amount necessary to satisfy the beneficial purpose served by the right. See *Glavin v. Salmon River Canal Co.*, 44 Idaho 583, 589, 258 P. 532, 534 (1927); *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320, 323-24, 227 P. 29, 30 (1924). No water user is entitled to make a wasteful use of water. *Twin Falls Land & Water Co. v. Twin Falls Canal Co.*, 7 F. Supp. 238, 251 (D. Idaho 1933). The Idaho Supreme Court has held that many factors enter into a determination of the appropriate duty of water for a particular use based upon considerations of beneficial and economical use. See *Uhrig v. Coffin*, 72 Idaho 271, 274, 240 P.2d 480 (1952). In addition, an appropriator is entitled to a reasonable allowance for loss in conveying the water from the point of diversion to the place of use. *Martiny v. Wells*, 91 Idaho 215, 219, 419 P.2d 470, 474 (1966); *Basinger v. Taylor*, 36 Idaho 591, 597, 211 P. 1085, 1086 (1922).

The Idaho Supreme Court recently ruled that the description of a water right may not be reduced from the historic beneficial use by considerations of current beneficial use, absent a finding of forfeiture, abandonment, adverse possession or other voluntary change such as a transfer. *In re SRBA*, 1997 WL 564393 (Idaho Sept. 11, 1997).

f. Adjudications.

Three types of proceedings exist for the court adjudication of water rights: private adjudications under IDAHO CODE § 42-1404; general adjudications under IDAHO CODE §§ 42-1405 to -1423; and summary supplemental adjudications under IDAHO CODE § 42-1424. A private adjudication determines those water rights necessary to resolve a local dispute. A general adjudication determines all rights to the use of water from a water system. A summary supplemental adjudication may determine rights developed subsequent to the entry of a decree in a private or general adjudication, or determine preexisting rights of a claimant not made a party to the earlier proceeding.

The Idaho Supreme Court recently issued a decision regarding the effect of a prior adjudication in the SRBA. *In re SRBA*, 1997 WL 564393 (Idaho Sept. 11, 1997). The Court indicated that a decree from a private adjudication "evidences" a water right, but is not conclusive. The water right claimant bears the burden to prove each element of the right, and IDWR may make independent findings regarding the right. Presumably this applies to supplemental adjudication decrees as well. On the other hand, the Idaho Supreme Court indicated that a general adjudication decree should be given conclusive effect in the SRBA. See Idaho Code § 42-1420.

2. Establishing a Water Right.

The state constitution provides that, "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use, shall never be denied" IDAHO CONST. art. 15, § 3. Under this constitutional sanction, IDAHO CODE § 42-103 has provided since statehood that "The right to the use of the waters of rivers, streams, lakes, springs, and of subterranean waters, may be acquired by appropriation." Historically, there are four basic methods by which a water right could be obtained in Idaho: constitutional method, posted notice, permit and enlargement.

a. Constitutional Method.

Surface or ground water rights established by means of diversion and application to beneficial use, prior to the statutory procedure having become mandatory, are called "beneficial or constitutional" use water rights in reference to art. 15, § 3 of the Idaho Constitution. The basic findings that must be made to determine that such a right has been established are: (1) an intent to appropriate water for a beneficial use; (2) diversion; and (3) application of the diverted water to the beneficial use for which it is appropriated. The SRBA District Court recently held that the requirement of diversion is not necessary to create a beneficial use right in Idaho. This decision is on appeal to the Idaho Supreme Court.

Claims for constitutional use rights, other than for domestic purposes, are required to have been filed with the state Department of Water Resources by June 30, 1988. IDAHO CODE § 42-243 (statutory claims). Rights not claimed by that date are deemed lost, unless the right is claimed in a general water rights adjudication proceeding commenced prior to June 30, 1988. Id. § 42-245. Generally, a statutory claim should be evaluated the same as any other affidavit by a claimant. However, the statutory claim speaks ONLY as to the date as of which the claim was filed. It is NOT evidence in support of a priority prior to the date the statutory claim was filed.

b. Posted Notice.

The posted notice method of appropriating water was first enacted in 1881. Idaho Laws 1881, p. 267. This method provided that if the appropriator posted notice of his intent to appropriate water at the point of diversion and recorded that notice in the same fashion as for mining claims in the county where the diversion is located, then if the water use was commenced within a reasonable time the priority date of the right was the date of posting. The primary difference between this and the constitutional method is that there is clear evidence of the appropriator's intent and the priority date of posted notice rights relates back to the date notice was posted. *Sandpoint Water & Light Co. v. Panhandle Development Co.*, 11 Idaho 405 (1905). A posted notice appropriator has a reasonable time within which to apply the diverted water to the intended beneficial use

c. Permit.

The third method of obtaining a water right is the familiar permit method administered by IDWR. First enacted in 1903, the statutes governing the appropriation of water are contained in Title 42, Chapters 1, 2 and 3, Idaho Code. For much of its history the permit system was not mandatory, it simply provided a means to provide an earlier priority date for a water right than the constitutional method. The doctrine of relation allows the priority date of a water right based upon a permit to "relate" back to the date of permit application. To gain the benefit of the doctrine of relation, the requirements of the permit statutes and conditions of IDWR's permits must be strictly followed. *Big Wood Canal Co. v. Chapman*, 45 Idaho 380 (1927).

Compliance with the statutory procedure is now mandatory for establishing an appropriative right to both ground and surface water in Idaho. IDAHO CODE §§ 42-103 and 42-229. Effective March 25, 1963, the Idaho Legislature made the statutory procedure mandatory for the appropriation of ground water. Id. § 42-229. An exception exists for wells diverting water for domestic purposes. Id. § 42-227. The Idaho Supreme Court upheld this mandatory permit procedure in *State ex rel. Tappan v. Smith*, 92 Idaho 451, 444 P.2d 412 (1968). The court held the mandatory permit statute does not violate art. '15, § 3 of the Idaho Constitution, as extended to subterranean waters by IDAHO CODE § 42-103, because the permit statute does not deny the right of appropriation but merely regulates the method and means by which one might perfect a right to the use of ground water.

The statutory permit procedure for the appropriation of surface water became mandatory on May 19, 1971. IDAHO CODE § 42-103. An exception exists for instream livestock watering. Id. § 42-113. Prior to 1971 a surface water right could be obtained in Idaho by diverting unappropriated water and applying it to a beneficial use. See *Nielson v. Parker*, 19 Idaho 727, 115 P. 488 (1911); *Silkey v. Tiegs*, 51 Idaho 344, 5 P.2d 1049 (1931). The Idaho Supreme court has not yet considered a constitutional challenge to the statute but there is no reason to expect that the court would not uphold the mandatory permit procedure for appropriating surface water.

The Idaho Supreme Court has held that the constitution does not make a physical diversion mandatory, but it has construed Idaho's general water appropriation statutes to require a physical diversion. *State Dep't of Parks v. Idaho Dep't of Water Admin.*, 96 Idaho 440, 530 P.2d 924 (1974). An exception exists where the legislature has authorized a state agency to appropriate instream

flow water rights. See IDAHO CODE §§ 67-4301 to -4312 and §§ 42-1501 to -1505. As previously noted, the SRBA District Court recently held that there is no diversion requirement to obtain a water right in Idaho. Because this differs from the historic understanding of how water rights may be obtained there are few, if any, water licenses issued for instream uses in Idaho other than to the Water Resource Board

The Director of the Idaho Department of Water Resources, Statehouse, Boise, Idaho 83720, is responsible for issuing state water right permits. IDAHO CODE §§ 42-202 and 42-1701. An "application for permit" for a proposed water use must be submitted on a department form requiring the applicant's name and address; a description of the water supply, the nature and period of use, the point of diversion, and the time for project completion; and a map of the project. *Id.* § 42-202. A fee is charged which varies with the amount of water sought to be appropriated. *Id.* § 42-221

The department publishes notice of an application for permit in one or more newspapers. Any protest to the application must state the objections to the proposed appropriation. *Id.* § 42-203A. The statute requires a hearing to be held on the protest under the provisions of the state administrative procedure act. Chap. 52, Title 67, Idaho Code. If no protest is filed the department may take action on the application for permit without holding a hearing. *Id.* § 42-203A. If the applicant is aggrieved by the department decision, a hearing may be requested before the agency pursuant to IDAHO CODE § 42-1701A(3).

The statutory criteria for approving an application for permit are: (a) that the use will not reduce the quantity of water under existing water rights; (b) that the water supply is sufficient for the proposed use; (c) that the application is made in good faith and not for purposes of speculation and delay; (d) that the applicant has sufficient financial resources to complete the project; (e) that the project will not conflict with the local public interest; and (f) that the proposed use is not contrary to the conservation of water resources within the state. *Id.* § 42-203A. The director may approve an application in whole, in part or upon conditions, or reject the application. *Id.* The holder of a permit is given up to five years to complete the project a submit proof of beneficial use. *Id.* § 42-204. one five-year extension of time to place the water to beneficial use may be granted upon a showing of due diligence. *Id.* Additional time may be allowed for delay caused by litigation or the obtaining of necessary federal approvals. *Id.*

Judicial review of the agency decision before the district court is limited to a review on the record created before the department. *Id.* §§ 42-203A, 42-1701A and Chap. 52, Title 67. Appellate procedure before the district court is governed by IDAHO CODE §§ 67-5270 through 67-5279 and Rule 83 of the IDAHO RULES OF CIVIL PROCEDURE. Further appeal from the district court to the Idaho Supreme Court is governed by the IDAHO APPELLATE RULES.

After proof of beneficial use is submitted, the department will cause the use of water under the permit to be examined. *Id.* § 42-217. If the results of the examination are satisfactory, the department will issue a license for the right. *Id.* § 42-219. A water right license is binding upon the state and is prima facie evidence of the water right. *Id.* § 42-220.

d. Enlargement.

In 1994, the Idaho Legislature enacted the so-called "amnesty statutes." One of these statutes authorizes recognition of claims to the use of water in the Snake River Basin Adjudication in circumstances where an underlying water right was "enlarged," without complying with the mandatory statutory requirements for establishing a new water right. IDAHO CODE §§ 42-1426. The validity of this statute was upheld by the Idaho Supreme Court in *In re SRBA: Fremont-Madison Irrig. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). The court held the statute was constitutional as written. The court determined that the statute permits only those enlargements which do not increase the rate of diversion, do not injure other water rights existing on the date of enlargement, and which fully mitigate any potential injury to junior water rights existing as of the date of enactment of the amnesty statutes. *Id.* at 926 P.2d 1307. IDWR has construed this language to mean that all enlargement rights should be subordinated to rights existing prior to the 1994 passage of Idaho Code § 42-1426 in order to preserve the priority position of those already existing rights.

3. Changing or Losing a Water Right

A water right's historic description can be changed in several ways. The most simple is by the sale or conveyance of the water right to a new owner. Other, more substantive changes, include transfers and changes in use, loss through forfeiture or abandonment, and accomplished transfer.

a. Sale or Conveyance.

Title to previously established state water rights may be acquired in a manner similar to that for acquiring title to land. See IDAHO CODE § 55-101. This may include acquisition by lease or purchase, or in appropriate circumstances by eminent domain. IDAHO CONST. art. 15, § 3; *Basinger v. Taylor*, 30 Idaho 289, 164 P. 522 (1917). Water rights in Idaho are appurtenant to the land on which used and pass with a conveyance of the land unless specifically reserved in the deed or unless it can be shown clearly that the parties did not intend the water rights to be conveyed. See IDAHO CODE SS 42-220 and 42-1402; *Hunt v. Bremer*, 47 Idaho 490, 493, 276 P. 964 (1929); *Russell v. Irish*, 20 Idaho 194, 118 P. 501 (1911). However, title to a water right is separate from the underlying land and a water right may be developed by a person not owning the underlying land. *Sarret v. Hunter* 32 Idaho 536 (1919) This ability is limited by the rule that a water right cannot be developed in trespass. *Rabido v. Furey*, 33 Idaho 56 (1920).

b. Administrative Change.

The holder of a water right who desires to change the point of diversion, place of use, period of use, or nature of use of the right must first receive the approval of the Department of Water Resources. IDAHO CODE § 42-222. The application must be on forms furnished by the department. After providing notice and opportunity for protest and hearing, the department may approve the transfer in whole, or in part, or upon conditions, provided the following criteria are

satisfied: (1) no other water rights are injured by the change; (2) the change does not enlarge the use of the original right; (3) the change is consistent with the conservation of water resources within the state; and (4) the change is in the local public interest. *Id.* A change in nature of use from agriculture may be allowed as long as the change does not significantly affect the agricultural base of the local area. *Id.* An expedited procedure is provided for the approval of emergency transfers during drought conditions. *Id.* § 42-222A.

c. Accomplished Transfer.

The second "amnesty statute" enacted in 1994 authorizes recognition of claims to the use of water in the Snake River Basin Adjudication in circumstances where an underlying water right was transferred without complying with the mandatory statutory requirements for changing an existing water right. IDAHO CODE §§ 42-1425. The validity of this statute was upheld by the Idaho Supreme Court in *In re SRBA: Fremont-Madison Irrig. Dist. v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). The court held the statute was constitutional as written. The court determined that the provision that provides for the prevention of injury to other water right holders and prohibited enlargements allowed for approval of accomplished transfers.

d. Forfeiture, Abandonment and Adverse Possession.

State water rights are generally considered to remain valid for as long as they are beneficially used for an approved purpose. Rights for power purposes licensed after July 1, 1985, are required to be limited to a term of years set by the Department of Water Resources. *Id.* § 42-203B.

All or part of a water right may be lost by statutory forfeiture through a failure for five consecutive years to apply the water to the beneficial use for which appropriated. *Id.* § 42-222(2). An extension of time for an additional five-year period to avoid forfeiture may be requested. *Id.* Water rights appurtenant to land while in a federal cropland set-aside program are not subject to forfeiture. *Id.* Similarly, rights while placed in the state water supply bank are not subject to forfeiture. *Id.* § 42-1764.

The Legislature in 1996 amended Idaho's forfeiture statute to provide that a water right shall not be lost by a failure to divert and apply the water to beneficial use if the water is not needed to maintain full beneficial use under the right because of land application of waste for disposal purposes, including but not limited to discharge from dairy lagoons, used in combination with or substituted for water diverted under the water right. IDAHO CODE § 42-222(2).

The Idaho Supreme Court has frequently addressed the loss of water rights through statutory forfeiture, common-law abandonment, and prescription through adverse use. *See Jenkins v. State, Dep't of Water Resources*, 103 Idaho 384, 647 P.2d 1256 (1982); *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976). These cases clarify that abandonment, in contrast to statutory forfeiture, is a question of intention and must be evidenced by a clear and decisive act. The cases also confirm

that water rights lost through abandonment or forfeiture revert to the state and are again subject to appropriation from the state.

Forfeiture and abandonment may be prevented by resumption of use. The key to whether resumption prevents forfeiture or abandonment is whether there is injury to other water users by such injury. Injury can include loss of priority, so if there exist other water users on the water source where the resumption occurs there may either be a loss of priority or an invalid resumption.

Prescriptive title to a water right may be acquired by adverse use for five years if the adverse use is open, hostile, exclusive, continuous and under claim of right. *Gilbert v. Smith*, 97 Idaho 735, 552 P.2d 1220 (1976):

IV.

WATER LAW RESEARCH

The following sources are available to persons researching Idaho water law issues:

Idaho Code, Vol. 1 - Idaho Constitution (1980), and Vol. 8 - Water Rights (1990), published by The Michie Company, P.O. Box 7587, Charlottesville, Virginia 22906.

Idaho Department of Water Resources, IDAHO WATER LAW HANDBOOK (1988) (includes Dept rules and regulations and water rights adjudication handbook).

W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971) (Idaho Summary Vol. III, pages 261-286).

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CHAPTER 2

NAME & ADDRESS

Idaho Code § 42-1411(2)(a) requires IDWR to determine the name and address of the claimant in its recommendation. Generally, the claimant and the owner of a water right are the same. See Chapter 12 on duplicative claims for advice when there are two claimants for the same water right.

A. ADDRESS AND OWNERSHIP RECOMMENDATION

The agent should recommend the water right to the person or entity and address shown on the claim, or the most recent, proper, notice of change in address or ownership received by IDWR. If there is reason to believe that there has been a change in address or ownership, and proper notice of the change in address or change in ownership has not been received, then the claimant should be contacted to obtain proper documentation of the change. If such documentation is not received, notices will be sent to the claimant or to the name/address shown on the most recent notice of change in address or ownership.

A complete address must be recommended for each right. See Adjudication Memo #18 for more information as to changes in ownership and address.

B. PHONE NUMBER

If available, a phone number should be inserted in the electronic and written file for each right.

C. ATTORNEY

The name of the attorney, if any, representing a claimant should be reflected in the electronic and written file. See Adjudication Memo #22 as to changes in attorney.

CHAPTER 4

SOURCE

I. EVALUATION OF CLAIMED SOURCE

A water right's source is first determined at the time of establishment of the right, and then as it may have been transferred. Although determining the source is not particularly dependent upon the legal method by which the water right was established, the evidence available to the agent differs based upon the legal method. This chapter is concerned primarily with claimed sources where there is little evidence regarding historic use of the source, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR. However, there are a few other general issues described in Section II below of which the agent should be aware. —

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the source of water used by the appropriator:

- ▶ Beneficial Use Method.
- ▶ Posted Notice Method.
- ▶ Permit Method.
- ▶ 42-1426 Enlargement Method.
- ▶ 42-1416B Expansion Method.

A. BENEFICIAL USE WATER RIGHTS

The source of water for a beneficial use water right is the source used when water is first appropriated by application to beneficial use. However, with the passage of the accomplished transfer statute, Idaho Code § 42-1425, the source to be recommended for most beneficial use rights is the source used by the water user as of the commencement of the adjudication on November 19, 1987. The agent's investigation of the source claimed should consist of an evaluation of whether the source claimed under a beneficial use claim is that source of water being used on the commencement date. A field exam will be necessary to fully evaluate this element.

The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA, including source. Therefore, IDWR generally will recommend a beneficial use water right with the source as it existed as of commencement. IDWR will allow the objection process provided in Idaho Code § 42-1425(2)(a) to raise issues of injury and will not do so in its investigation.

The exception to this general rule is that if the agent is aware of an accomplished transfer changing the source of a beneficial use water right, the agent should refer the question of whether or not such a change will be recommended to the State Office for evaluation. An example of this would be where a ground water source is claimed with a

priority date that suggests the right was established using a surface water source. This circumstance should be rare.

B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

If the claimed source is the same as the source shown on the decree, posted notice or license (as amended by any approved transfers), then no further review of this item generally is required. If the agent's GIS review reveals that the claimed source is inaccurate, the agent may wish to contact the claimant to verify the source information.

If the claimed source is not the same as the source shown on the decree, posted notice or license (as amended by any approved transfers), then the agent should refer the change to the State Office for evaluation.

C. CLAIM BASED ON PERMIT

1. Permits for which a proof due notice was filed prior to commencement

If the claim is based on a permit for which a proof due notice was submitted prior to commencement, then contact water allocations staff in the state office before proceeding with review of this claim. See Introduction for a general discussion of claims in this category.

2. Source claimed different than source on permit

If the claim is to be recommended with a basis of permit, and the source claimed is different than the source shown on the permit (as amended by any approved amendments to the permit), then the source shown on the permit (as amended by any approved amendments to the permit) should be recommended.

A change in source may not be recommended for a claim based on a permit, because the accomplished transfer statute does not apply to permits. The only way to change the source on a permit is to file an application to amend the permit with IDWR.

D. CLAIM BASED ON 42-1426 ENLARGEMENT OR 42-1416B EXPANSION

The source of a claim based on the enlargement statute or a critical GW expansion may not be different than the source of the original right. The evaluation of the enlargement or expansion claim should parallel the analysis used for the base right.

E. RECOGNITION OF ACCOMPLISHED TRANSFER STATUTE.

If IDWR approves an accomplished change in source, then the recommendation should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN SOURCE PURSUANT TO IDAHO CODE 42-1425." (C02)

II. CONSIDERATIONS WHEN IDENTIFYING SOURCE

1. Common names

Use the name for a source shown on the USGS maps. If no name is shown on the map use a local name, if any, or simply a description of the water body. Where the source has a local name that is different from the name shown on USGS maps, then the claim should include the following remark: "SOURCE IS ALSO KNOWN AS _____." (B01)

2. Multiple sources

If the water use has multiple sources, is used in a single delivery system, and a single priority date, the use may be recommended as a single water right. If the water use has more than one source, with a separate systems for each source, and a single priority date, and the claim can readily be split so that each claim shows only one source, then the claim should be split (with alpha suffixes assigned to the claim numbers). If the claim is split, then appropriate remarks should be included where necessary to limit combined use of the rights to the total of the original right. See Adjudication Memo #12 as to review of a claim with multiple sources.

3. Wastewater

When investigating claims to wastewater the agent should attempt to identify: (1) the original source of the wastewater, (2) the original appropriator of the water, and (3) the tributary destination of the wastewater. This information should be documented in the claim file. The recommendation should show the source as "wastewater" and the tributary destination. The GO1 and 2 remarks are being re-evaluated, and in the future the original source of the wastewater may also be identified.

4. Developed/salvaged water

Developed water (or foreign water) is water added to the water system that was not previously part of the water system. A right to developed water has a priority independent of the water system to which the water was added (although the right should have a priority relative to the water system from which the water came). Salvaged water is water that was originally part of the water system, then was lost from the system (not through diversion), and is added back in. Salvaged water also has a priority independent of the water system. Conserved water, or water saved through conservation practices (after diversion), is not salvaged water.

Any claim that asserts the water is developed or salvaged should be referred for further review by the bureau chief.

5. Exchanges

The agent should consult with legal counsel if examining a water right claim involving an exchange of water. See Idaho Code §§ 42-105 and 42-240 for more information about recommendation of claims involving an exchange of water from one source for water from another source .

CHAPTER 5

POINT OF DIVERSION

I. EVALUATION OF CLAIMED POINT OF DIVERSION

A water right's point of diversion is first determined at the time of establishment of the right, and then as it may have been transferred. Although determining the point of diversion is not particularly dependent upon the legal method by which the water right was established, the evidence available to the agent differs based upon the legal method. This chapter is concerned primarily with claimed point of diversions where there is little evidence regarding historic use of the point of diversion, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR. However, there are a few other general issues described in Section II below of which the water agent should be aware.

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the point of diversion of water used by the appropriator:

- ▶ Beneficial Use Method.
- ▶ Posted Notice Method.
- ▶ Permit Method.
- ▶ 42-1426 Enlargement Method.
- ▶ 42-1416B Expansion Method.

A. BENEFICIAL USE WATER RIGHTS

The point of diversion for a beneficial use water right is the point of diversion used when water is first appropriated by application to beneficial use. However, with the passage of the accomplished transfer statute, Idaho Code § 42-1425, the point of diversion to be recommended for most beneficial use rights is the point of diversion used by the water user as of the commencement of the adjudication on November 19, 1987. The agent's investigation of the point of diversion claimed should consist of an evaluation of whether the point of diversion claimed under a beneficial use claim is that point of diversion of water being used on the commencement date. The claimant should be contacted to determine the point of diversion used prior to commencement of the SRBA. A field exam will be necessary to fully evaluate this element.

The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA, including point of diversion. Therefore, IDWR generally will recommend the point of diversion for beneficial use water rights as they exist as of commencement. IDWR will allow the objection process provided in Idaho Code § 42-1425(2)(a) to raise issues of injury and will not do so in its investigation.

Where the evidence supports a finding that the change occurred after commencement, then the original point of diversion should be recommended. (NAPP

photography may be useful in this regard.) In this situation the agent should notify the claimant that a transfer is required under Idaho Code § 42-222.

B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

If the claimed point of diversion is the same as the point of diversion shown on a decree, posted notice or license (as amended by any approved transfers), then no further review of this item generally is required. If the agent's GIS review reveals that the claimed point of diversion is inaccurate, the agent may wish to contact the claimant to verify the point of diversion information.

If the claimed point of diversion is not the same as the point of diversion shown on the decree, posted notice or license (as amended by any approved transfers), then the agent should recommend the point of diversion in the same fashion as for beneficial use claims.

If the 1987 point of diversion is different than both the claimed point of diversion and the point of diversion shown on the decree or license (as amended by any approved transfers), recommend the 1987 point of diversion. An amended claim is not required.

The point of diversion is an essential element of a water right. The failure of a decree to include the point of diversion in the listing of rights is an ambiguity in the decree. In other words, when the decree determined the water right, it necessarily determined the point of diversion as of the same time as the rest of the elements of the water right; the decree just failed to describe it. The relevant question at this point is how to resolve the ambiguity. For purposes of preparing the director's report, it will be assumed that the current point of diversion is the decreed point of diversion, unless there is reason to believe that there has been a change in point of diversion. The point of diversion of a claim based on a decree that does not state the point of diversion should therefore be analyzed the same as the point of diversion of a claim based on beneficial use (but the basis of the claim should not be changed).

C. CLAIM BASED ON PERMIT

1. Permits for which a proof due notice was filed prior to commencement

If the claim is based on a permit for which a proof due notice was submitted prior to commencement, then contact water allocations staff in the state office before proceeding with review of this claim. See Introduction for a general discussion of claims in this category.

2. Point of diversion claimed different than point of diversion on permit

If the point of diversion claimed is different than the point of diversion shown on the permit (as amended by any approved amendments to the permit), then the point of diversion

shown on the permit (as amended by any approved amendments to the permit) should be recommended.

A change in point of diversion may not be recommended for a claim based on a permit, because the accomplished transfer statute does not apply to permits. The only way to change the point of diversion on a permit is to file an application to amend the permit with IDWR.

D. CLAIM BASED ON 42-1426 ENLARGEMENT OR 42-1416B EXPANSION

The point of diversion of a claim based on the enlargement statute or a critical GW expansion may not be different than the point of diversion of the original right. The evaluation of the enlargement or expansion claim should parallel the analysis used for the original right. GIS Guidelines

E. RECOGNITION OF ACCOMPLISHED TRANSFER STATUTE.

If IDWR approves an accomplished change in point of diversion, then the recommendation should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION PURSUANT TO IDAHO CODE 42-1425."

II. CONSIDERATIONS WHEN IDENTIFYING POINT OF DIVERSION

A. DIVERSION REQUIREMENT

Claims based on state law must have a physical diversion from the natural source, unless an appropriation without a diversion has been authorized by statute. Appropriations without diversions that have been authorized by statute include a) instream flows held by the Water Resource Board, and b) minimum lake level appropriations by the Water Resource Board and other state agencies (all of the claims in these categories should have a permit or license). Although stock watering rights are called "instream" uses, the diversion in these cases is the stock drinking the water. This is distinguishable from wildlife instream uses because wildlife do not drink from natural sources as an instrumentality of human enterprise and intent.

When water is stored or backed-up through the use of a dam structure, even if water is not removed in so many words from the natural stream channel, the location of the dam is the point of diversion.

B. REMARKS DESCRIBING POINT OF DIVERSION

Adjudication Memo #32 sets forth standard remarks to describe the following:

- a. common name of ditch (F01),

- b. multiple points of diversion in a single tract (F02),
- c. point of diversion in center of four tracts (F03),
- d. point of diversion on boundary between two tracts (F04),
- e. other rights diverted through same point of diversion (F05, F06).

C. POINT OF DIVERSION FLAGS

Where stored water or water from another point of diversion is conveyed in a natural channel, then the point of injection should be included as a point of diversion with an "I" flag, and the point of redirection should be included as a point of diversion with an "R" flag. See Adjudication Memo #32 for standard remarks identifying the point of diversion to which water is injected and redirected. (G01, G02).

The beginning point and ending point of instream flow claims should be included as points of diversion with a "B" and an "E" flag.

D. DESCRIPTION OF POINT OF DIVERSION

Use the Geographic Coordinate Database (GCDB) locations to describe the location of the point of diversion. The agent should include government lot, homestead entry, mineral survey number, or government tract descriptions as appropriate. If the claimant has survey data that information needs to be considered when describing the location. See Adjudication Memo #30 as to when the point of diversion should be described by ten acre tract.

E. WHEN IS A CHANGE A CHANGE?

1. Changes within a tract.

An administrator's memorandum dated May 10, 1984 states that an application for transfer is necessary when the point of diversion is moved from one tract to another, or where an additional point of diversion is added, even if the additional point of diversion is in the same tract. A tract for these purposes is the quarter-quarter unless the license, permit, or decree established the quarter-quarter-quarter or other description. However, in adjudication a change in point of diversion condition code should be inserted in the recommendation when a new point of diversion within the same tract is substituted for the old point of diversion to provide notice to other claimants and allow them to assert injury by filing an objection.

2. Additional point of diversion.

An additional point of diversion established prior to commencement of the adjudication may be recommended as a result of an accomplished transfer of the point of diversion. Generally, a partial change in point of diversion results where the claimant established a new point of diversion for a portion of a water right previously appropriated.

In such cases, the partial change in point of diversion should be recommended the same as any other change in point of diversion.

3. New ground water wells.

For ground water right claims the agent must consider whether a new well is a change in point of diversion, or whether it is really a new appropriation from a separate source. The fact that both points of diversion are wells for the diversion of groundwater is not sufficient to make this determination, because the two wells could divert water from aquifers that are not tributary or are separately administered. See Chapter 4 as to changes in source. The agent should consult with legal counsel if this situation arises.

CHAPTER 6

PURPOSE OF USE, QUANTITY FOR EACH PURPOSE, AND TOTAL QUANTITY

I. INTRODUCTION

The purpose and quantity elements of a water right lie at the heart of the description of water use under a water right. The agent must be familiar with how to describe the various uses of water the investigation uncovers. Further, the method by which the water right was established determines to a large extent what evidence is relevant to the purpose of use and quantity to be recommended.

II. PURPOSES OF USE AND QUANTITY

Any use of water can be recommended for a water right so long as the use is for a beneficial purpose. The following subsections describe various beneficial uses, how they should be reported, and the quantity to recommend for each.

Adjudication Memo #32 sets forth standard remarks to describe the following:

- a. right measured at point other than point of diversion (D01),
- b. portion of right solely for conveyance loss (D02 - D04),
- c. storage capacity (D05),
- d. facility volume (D06).

The agent's recommendation on quantity must include the rate and volume of diversion for each use, and the total rate and volume of diversion. See Adjudication Memo #31 as to measurement of flow for ground water claims that require field exam; see Adjudication Memo #34 as to which rights require determination of diversion volume. See Application Processing Memo 14 as to determination of amount for rights that include storage purposes.

For a claimed quantity to be recommended, the full amount must be beneficially used and the amount must be reasonable. Otherwise the amount recommended will be limited to a reasonable amount. In determining whether the amount used is reasonable, the following factors should be taken into account: the nature of use, the purpose of use, transmission losses, quantities used for the same purpose by others in the area, and amount of return flows. The fact that water is returned to the stream does not automatically make the diversion unreasonable. A determination that the quantity diverted for a long-standing use is not reasonable is a decision that should be made only after consultation with legal staff and the bureau chief.

There may be instances in which the total quantity may appropriately be less than the sum of the amounts for each purpose, such as where all or part of the amount for one purpose may also be used for another purpose. (For example, if an appropriator diverts 10

CHAPTER 10

REMARKS

See Adjudication Memo #32 for standardized remarks and conditions. Remarks for specific elements of a right are often noted in this manual in the discussion of that element.

CHAPTER 11

FORFEITURE AND ABANDONMENT

This chapter provides guidance to the agents when developing recommendations in the SRBA based upon the concepts of total or partial forfeiture or abandonment. Always remember, however, that the focus of the agent's investigation should be to confirm the water use as claimed. The agent should recommend forfeiture only when the agent finds virtually no evidence of beneficial use during a five year period or clear intent to abandon the water use. These circumstances should be rare.

I. ABANDONMENT

The doctrine of abandonment has been established by case law (unlike forfeiture, which is established by statute). The elements of abandonment are "intent to abandon" the right, **concurrent** with "actual relinquishment" of the right. Intent to abandon must be shown by "clear and unequivocal acts"; nonuse alone is not sufficient, but a substantial period of nonuse gives rise to a **rebuttable** presumption of intent to abandon. Unlike forfeiture, no defenses to abandonment have been recognized.

Absent a substantial period of nonuse, abandonment is generally difficult to prove, due to the requirement of evidence of intent to abandon by "clear and unequivocal acts." The following example provides guidance to the agent regarding a situation in which it is appropriate to initially recommend **abandonment** when considering evidence of intentional relinquishment of water rights:

- ▶ A farmer makes statements to neighbors to the effect that he's had enough and isn't going to farm his land anymore, and proceeds to plow under the ditches and dig up the headgates.

II. THE IDAHO SUPREME COURT'S EMPHASIS ON HISTORIC BENEFICIAL USE IN WATER RIGHT FORFEITURE ANALYSIS.

The Idaho Supreme Court has provided direction to the SRBA District Court regarding how it is to analyze water rights in the adjudication. The following steps describe the legal analysis necessary to determine whether a water right has been forfeited:

1. Define the elements of the water right using the scope and extent of historic beneficial use at the inception of the right as defined by the constitutional, posted notice, permit, or enlargement methods of obtaining a water right.
2. Determine if clear and convincing evidence establishes that water was not used under this water right for a period of five consecutive years from the date of the

inception of the right to the present (this will be referred to as determining continuity of use).

3. If a five-year cessation in water use has occurred, determine if any of the statutory or common law defenses to forfeiture are present.
4. If a five-year cessation in water use has occurred, but the use has resumed, determine if any other water right holders are injured by such resumption.

When an agent is asked to present the basis for a forfeiture recommendation in court, the agent must be sure that the analysis described above has been fully conducted. The analysis should be fully documented in the claim file. Section III, below, describes the circumstances when this complete analysis is necessary.

III. PARTIAL FORFEITURE.

The agent must consider the following when making a partial forfeiture recommendation:

A. Irrigation Uses.

An irrigation use may be recommended as partially forfeited only if there is a reduction in the actual number of acres irrigated. Descriptive elements of a water right, standing alone, will not be recommended as forfeited except in the context of a limitation in the number of acres. When there is a recommendation of partial forfeiture based upon the number of acres irrigated, the diversion rate and volume may need to be adjusted down, depending upon the extent of the original diversion rate and volume.

B. Other Uses.

For all other uses, the agent should consult with their legal liaison and State Office staff if there is a potential partial forfeiture.

IV. CLEAR AND CONVINCING EVIDENCE OF FORFEITURE?

It is not possible to provide a general rule for what constitutes clear and convincing evidence of forfeiture. There is a range within which different fact-finders could find forfeiture. At one end of the range would be two photographs, five years apart which show that water was not used in either of those years. At the other end of the range would be physical evidence such as a parking lot or a diversion system with limited capacity that was in place for five or more years. In between is a host of possibilities with testimony from neighbors, watermaster records, electrical bills, assessors' records, crop records, and so on. The question is: when looked at most favorably for the water right holder, does the evidence clearly show that water was not used for five years?

The type and degree of evidence of forfeiture will determine how IDWR participates in subcase proceedings. In situations where IDWR has some evidence of forfeiture, the agent may recommend forfeiture, but should not expect IDWR to submit extensive evidence of this recommendation if challenged in a subcase. The forfeiture recommendation will be used to raise a presumption that water has not been used for a specifically identified five year period, and the claimant will have to specifically rebut this presumption with evidence showing **continuity of use**. Where IDWR has what it considers to be clear and convincing evidence of forfeiture, IDWR will enter the full basis for its recommendation in a Class II subcase context. Forfeiture cases should be discussed with the agent's legal liaison when the case management report to the SRBA District Court is being prepared to assess the strength of the recommendation.

The following examples provide guidance to the agent regarding situations in which it is appropriate to initially recommend **forfeiture** when considering evidence of non-use of water rights:

- ▶ Permanent physical features preventing use, such as parking lots or homes, are constructed after the right is established.
- ▶ Two photos greater than five years apart showing no use.
- ▶ A photo and field exam greater than five years apart showing no use.
- ▶ Anecdotal information from a neighbor of five consecutive years of non-use.

If the claimant presents evidence during the notice of error process that establishes **continuity of use** and disproves forfeiture, the preliminary recommendation will be changed. If not, the forfeiture recommendation will be issued to the SRBA District Court and the claimant will need to show **continuity of use** to the Court.

The following examples illustrate situations when **forfeiture should not be recommended** when considering evidence of non-use of water rights:

- ▶ Incidental acreage not irrigated due to the characteristics of the irrigation system, such as corners on land now irrigated with circles, but originally square.
- ▶ Water use resumed in good faith at time of field examination.
- ▶ Less than five percent (< 5%) discrepancy between claimed irrigation acres and irrigation determined by G.I.S. analysis.

In these situations third parties would have to allege and prove forfeiture if they disagree with IDWR's recommendation.

V. RECOMMENDING FORFEITURE IN THE SRBA.

The following is how various right categories will be treated by IDWR *vis a vis* forfeiture in the SRBA:

A. Beneficial Use Rights.

Although, as a technical matter, there are only four methods or bases for developing a water right in Idaho--beneficial use, posted notice, permit method, and §42-1426 enlargement--IDWR generally considers "decree" as being the fifth basis for a water right. For purposes of this section, beneficial use rights will be considered to be those rights that are not memorialized in a water rights decree. For beneficial use rights IDWR will not investigate or recommend forfeiture.

For beneficial use water rights IDWR will recommend recent beneficial use as shown by aerial and satellite photography, field examinations, and other general information in the possession of IDWR. IDWR will not extensively investigate the historic development of these rights, except in the context of priority date, and **will not** make recommendations based upon forfeiture. Beneficial use rights will be recommended as either: (1) a right described by recent beneficial use or (2) disallowed based upon no recent beneficial use.

B. Posted Notice Rights.

Posted notice water rights will be treated in the same way as beneficial use rights.

C. Licensed Rights.

IDWR will recommend forfeiture in appropriate circumstances for water rights based upon the statutory permit method. The license will be considered to describe the elements of the right.

In situations where there is evidence of past non-use, but the licensed right is currently being used consistently with the license provisions, the right will be recommended as licensed. Third parties will need to raise issues of forfeiture and injury if the use of a right has resumed after a period of non-use.

For situations where natural physical features always prevented the use of a water right as described in the license (such as a cliff or other impassable barrier), IDWR will recommend the actual use of the licensed right, not forfeiture.

D. Decreed Rights.

Decreed water rights will be treated in the same way as licensed rights.

E. Enlargement Rights.

Enlargement water rights will be treated in the same way as beneficial use rights.

V. FORM OF RECOMMENDATIONS.

A. Form of Recommendation in Partial Forfeiture Situations.

When a right is recommended as having been partially forfeited the recommendation should indicate "The remainder of this water right was forfeited for non-use from _____ to _____."

B. Form of Recommendation in Total Forfeiture Situations.

When a right is recommended as having been totally forfeited the recommendation should indicate "This water right was forfeited for non-use from _____ to _____."

VI. DEFENSES TO FORFEITURE

If the agent preliminarily recommends that a water right has been forfeited the claimant will have the opportunity to rebut this preliminary recommendation. The claimant can, of course, show that the water right has been used during the period in question. If the water right has not been used, Idaho Code § 42-222(2) provides exceptions to the application of forfeiture as follows:

- ▶ Nonuse during a period of time when land is contracted in a federal cropland set-aside program does not count towards forfeiture.
- ▶ Nonuse of a water right held by a municipal supplier to meet reasonably anticipated future needs generally will not lead to the forfeiture of that right.
- ▶ Nonuse of a water right because land application of waste for disposal purposes satisfies the need for water does not count towards forfeiture.
- ▶ Nonuse of a water right when an extension of time to avoid forfeiture has been granted by IDWR does not count towards forfeiture.

Idaho Code § 42-1764 provides that nonuse of a water right during the time when it is credited to the water supply bank does not count towards forfeiture.

Generally nonuse of a water right does not count towards forfeiture when the nonuse is involuntary either due to natural shortages or due to the acts of others. Supplemental rights are generally not subject to forfeiture.

EXHIBIT H

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT



POLICY OF TITLE INSURANCE



First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, Insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land;
5. The invalidity or unenforceability of the lien of the insured mortgage upon the title;
6. The priority of any lien or encumbrance over the lien of the insured mortgage;
7. Lack of priority of the lien of the insured mortgage over any statutory lien for services, labor or material:
 - (a) arising from an improvement or work related to the land which is contracted for or commenced prior to Date of Policy; or
 - (b) arising from an improvement or work related to the land which is contracted for or commenced subsequent to Date of Policy and which is financed in whole or in part by proceeds of the indebtedness secured by the insured mortgage which at Date of Policy the insured has advanced or is obligated to advance;
8. Any assessments for street improvements under construction or completed at Date of Policy which now have gained or hereafter may gain priority over the insured mortgage; or
9. The invalidity or unenforceability of any assignment of the insured mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the insured mortgage in the named insured assignee free and clear of all liens.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title or the lien of the insured mortgage, as insured, but only to the extent provided in the Conditions and Stipulations.

First American Title Insurance Company

BY

Gary L. Keruett

PRESIDENT

ATTEST

Mark R. Arnesen

SECRETARY

CW 4662647

FIRST AMERICAN TITLE INSURANCE COMPANY

Issued with Policy Number: J1385514 (1402.92)

SCHEDULE A

File Number: 17135

Policy Number: CW4662647 (1056.92)

Amount of Insurance: \$ 440,000.00

Premium: \$ 75.00

Date of Policy: March 18, 2002 at 01:50 PM

1. Name of Insured:

SS RANCH, INC., an Idaho corporation, its successors and/or assigns as their respective interests may appear.

2. The estate or interest in the land which is encumbered by the insured mortgage is:

Fee Simple

3. Title to the estate or interest in the land is vested in:

BOAR'S NEST RANCH, L.L.C., a Georgia Limited Liability Company

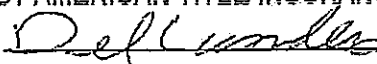
4. The insured mortgage and assignments thereof, if any, are described as follows:

A MORTGAGE dated March 18, 2002, to secure an indebtedness in the principle sum of \$440,000.00
Recorded: March 18, 2002 Instrument Number 421550, records of Idaho County, Idaho
Mortgagor: BOAR'S NEST RANCH, L.L.C., a Georgia Limited Liability Company
Mortgagee: SS RANCH, INC., an Idaho Corporation

5. The land referred to in this policy is described as follows.

SEE SCHEDULE C ATTACHED HERETO

FIRST AMERICAN TITLE INSURANCE COMPANY

By: 

DEL LUNDERS, AUTHORIZED SIGNATORY

FIRST AMERICAN TITLE INSURANCE COMPANY

SCHEDULE B

File Number: 17135

Policy Number: CW4662647 (1056.92)

EXCEPTIONS FROM COVERAGE

PART I

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.
2. Any facts, rights, interests or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.
3. Easements, claims of easement or encumbrances which are not shown by the public record.
4. Discrepancies, conflicts in boundary line, shortage in area, encroachments or any other facts which a correct survey would disclose, and which are not shown by the public records.
5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in acts authorizing the issuance thereof; (c) water rights, claims or title to water, whether or not the matters excepted under (a), (b), or (c) are shown by the public records.
6. Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.
7. Taxes for the year 2002 are an accruing lien not yet due or payable.
8. Possible rights of possession or ownership as evidenced by existing fence lines.
9. EASEMENT AND RIGHT OF WAY dated March 20, 1907 by and between JOHN T. HOLLENBEAK and MARY B. HOLLENBEAK, husband and wife, and J.N. BROWN, Trustee, including the terms and conditions therein, recorded May 22, 1908 as Instrument Number 6469, records of Idaho County, Idaho.
10. RESERVATION of all coal and other minerals in United States Patent recorded March 20, 1925 as Instrument Number 77516, records of Idaho County, Idaho, together with the appurtenant rights to use the surface of the land. (N $\frac{1}{4}$ SE $\frac{1}{4}$, Section 6)
11. RESERVATION of all coal and other minerals in United States Patent recorded September 10, 1929 as Instrument Number 90602, records of Idaho County, Idaho, together with the appurtenant rights to use the surface of the land. (W $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 8)
12. EASEMENT dated August 25, 1932 by and between JOSEPH N. AUBIN and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., including the terms and conditions thereof, recorded August 31,

ALTA Loan/Construction Loan/Leasehold Loan
Schedule B - Part I (10/17/92)

(17135.pfd/17135/42)

FIRST AMERICAN TITLE INSURANCE COMPANY

Policy Number: CW4662647 (1056.92)

SCHEDULE B - PART I

(Continued)

1932 as Instrument Number 99260, records of Idaho County, Idaho.

13. EASEMENT dated August 31, 1932 by and between MARY B. SHEPHARD and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., including the terms and conditions thereof, recorded September 3, 1932, as Instrument Number 99293, records of Idaho County, Idaho.
14. EASEMENT dated September 3, 1932 by and between ARTY HOLLENBEAK and SAMANTHA HOLLENBEAK and ELGIE B. BRATLAND and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO., including the terms and conditions thereof, recorded September 3, 1932, as Instrument Number 99295, records of Idaho County, Idaho.
15. CONTRACT OF SALE for all mineral rights dated November 13, 1934 by and between ART HOLLENBEAK and SAMANTHA HOLLENBEAK, husband and wife, and F.G. HIGGINS and BEN CHANCE, including the terms and conditions therein, recorded November 14, 1934 as Instrument Number 106662, records of Idaho County, Idaho. (S $\frac{1}{2}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ of Section 7, NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8)
16. CONTRACT OF SALE for all mineral rights dated November 14, 1934 by and between MARY B. SHEPPARD, a widow, and F.G. HIGGINS and BEN CHANCE, including the terms and conditions therein, recorded November 14, 1934 as Instrument Number 106663, records of Idaho County, Idaho. (NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 8)
17. EASEMENT as reserved in Warranty Deed dated June 15, 1965 by and between JOHN H. CARREY and PEARL E. CARREY, husband and wife, and DEWARD L. GILL and DOLINA C. GILL, husband and wife, including the terms and conditions thereof, recorded June 24, 1965 as Instrument Number 220031, records of Idaho County, Idaho.
18. EASEMENT FOR DRAINFIELD AND OUTFALL LINE by JOHN H. CARREY and PEARL E. CARREY, husband and wife, including the terms and conditions therein, recorded May 16, 1977 as Instrument Number 268046, records of Idaho County, Idaho.
19. GRANT OF EASEMENT dated November 16, 1977 by and between JOHN CARREY and PEARL CARREY, husband and wife, and VALLEY TV & SUPPLY CO./RIGGINS TV CABLE, INC., including the terms and conditions therein, recorded December 27, 1977 as Instrument Number 271530, records of Idaho County, Idaho.
20. A 10 FOOT WIDE WATER LINE EASEMENT as described in a Warranty Deed dated August 18, 1978 by and between JOHN H. CARREY and PEARL CARREY, husband and wife, and RUSSELL B. MORELL, a single person, including the terms and conditions therein, recorded August 18, 1978 as Instrument Number 274874, records of Idaho County, Idaho.

FIRST AMERICAN TITLE INSURANCE COMPANY

Policy Number: CW4662647 (1056.92)

SCHEDULE B - PART I

(Continued)

21. WATER LINE EASEMENT dated January 5, 1990 by and between R & S REALTY CORP., and JOHN H. CARREY and PEARL E. CARREY, husband and wife, including the terms and conditions therein, recorded January 17, 1990 as Instrument Number 351608, records of Idaho County, Idaho.

ASSIGNMENT OF WATER LINE EASEMENT by JOHN H. CARREY and PEARL E. CARREY, husband and wife, to ERNEST D. FREELAND and VERNIE B. FREELAND, including the terms and conditions therein, recorded June 5, 1991 as Instrument Number 358561, records of Idaho County, Idaho.

22. MATTERS as shown on surveys:
recorded January 21, 1982 as Instrument Number 296388;
recorded September 8, 1982 as Instrument Number 299843;
recorded October 22, 1986 as Instrument Number 330489;
recorded January 3, 1990 as Instrument Number 351469;
recorded August 4, 1994 as Instrument Number 375712;
recorded October 11, 1994 as Instrument Number 376888;
recorded June 17, 1996 as Instrument Number 387314;
recorded November 14, 1997 as Instrument Number 396756;
recorded November 19, 1997 as Instrument Number 396839;
recorded September 13, 1999 as Instrument Number 408187;
recorded March 8, 2000 as Instrument Number 0410939;
the Amended Plat of Whitewater Wilderness Ranch Subdivision recorded October 10, 1995 as Instrument Number 382712 and any amendments thereto, all records of Idaho County, Idaho.

FIRST AMERICAN TITLE INSURANCE COMPANY

SCHEDULE B

File Number: 17135

Policy Number: CW4662647 (1056.92)

PART II

in addition to the matters set forth in Part I of this Schedule, the title to the estate or interest in the land described or referred to in Schedule C is subject to the following matters, if any be shown, but the Company insures that these matters are subordinate to the lien or charge of the insured mortgage upon the estate or interest:

NONE

FIRST AMERICAN TITLE INSURANCE COMPANY

SCHEDULE C
PROPERTY DESCRIPTION

The land referred to in this Policy is described as follows:

EXHIBIT A

Township 23 North, Range 1 East, Boise Meridian, Idaho County, Idaho

Section 8: SE $\frac{1}{4}$

Section 7: E $\frac{1}{2}$

Section 8: NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, that portion of the W $\frac{1}{2}$ NE $\frac{1}{4}$ West of old US Highway 95 Right-of-Way, that portion of the SE $\frac{1}{4}$ NE $\frac{1}{4}$ West of old US Highway 95 Right-of-Way.

LESS: The following described tracts:

A parcel of land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ and the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, said Township and Range, sometimes referred to as Idaho County Assessor's Tax #52, more particularly described as follows:

BEGINNING at the North quarter corner of said Section 8;

Thence N 89°56' W, 64.59 feet along the North line of said Section 8 to a 5/8 x 30 inch rebar;

Thence S 26°53' E, 244.70 feet to a 5/8 x 30 inch rebar;

Thence S 38°09' E, 166.12 feet to a 5/8 x 30 inch rebar;

Thence S 55°03' E, 445.61 feet to a 5/8 x 30 inch rebar;

Thence S 25°49' E, 170.10 feet to a 5/8 x 30 inch rebar;

Thence S 21°37' E, 235.87 feet to a 5/8 x 30 inch rebar;

Thence S 56°40' E, 152.29 feet to a 5/8 x 30 inch rebar;

Thence S 53°04' E, 184.65 feet to a 5/8 x 30 inch rebar;

Thence N 75°12' E, 410.00 feet to a 5/8 x 30 inch rebar set on the Westerly Right-of-Way of old US Highway 95;

Thence N 25°27' W, 365.40 feet along said Westerly Right-of-Way;

Thence N 35°11' W, 900.22 feet to a 5/8 x 30 inch rebar set at the intersection of said Westerly Right-of-Way with the North line of said Section 8;

Thence N 89°56' W, 670.41 feet along the North line of said Section 8 to the PLACE OF BEGINNING.

AND

A parcel of land in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, said Township and Range, sometimes referred to as Idaho County Assessor's Tax #199, more particularly described as follows:

Commencing at an aluminum cap marking the CE 1/16 Corner of said Section;

Thence N 89°48'15" E, 290.76 feet to a 5/8" rebar on the Westerly Right-of-Way of old US Highway 95;

Thence 105.01 feet along a non-tangent curve to the right whose long chord bears N19° 23'42" W, 104.99 feet, whose radius is 1,465.00 feet and delta angle is 04°06'20" along said right-of-way;

Thence N 17°20'32" W, 83.05 feet along said Right-of-Way to the center line of an existing road, the REAL POINT OF BEGINNING;

Thence S 84°32' 30" W, 62.38 feet along said road center line;

Thence 90.67 feet along a curve to the right whose radius is 60.00 feet and delta angle is 86°34' 48" along said road center line;

Thence N 08°52' 42" W, 110.06 feet along said road center line;

Thence 68.70 feet along a curve to the left whose radius is 300.00 feet and delta angle is 13° 07' 15" along said road center line;

Thence N 80° 30' 00" E, 90.41 feet to a 1/2" rebar on the Westerly Right-of-Way of old US Highway 95;

Thence S 17° 20' 32" E, 245.43 feet to the POINT OF BEGINNING.

ALTA

Schedule C

(17135.pfd/17135/42)

FIRST AMERICAN TITLE INSURANCE COMPANY

SCHEDULE C
(Continued)

Bearings based on a Record of Survey recorded as Instrument Number 351469.

AND

A parcel of land situate in the NE $\frac{1}{4}$ and the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8, said Township and Range, sometimes referred to as Idaho County Assessor's Tax #177, more particularly described as follows:
Commencing at an aluminum cap marking the CE 1/16 Corner of Section 8, said Township and Range, the REAL POINT OF BEGINNING;

Thence S 51°52'08" W, 76.28 feet to a 1/2 inch rebar;

Thence N 31°01'28" W, 366.78 feet to a 1/2 inch rebar;

Thence N 0°53'38" W, 201.26 feet to a 1/2 inch rebar;

Thence N 51°46'02" E, 47.03 feet to the centerline of an existing road;

Thence along said road centerline 44.18 feet along a non-tangent curve to the left whose long chord bears S 88°30'36" E, 41.97 feet, whose radius is 40.00 feet and delta angle is 63°17'18";

Thence N 59°50'42" E, 114.03 feet;

Thence 59.58 feet along a curve to the right whose radius is 40.00 feet and delta angle is 85°20'36";

Thence S 34°48'42" E, 102.85 feet;

Thence 135.79 feet along a curve to the right whose radius is 300.00 feet and delta angle is 25°56'00";

Thence S 8°52'42" E, 110.06 feet;

Thence 90.67 feet along a curve to the left whose radius is 60.00 feet and delta angle is 86°34'48";

Thence N 84°32'30" E, 62.38 feet to the Westerly Right-of-Way of Old US Highway 95;

Thence S 17°20'32" E, 83.05 feet along said highway right of way to P. C. Station 1521+66.30, marked by a 1/2 inch rebar;

Thence 105.01 feet along a curve to the left whose radius is 1465.5 feet and delta angle is 4°06'20" along said Highway Right of Way to a 5/8" rebar;

Thence S 89°48'15" W, 290.77 feet to the POINT OF BEGINNING.

EXHIBIT I

TO AFFIDAVIT OF MATTHEW J. MCGEE IN SUPPORT OF
RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at Boise, Idaho, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Loy O. Hollenbeck has been established and duly consummated, in conformity to law, for the southeast quarter of the southeast quarter of Section twenty-one and the southwest quarter, the southwest quarter of the northwest quarter, and the west half of the southeast quarter of Section twenty-two in Township twenty-three north of Range one east of the Boise Meridian, Idaho, containing three hundred twenty acres,

according to the Official Plat of the Survey of the said Land, returned to the GENERAL LAND OFFICE by the Surveyor-General:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described, TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Woodrow Wilson,

President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, in the District of Columbia, the TWENTY-THIRD

(SEAL)

day of NOVEMBER in the year of our Lord one thousand nine hundred and TWENTY and of the Independence of the United States the one hundred and FORTY-FIFTH.

By the President:

By

Woodrow Wilson
W. P. Le Roy Secretary.
L. J. C. Samson

Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number...783730

4-1003

4-1007-R.

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, a Certificate of the Register of the Land Office at **Blackfoot, Idaho,** has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of **Loy O. Hollenbeak** has been established and duly consummated, in conformity to law, for the **east half of the southeast quarter of Section five and the south half of the southwest quarter of Section four in Township twenty-three north of Range one east of the Boise Meridian, Idaho, containing one hundred sixty acres,**

according to the Official Plat of the Survey of the said Land, on file in the GENERAL LAND OFFICE:

NOW KNOW YE, That there is, therefore, granted by the UNITED STATES unto the said claimant the tract of Land above described; TO HAVE AND TO HOLD the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States. Excepting and reserving, however, to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat., 862).

IN TESTIMONY WHEREOF, I, **Herbert Hoover,**

President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the **THIRTY-FOUR** day of **NOVEMBER** In the year of our Lord one thousand nine hundred and **THIRTY-TWO** and of the Independence of the United States the one hundred and **FIFTY-SEVENTH**

By the President:

By

Herbert Hoover
Leah E. Dietz, Secretary.
Emma L. Nelson

Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number **1059407**

APPROVED BY THE GENERAL LAND OFFICE 6-2177

