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DEPARTMENT OF
WATER RESOURCES

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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 No. **01-00006**

**AFFIDAVIT OF ISAAC KEPPLER RE:
DEPOSITION ISSUES**

STATE OF IDAHO)
) ss.
County of Gooding)

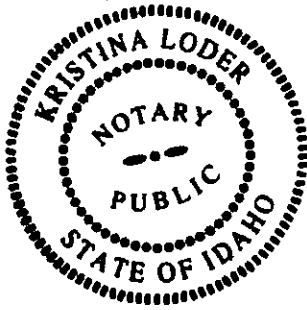
ISAAC KEPPLER, being first duly sworn upon his oath, deposes and states as follows:

1. I am an attorney representing American Falls Reservoir District No. 2 in the above entitled action. I am over the age of eighteen and state the following based upon my own personal knowledge.
2. Attached hereto and incorporated herein as Exhibit "A" is a true and correct copy of excerpts of the transcript from the July 7, 2010, I.R.C.P. 30(b)(6) deposition of the State of Idaho, Anthony Olenichak testifying.
3. That pages 84 through 86 of said transcript contain discussion regarding recessing and reconvening the July 7, 2010, deposition at a later date if necessary.

FURTHER YOUR AFFIANT SAYETH NAUGHT

Isaac Keppler
Isaac Keppler

SUBSCRIBED AND SWORN to before me this 24th day of September, 2010.



Kristina Loder
NOTARY PUBLIC for Idaho
Residing at Gooding
My Commission Expires 3/1/14

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 24 day of September, 2010, I served a true and correct copy of the foregoing document by depositing a true and correct copy thereof in the United States mail, postage prepaid, in an envelope addressed to the following individuals at the addresses below listed:

Clerk of the SRBA Court 253 Third Ave North P. O. Box 2707 Twin Falls, ID 83303-2707 Robert L. Harris Holden, Kidwell, Hahn & Crapo, PLLC P.O. Box 50130 Idaho Falls, Idaho 83405 Candace McHugh Randall C. Budge Racine, Olson, Nye, Budge & Bailey, Chd. 101 S. Capitol Blvd., Suite 208 Boise, Idaho 83702 Chief, Natural Resources Division Office of the Attorney General P.O. Box 44449 Boise, Idaho 83711-4449	Craig D. Hobdey P.O. Box 176 Gooding, Idaho 83330 Jerry R. Rigby P.O. Box 250 Rexburg, Idaho 83440 IDWR Document Depository P.O. Box 83720 Boise, Idaho 83720-0098 United States Department of Justice Environment & Nat'l Resources Division 550 West Fort Street, MSC 033 Boise, Idaho 83724 American Falls Reservoir District No. 2 PO Box "C" Shoshone, ID 83352
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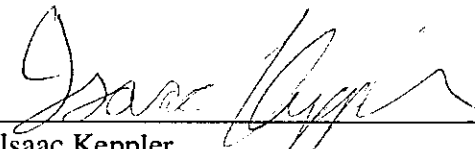

Isaac Keppler

EXHIBIT A

1 watermaster after Henry Eagle, I couldn't find any
2 evidence that he did any accounting for a refill
3 of the storage rights.

4 Q. What year was that?

5 A. I don't know the exact date. I think
6 it was sometime around 1969, 1970.

7 Q. Okay. If you require enough water to
8 fill the entire system in order for the American
9 Falls Reservoir District No. 2 right to refill,
10 rather than merely enough water to fill the
11 American Falls Reservoir, does that alter the
12 priority of the American Falls Reservoir District
13 No. 2 right as a consequence of the construction
14 of Palisades Reservoir?

15 A. You'll have to repeat that.

16 Q. If you require the refill of the
17 entire system, including Palisades, in order to
18 refill the American Falls Reservoir District No. 2
19 right, rather than merely the refill of the
20 American Falls right, does that alter the priority
21 of the American Falls Reservoir District No. 2
22 right?

23 A. When you say "the American Falls
24 Reservoir District No. 2 right," I'm assuming
25 you're talking about the natural-flow right. As

1 far as their storage right -- well, while there's
2 no change to the delivery of the natural-flow
3 right. But as far as AFRD No. 2's storage right,
4 they're treated just like everybody else, all the
5 other spaceholders' storage rights.

6 If there's more water in the system
7 physically than we have on paper, then the
8 difference between those two totals allows us to
9 cancel storage usage.

10 Q. But prior to the construction of
11 Palisades, that occurred with just the fill of
12 American Falls Reservoir?

13 A. Generally, I think that's true, yes.
14 The system -- when American Falls filled, the
15 system generally filled.

16 Q. After the construction of Palisades,
17 more water's required in order to refill the
18 American Falls Reservoir District No. 2 rights?

19 A. More water would be required to cancel
20 out the storage of all spaceholders.

21 Q. Well, the American Falls Reservoir
22 District No. 2 storage right is also a 1921 right,
23 is it not?

24 A. Yes.

25 Q. And it was refilled every time

1 American Falls Reservoir right filled on paper
2 prior to the construction of Palisades?

3 A. The storage was cancelled, yes.

4 Q. The way you want to administer water,
5 that won't happen; correct?

6 A. Well, just as it did prior to the
7 construction of those reservoirs, when the system
8 fills, then we're able to cancel --

9 Q. Wasn't my question. My question was
10 just on the fill of American Falls Reservoir.

11 It won't happen the way you administer
12 water?

13 MR. ORR: Objection. Ambiguous.

14 THE WITNESS: With the construction of the
15 junior's reservoir -- junior reservoirs, it's less
16 likely that we'll refill the system and spill
17 water.

18 MR. ARKOOSH: Let's take a small break
19 here.

20 (Recess.)

21 Q. (BY MR. ARKOOSH): If the right's
22 interpreted as you want it interpreted, the
23 construction of Palisades Reservoir lessens the
24 chances of American Falls Reservoir District No. 2
25 refilling its right; is that correct?

1 A. If AFRD No. 2's storage is cancelled
2 only when the system fills and spills, after the
3 construction of the additional storage reservoirs,
4 it does lessen the likelihood that the storage
5 will be cancelled.

6 Q. Do you recognize that American Falls
7 Reservoir District No. 2 was to be left
8 indifferent to the construction of the Palisades
9 Reservoir?

10 MR. ORR: Objection. Calls for
11 speculation.

12 THE WITNESS: I haven't seen any historical
13 administration of the right that singled out AFRD
14 No. 2 over other placeholders.

15 Q. (BY MR. ARKOOSH): Well, this right is
16 uniquely written, is it not?

17 A. Well, it describes how AFRD No. 2's
18 natural flow should be delivered. There are
19 several unique water rights in the decrees.

20 Q. This right's very uniquely written, is
21 it not?

22 A. It's one of the longest sentences I've
23 ever read in a decree.

24 Q. You know, we're just dancing here,
25 Tony.

1 I mean you don't take the position
2 that this right is not very uniquely written? Or
3 do you take that position? Either way. Do you
4 take the position this is not a uniquely written
5 right?

6 A. No, it's certainly different than most
7 rights.

8 Q. Okay. But you do not perceive the
9 efforts that went into the creation of this right
10 in order to protect this right from the
11 construction of Palisades Reservoir?

12 A. I haven't been able to determine that.

13 Q. Okay. You don't disagree with that,
14 however, you just don't know?

15 A. I don't know.

16 MR. ARKOOSH: Okay. I'm going to hand you
17 all of the documents, including the PowerPoint
18 that you brought, and we'll mark them as
19 Exhibit 11. And then I'm going to go through
20 these. I'm going to recess my portion of this
21 deposition, so if something really occurs that we
22 really need to visit about prior to the summary
23 judgment, I'll reconvene the deposition probably
24 by telephone.

25 THE WITNESS: Okay. These were the e-mails

1 from Michael Holliday as well.

2 MR. ARKOOSH: These are part of it also.

3 Okay.

4 Can we mark this as Exhibit 11.

5 Let's go off the record.

6 (Recess.)

7 (Exhibit 11 marked.)

8 Q. (BY MR. ARKOOSH): I'm going to hand
9 you what's been marked as Exhibit 11.

10 Are those all documents kept in the
11 regular course of business at the Department?

12 A. Yes.

13 Q. And were produced pursuant to the
14 Notice of Deposition, Exhibit 1?

15 A. Yes.

16 MR. ARKOOSH: Okay. I'll represent to you
17 that neither I nor other participants in the
18 deposition have had an opportunity to review
19 those, and so for my part, I'm going to recess my
20 portion of this deposition. And I'll go through
21 those, and if something drastic needs to be
22 discussed, I'll reconvene the deposition, probably
23 by telephone, if there's any inquiries to follow
24 up on that.

25 If that's agreeable with counsel.

1 MR. ORR: I have no objection to that.

2 MS. McHUGH: That's fine.

3 MR. GEHLERT: I think that's acceptable to
4 the United States.

5 MR. ARKOOSH: Let's go off the record.

6 (Recess.)

7

8 EXAMINATION

9 BY MS. McHUGH:

10 Q. Good morning, Tony. My name is
11 Candice McHugh, and I represent the ground water
12 districts in this matter. And Tom's asked you a
13 lot of questions today about varying language.

14 And I guess I wanted to just kind of
15 ask you to tell me in practical terms what you see
16 the practical difference between AFRD's
17 interpretation and Water District 1's
18 interpretation as far as how it would change
19 delivery on the Snake River.

20 A. The current process Water District 1
21 uses in the distribution of AFRD No. 2's natural
22 flow and storage is that prior to American Falls
23 Reservoir filling, they only have a right under
24 the 1921 priority beginning on May 1st for 800 --
25 or I should say half of the first 1700 cfs

1 available under the 1921 priority up until the
2 time the American Falls storage right fills on
3 paper.

4 Once that occurs, then they have a
5 right for 1700 cfs under the 1921 priority of
6 natural flow.

7 Q. And --

8 A. If we use their interpretation, they
9 would have a right to the full 1700 cfs of natural
10 flow under the 1921 priority, unless American
11 Falls didn't fill during the year.

12 And then only in that case would we go
13 back and only deliver them the 850 cfs of natural
14 flow after -- between May 1st and when the 1921
15 priority was cut.

16 Q. And can you explain what the impact
17 would be to upstream junior spaceholders under
18 AFRD No. 2's interpretation. What would be the
19 impact to their storage water rights?

20 A. Since they share in the 1921 priority,
21 when American Falls' storage right is filling,
22 they are entitled to only 850 cfs of natural flow.

23 Under their interpretation, they would
24 be entitled to the 1700 -- full 1700 cfs of
25 natural flow, and therefore the American Falls

1 storage right would take longer to fill. And if
2 American Falls storage right takes longer to fill,
3 then that pushes it later in time before we can
4 fill junior rights, because junior rights, of
5 course, can't be filled until after the 1921
6 storage right is completely full. And that would
7 be the difference.

8 Q. Is it fair to say that the junior
9 upstream storage rights would fill less often
10 under AFRD No. 2's interpretation?

11 A. Well, if you compare the two
12 interpretations, if we didn't spill excess water
13 past Milner, AFRD No. 2 would get more natural
14 flow under their interpretation than under the
15 current interpretation by Water District 1, which
16 would mean that junior rights would get less
17 natural flow.

18 Q. Junior upstream natural-flow rights?

19 A. Wouldn't necessarily be upstream.

20 Q. Okay.

21 A. Probably upstream. But it would be
22 anyone junior to the 1921 priority.

23 Q. Okay. And just so the record's clear,
24 when you talk about the American Falls right,
25 you're talking about the Bureau's right in

1 American Falls Reservoir?

2 A. Yes.

3 Q. Because there is some potential
4 confusion in the record when we talk about
5 American Falls Reservoir District 2 and the
6 American Falls right.

7 So when you're referring to the
8 American Falls right, you're talking about the
9 Bureau's right for storage in American Falls
10 Reservoir?

11 A. Correct.

12 Q. Okay. Okay. Can you generally
13 describe when Water District 1 knows whether or
14 not American Falls Reservoir storage right is
15 full, is filled.

16 A. Each day we calculate the amount of
17 natural flow available in the system. And we
18 distribute that natural flow according to the
19 priorities and the right. So we keep a daily
20 accounting of the accrual into that American Falls
21 storage right. And once it's reached its maximum
22 volume limit, then that's when we consider it
23 full.

24 Q. And do you know approximately when
25 that occurs, or a date range during the irrigation

1 season?

2 A. It depends on the carryover storage
3 from the previous year and the water supply of the
4 current year. It could probably happen anytime in
5 early spring to -- well, all the way into
6 mid-July, or not filling at all.

7 Q. Is it fair to say that one of the
8 reasons that this issue is important to AFRD No. 2
9 or from their perspective is the longer they're on
10 natural flow, the less storage they use?

11 A. That's correct.

12 Q. And therefore, they have more storage
13 to carry over?

14 A. Or would extend their season.

15 Q. Okay. Can I have you look at
16 Deposition Exhibit No. 3. And turn to page 4.

17 A. Okay.

18 Q. And in the middle there there's a
19 sentence that starts out "AFRD No. 2." Underneath
20 that there's a "2" with a parentheses that says
21 "If American Falls Reservoir."

22 Do you see that in the middle there?

23 A. Yes.

24 Q. And then Mr. Arkoosh also asked you a
25 bunch of questions about when storage goes to zero