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FEB 23 2012
DEPARTMENT OF
WATER RESOURCES

Attorneys for Twin Falls Canal Company

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

	)	
	)	Subcase Nos.: 1-4, 1-6, 1-10, and 1-209
In Re SRBA	)	
	)	AFFIDAVIT OF PAUL L.
	)	ARRINGTON
Case No. 39576	)	
	)	
	)	
_____	)	

I, PAUL L. ARRINGTON, being first duly sworn upon oath, deposes and hereby states as follows:

1. I reside in Twin Falls County and I am over the age of 18. I am an attorney representing the Twin Falls Canal Company in the above-captioned proceedings.

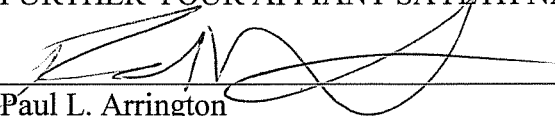
2. Attached hereto, as Exhibit A, is a true and correct copy of *Pocatello's First Set of Discovery Requests to Claimant Twin Falls Canal Company*, dated January 11, 2012.

3. Attached hereto, as Exhibit B, is a true and correct copy of the October 17, 2011 *Memorandum RE: Date of Commencement and Administrative Conditions*, prepared by Carter Fritschle, Manager, Adjudication Section of the Idaho Department of Water Resources.

4. Attached hereto, as Exhibit C, is a true and correct copy of excerpts from the *Deposition of Douglas Jones, P.E.*, dated December 19, 2011.

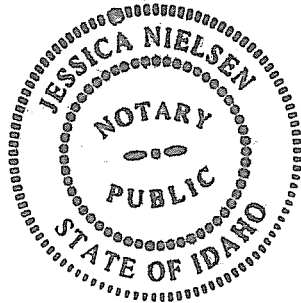
5. Attached hereto, as Exhibit D is a true and correct copy of excerpts from the *Deposition of Michael Warren Holliday*, dated December 19, 2011.

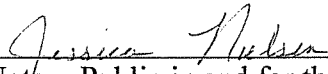
FURTHER YOUR AFFIANT SAYETH NAUGHT



Paul L. Arrington

SUBSCRIBED & SWORN to before me this 22 day of February, 2012.





Notary Public in and for the State of Idaho
My Commission Expires: 4/3/12

CERTIFICATE OF MAILING

I certify that on this 22 day of February, 2012, I mailed the original and copies of the foregoing to the following persons:

United States Department of Justice
Environment & Natural Resources Division
550 West Fort Street MSC 033
Boise, Idaho 83724

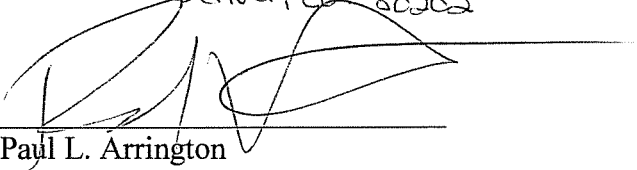
Randy C. Budge
Candice M. McHugh
Racine, Olson, Nye, Budge, & Bailey, CHTD.
P.O. Box 1391
Pocatello, Idaho 83201

Natural Resources Division Chief
State of Idaho Attorney General's Office
P.O. Box 44449
Boise, Idaho 83711-4449

A. Dean Tranter
P.O. Box 4169
Pocatello, Id. 83201

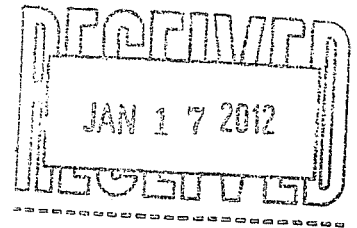
IDWR Depository
P.O. Box 83720
Boise, Idaho 83720-0098

Sarah Klahn
Mittra Pemberton
White & Jankowski
511 16th St., Suite 500
Denver, CO 80202



Paul L. Arrington

Exhibit A



A. Dean Tranmer I.B. #2793
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(208) 234-6149
(208) 234-6297 (Fax)
dtranmer@pocatello.us

Sarah A. Klahn I.B. #7928
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303-825-5632 (Facsimile)
sarahk@white-jankowski.com

Attorneys for City of Pocatello

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

In Re SRBA	)	Subcases No. 1-4, 1-10, 1-209 (Twin Falls Canal Co.)
	)	
	)	
Case No. 39576	)	POCATELLO'S FIRST SET OF DISCOVERY
	)	REQUESTS TO CLAIMANT TWIN FALLS CANAL
		COMPANY

The City of Pocatello, Idaho ("City" or "Pocatello") propounds the following First Set of Discovery Requests to Claimant Twin Falls Canal Company pursuant to the Idaho Rules of Civil Procedure ("Discovery Requests"). The Instructions and Definitions are an integral part of the Discovery Requests, and all of the Discovery Requests are to be interpreted and answered in light of the Instructions and Definitions.

INSTRUCTIONS

1. These Discovery Requests are made under Rules 26 through 37 of the Idaho Rules of Civil Procedure (the "Rules"). **YOU** are directed to respond separately and fully to each of the Discovery Requests as required by the Rules.

2. For purposes of convenience, terms that are defined in the “Definitions” section of these Discovery Requests are capitalized and presented in bold print. However, the failure to capitalize or bold any defined term herein does not excuse **YOU** from responding fully to a Discovery Request.
3. Please copy each Discovery Request and then provide **YOUR** written response to that request.
4. **YOU** are directed to **PRODUCE**, in response to a Document Request, every **DOCUMENT** that is **RELEVANT** to the subject matter of the Discovery Request.
5. If **YOU** decline to **PRODUCE** any **DOCUMENT** or thing in response to a Document Request, or if **YOU** decline to **IDENTIFY** fully any **DOCUMENT** or **COMMUNICATION** (as provided in the Definitions) in response to an Interrogatory because **YOU** claim that the **DOCUMENT** or **COMMUNICATION** is privileged, **YOU** shall make the claim expressly, and **YOU** shall **DESCRIBE** the nature of each such **DOCUMENT**, **COMMUNICATION** or thing not **PRODUCED** in a matter that, without revealing information itself privileged or protected, will allow Pocatello and the Court to assess the applicability of the privilege.
6. If **YOU** object to any Discovery Request, **YOU** are directed to state the basis fully for **YOUR** objection.
7. **YOU** are directed to amend, correct and/or supplement any response that **YOU** make to these Discovery Responses, if **YOU** learn that in some material respect the information provided by **YOU** in response to a Discovery Request was incomplete or incorrect, or even if originally complete and correct has become incomplete or incorrect, within 10 days after **YOU** discover that a previous response requires supplementation.
8. These Discovery Requests are continuing requests. If **YOU** receive any **DOCUMENT**, **COMMUNICATION** or other information that is **RELEVANT** to any of these Discovery Requests, **YOU** are directed to **IDENTIFY** the information, **PRODUCE** a copy of any such **DOCUMENT** to Pocatello and to supplement **YOUR** response to the Discovery Request to which the **DOCUMENT**, **COMMUNICATION** or other information is **RELEVANT** within 10 days after **YOU** receive the **DOCUMENT**, **COMMUNICATION** or other information.
9. If **YOU** deny any Request for Admission in the following Discovery Requests, state the basis for **YOUR** denial as part of **YOUR** response to the Request for Admission.
10. Some of the Discovery Requests (e.g. those that ask about anticipated witnesses and exhibits) ask **YOU** to respond “based upon present information”. That terminology means that **YOU** are to make a good faith and complete response based upon the information that **YOU** have as of the time of **YOUR** response as well as **YOUR** then-current intentions about how **YOU** will proceed in this case. It is understood that **YOU** might answer more fully or differently at a later time, and **YOU** are directed to amend, correct and/or supplement any response that **YOU** make, as provided above in #8.

DEFINITIONS

As used in these Discovery Requests, the following terms have the following meanings:

- A. “**COMMUNICATION(S)**” means the sharing of information between or among two or more **PERSONS**, other than by means of a **DOCUMENT**.
- B. “**DESCRIBE**” as applied to an event, occurrence or incident, means to state fully, including without limitation the time and place, the identity of the **PERSONS**, and the attendant circumstances.
- C. “**DOCUMENT(S)**” means a writing as defined in Idaho Rule of Evidence 1001 and includes the original or a copy of handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, maps, diagrams, drawings, sounds or symbols, or combinations of them. Without limiting the generality of the definition, “**DOCUMENT**” includes all electronically created, stored or transmitted writings; and “**DOCUMENT**” includes drafts as well as final versions of writings.
- D. “**IDENTIFY**” or “**IDENTITY**” (i) as applied to a **PERSON**, means to state the name of the **PERSON**, the address and telephone number of the **PERSON**, if known, the nature and name of the business at which such **PERSON** is employed and the position of the **PERSON** at such business, and the relationship of the **PERSON** to the **APPLICANT**; (ii) as applied to a **DOCUMENT**, means to state the title, document identification number used in any database that **YOU** maintain, and the date, author(s), recipient(s) and subject matter of the **DOCUMENT** and, (iii) as applied to a **COMMUNICATION**, means to state the name of the **PERSON(S)** making the **COMMUNICATION**, the name(s) of the **PERSON(S)** receiving the **COMMUNICATION**, the time and place and the subject matter of the **COMMUNICATION**; and (iv) as applied to any other information, means to explain fully what such information is, the source of the information, and to **IDENTIFY** the **PERSON(S)** who has first-hand knowledge of such information.
- E. “**PERSON(S)**” includes a natural **PERSON**, firm, association, organization, partnership, business trust, corporation, limited liability company, or any other form of business entity and any form of public entity.
- F. “**PRIMARY LATERALS**” means any and all laterals that leave from the Main Canal, High Line Canal, or Low Line Canal, including numbered laterals.
- G. “**PRODUCE**” means to permit the attorneys and/or other representatives of Pocatello to inspect and copy the **DOCUMENTS** requested in these Discovery Requests and which are in **YOUR** possession, custody or control. Unless other arrangements are made between counsel of record, all **DOCUMENTS** shall be **PRODUCED** at the offices of White & Jankowski, LLP, 511 16th Street, Suite 500, Denver, CO 80202, on or before

February 13, 2012 at 10:00 a.m. Alternatively, **YOU** may **PRODUCE DOCUMENTS** by providing electronic copies thereof to White & Jankowski, LLP, on or before February 13, 2012.

- H. **“RELEVANT”** when used with respect to a **DOCUMENT**, means (1) having any tendency to make the existence of a fact that is of consequence to the determination of any issue in this case more probable or less probable than it would be without the **DOCUMENT**, or (2) any **DOCUMENT** that is reasonably calculated to lead to the discovery of admissible evidence.
- I. **“TFCC”** refers to the Twin Falls Canal Company, the claimant in the captioned matter, its agents or assigns.
- J. **“TFCC CLAIMS”** refers to the TFCC SRBA claims described in subcase nos. 1-4, 1-10 and 1-209.
- K. **“YOU”** or **“YOUR”** refers to **TFCC**, the claimant herein, or its agents, including attorneys, board members, managers, or other consultants assisting with the answers to these discovery requests on behalf of **TFCC**.

DISCOVERY REQUESTS

- 1. Request for Admission No. 1: Please admit that the total amount claimed in the **TFCC CLAIMS** is 3780 cfs.
- 2. Interrogatory No. 1: If **YOU** contend that the Twin Falls Main Canal between Milner Dam and Murtaugh Lake has the capacity to carry 3780 cfs, please state the basis of **YOUR** contention.
- 3. Request for Production No. 1: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 1.
- 4. Interrogatory No. 2: If **YOU** contend that the Twin Falls High Line Canal and the Twin Falls Low Line Canal at the point they begin at the Twin Falls Main Canal have sufficient combined capacity to carry 3780 cfs, please state the basis for **YOUR** contention.
- 5. Request for Production No. 2: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 2.
- 6. Interrogatory No. 3: If **YOU** contend that every one of the 196,162 acres in the Department’s place of use as identified in the Supplemental Director’s Report for subcases 1-4, 1-10, and 1-209 are currently irrigated with water diverted under the **TFCC CLAIMS**, please state the basis for **YOUR** contention.
- 7. Request for Production No. 3: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 3.

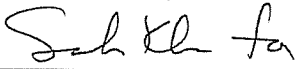
8. Interrogatory No. 4: If **YOU** contend that total acreage that was actually irrigated by water diverted pursuant to the **TFCC CLAIMS** on the date the **TFCC CLAIMS** were filed was 196,162 acres, please state the basis for **YOUR** contention.
9. Request for Production No. 4: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 4.
10. Request for Admission No. 2: Please admit that the total acreage that was actually irrigated by the **TFCC CLAIMS** in 2009 was less than 196,162 acres.
11. Request for Production No. 5: If **YOU** deny Request for Admission No. 2, please **PRODUCE** all **DOCUMENTS** in support of **YOUR** contention.
12. Interrogatory No. 5: If **YOU** contend that **TFCC** has ever diverted 3780 cfs under the **TFCC CLAIMS** at the Twin Falls Main Canal for use on the recommended place of use, please state the basis for **YOUR** contention.
13. Request for Production No. 6: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 5.
14. Interrogatory No. 6: What is the maximum rate of diversion that **YOU** contend has been diverted at the **TFCC** Main Canal for use on the recommend place of use?
15. Request for Production No. 7: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 6.
16. Interrogatory No. 7: If **YOU** contend that **TFCC** requires 3780 cfs to support its irrigation uses on each day between March 15 and April 15, please state the basis for that contention.
17. Request for Production No. 8: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 7 for the time periods of January 1, 1900 through August 2, 1989 and August 3, 1989 through December 31, 2011.
18. Interrogatory No. 8: If **YOU** contend that **TFCC** requires 3780 cfs for diversion to satisfy irrigation uses during each of the months of April, May, June, July, August, September, October and November, please state the basis of **YOUR** contention for each month.
19. Request for Production No. 9: Please **PRODUCE** all **DOCUMENTS** in support of any contention that **YOU** have made in response to Interrogatory No. 8 for the time periods of January 1, 1900 through August 2, 1989 and August 3, 1989 through December 31, 2011.
20. Interrogatory No. 9: If **YOU** contend that **TFCC** has the right to store water in Murtaugh Lake, please state the basis for **YOUR** contention.
21. Request for Production No. 10: Please **PRODUCE** all **DOCUMENTS RELEVANT** to the operation, measurement, and capacity of Murtaugh Lake.

22. Request for Production No. 11: Please **PRODUCE** all **DOCUMENTS RELEVANT** to showing the amount and destination of water diverted under the **TFCC CLAIMS** that is not consumptively used by the irrigated crops within the recommended place of use within the **TFCC** system, including measurement records and summaries thereof.
23. Interrogatory No. 10: Do **YOU** contend that **TFCC** requires 1,844,417 acre-feet (3780 cfs X 1.9835 af/d per cfs X 246 days) during the March 15 to November 15 irrigation season?
24. Request for Production No. 12: If **YOU** contend that **TFCC** requires 1,844,417 acre-feet during the irrigation season, please **PRODUCE** all **DOCUMENTS** reflecting such usage from January 1, 1900 through August 2, 1989 and August 3, 1989 through December 31, 2011.
25. Interrogatory No. 11: Please **DESCRIBE** the location of all canal checks in the High Line and Lowline Canals, and **PRIMARY LATERALS** under the **TFCC** canals.
26. Request for Production No. 13: Please **PRODUCE** all **DOCUMENTS** that support any contention that **YOU** have made in response to Interrogatory No. 11.
27. Interrogatory No. 12: Please **DESCRIBE** the location of all stream gages or measuring flumes in the Main Canal, High Line Canal, Lowline Canal and **PRIMARY LATERALS** under the **TFCC** canals.
28. Request for Admission No. 3: Please admit that some **TFCC** shares are used for municipal drinking water supplies or other non-irrigation uses.
29. Interrogatory No. 13: If **YOU** contend that 568,002 acre-feet has been consumed by crops each year under each of the water rights sought in the **TFCC CLAIMS**, please state the basis for **YOUR** contention.
30. Request for Production No. 14: Please **PRODUCE** all **TFCC** newsletters or other regular, periodical **COMMUNICATIONS** between **TFCC** and its shareholders from 1903-1990. This request for production specifically excludes records related to invoicing.
31. Request for Production No. 15: Please **PRODUCE** all correspondence, **DOCUMENTS**, or memoranda **RELEVANT** to **COMMUNICATIONS** between Water District 01 and **TFCC** representatives regarding the administration of the water rights sought in the **TFCC CLAIMS** from January 1, 1903 through August 2, 1989 and August 3, 1989 through December 31, 2011.
32. Request for Production No. 16: Please **PRODUCE** all correspondence, **DOCUMENTS**, or memoranda **RELEVANT** to **COMMUNICATIONS** between IDWR and **TFCC** representatives regarding the administration of the water rights sought in the **TFCC CLAIMS** from January 1, 1903 through August 2, 1989 and August 3, 1989 through December 31, 2011.

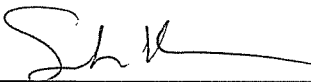
33. Interrogatory No. 14: Please **IDENTIFY** each witness **YOU** expect to call or may call, based upon present information, as a witness at the trial in these cases.
34. Request for Production No. 17: Please **PRODUCE** each report, analysis, letter or other **DOCUMENT**, whether draft or final, by any **PERSON YOU** expect to testify as a witness in this case, which is **RELEVANT** or related to testimony that **YOU** expect, based upon present information, will be adduced in these cases.
35. Request for Production No. 18: Please **PRODUCE**, or if a **DOCUMENT** is not yet in existence, **DESCRIBE**, each exhibit, which, based upon present information, **YOU** may offer at trial in these cases.

Dated this 11th day of January, 2012.

CITY OF POCATELLO ATTORNEY'S OFFICE
Attorneys for the City of Pocatello

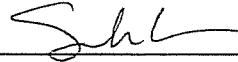
By 
A. Dean Tranmer

WHITE & JANKOWSKI, L.L.P.
Attorneys for the City of Pocatello

By 
Sarah A. Klahn

CERTIFICATE OF MAILING/SERVICE

I hereby certify that on this 11th day of January, 2012, a true and correct copy of **Pocatello's First Set of Discovery Requests to Claimant Twin Falls Canal Company for SRBA Surface Water Coalition Water Rights Cases [subcases 1-4, 1-10, 1-209]** was served by email as a courtesy copy and U.S. Mail, postage pre-paid and addressed to the following:



Sarah A. Klahn

Travis L. Thompson Barker Rosholt & Simpson LLP 113 Main Ave W, Ste 303 PO Box 485 Twin Falls ID 83303-0485 Facsimile 208-735-2444 [Twin Falls Canal Company] tlt@idahowaters.com	A.Dean Tranmer City of Pocatello PO Box 4169 Pocatello ID 83201 [City of Pocatello] dtranmer@pocatello.us
--	--

Exhibit B

MEMORANDUM

To: Steering Committee, Basin Wide Issue 16
From: Carter Fritschle, Manager, Adjudication Section *CF*
Re: Date of Commencement and Administrative Conditions
Date: October 17, 2011

INTRODUCTION

The Court issued its *Order Designating Basin Wide Issue 16, Subcase No. 00-92099, Form and Content of Final Unified Decree* on July 12, 2011. Subsequently, on July 15, 2011, the *Order Establishing Steering Committee and Notice of First Scheduled Meeting* was issued. Pursuant to the Court's directives, several meetings of the Steering Committee have been held. Pursuant to its charge of identifying issues and sub-issues pertaining to the form and content of the final unified decree, two issues have arisen for which the Steering Committee has requested Department input. These issues involve: 1) the significance of the date of commencement in the Department's water right recommendation process; and 2) administrative remarks and conditions that do not appear on the face of the partial decrees.

A. November 19, 1987 – SRBA Commencement Date

The *Commencement Order* for the Snake River Basin Adjudication was issued by the Honorable Daniel C. Hurlbutt, Jr. on November 19, 1987. Accordingly, the Department has considered that date as the "point in time" for which to make water right recommendations.

This approach was recognized by the Honorable Roger S. Burdick:

The SRBA is a lawsuit not a permanent water court. Because of the magnitude of the case and the way the SRBA is procedurally structured a "point in time" approach must be taken with respect to investigating, reporting, and adjudicating the rights. For example, absent subsequent administrative changes, IDWR reports the status of a water right as of the date of inception of the SRBA.

Memorandum Decision and Order on Challenge; and, Order of Partial Decree (Wood v. Troutt), Subcase 65-05663B at 21 (May 5, 2002).

The “point in time” approach works in concert with the accomplished transfer, enlargement, and ambiguous decree/license statutes. Idaho Code §§ 42-1425-1427. For accomplished transfers, Idaho Code § 42-1425 provides as follows:

Any change of place of use, point of diversion, nature or purpose of use or period of use of a water right by any person entitled to use of water or owning any land to which water has been made appurtenant either by decree of the court or under the provisions of the constitution and statutes of this state, prior to November 19, 1987, the date of commencement of the Snake River basin adjudication

Idaho Code § 42-1425(2).

For enlargements, Idaho Code § 42-1426 states as follows:

The mandatory permit requirements of sections 42-201 and/or 42-229, Idaho Code, are waived, and a new water right may be decreed for the enlarged use of the original water right based upon the diversion and application to beneficial use, with a priority date as of the date of completion of the enlargement of use for any enlargement occurring on or before November 19, 1987

Idaho Code § 42-1426(2).

In the case of an ambiguous decree or license, Idaho Code § 42-1427 provides as follows:

If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication.

Idaho Code § 42-1427(2).

Excerpts from the 1994 and 1999 Claim Investigation Handbook documenting the “point in time” approach are attached hereto as Attachment A (1994) and Attachment B (1999). The

manner in which the Department recommended decreed, licensed, and beneficial use rights in the SRBA is summarized below.

i. Decreed Water Rights

When preparing a recommendation for a previously decreed water right, the Department begins with the decree. If during its claim review and investigation process it is determined that changes may have occurred to the place of use, point of diversion, nature or purpose of use, or period of use since issuance of the decree, the Department will consider additional evidence to determine if the change occurred prior to November 19, 1987. If the evidence shows the change occurred prior to November 19, 1987, and if there was no injury to other water users at the time of the change, the Department will recommend the water rights as an accomplished transfer in accordance with Idaho Code § 42-1425. If no evidence is provided illustrating that the change occurred prior to November 19, 1987, the water right will be recommended as decreed.

If the decreed right has been enlarged, the Department will recommend the enlargement consistent with Idaho Code § 42-1426. If certain decreed elements are ambiguous, the Department will recommend the elements consistent with Idaho Code § 42-1427. In each instance, the recommendation is based on use as of the 1987 commencement of the SRBA.

If a change occurred after commencement of the SRBA, and the water user wishes to memorialize the change, the water user must file an application for administrative transfer with the Department. Idaho Code § 42-222.

ii. Licensed Water Rights

Similar to decreed water rights, when reviewing a claim based on an existing license, the Department begins with the license. If during its claim review and investigation process it is determined that changes may have occurred to the place of use, point of diversion, nature or purpose of use subsequent to the issuance of the license, the Department will consider additional

evidence to determine if the change occurred prior to November 19, 1987. If the evidence shows the change occurred prior to November 19, 1987, and if there was no injury to other water users at the time of the change, the Department will recommend the water right as an accomplished transfer in accordance with Idaho Code § 42-1425. If no evidence is provided illustrating that the change occurred prior to November 19, 1987, the water rights will be recommended as licensed.

If the licensed right has been enlarged, the Department will recommend the enlargement consistent with Idaho Code § 42-1426. If certain licensed elements are ambiguous, the Department will recommend the elements consistent with Idaho Code § 42-1427. In each instance, the recommendation is based on use as of the 1987 commencement of the SRBA.

If a change occurred after commencement of the SRBA, and the water user wishes to memorialize the change, the water user must file an application for administrative transfer with the Department. Idaho Code § 42-222.

iii. Beneficial Use Water Rights

Generally, the elements of a beneficial use water right are those when water is first appropriated by application to beneficial use. However, with the passage of Idaho Code § 42-1425, the place of use, point of diversion, nature or purpose of use, or period of use elements may be recommended as accomplished transfers if the evidence supports the claimed changes occurred prior to commencement. If the evidence supports that the change occurred after commencement, the water rights will be recommended as originally developed. If the water user wishes to memorialize the post-commencement change, the water user must file an application for administrative transfer with the Department. Idaho Code § 42-222.

When evidence relating specifically to November 19, 1987 was unclear, the Department would consider other available evidence. This might include consideration of more recent

evidence, such as aerial photography or measurement data, to determine beneficial use. If the more recent evidence could resolve the discrepancy, it would be relied upon for purposes of establishing beneficial use as of November 19, 1987.

B. Administrative Remarks and Conditions

When the Department filed its Director's Reports in the three test basins (34, 36, and 57), it listed the elements of each recommendation, and immediately below the recommended elements, the Department included any "remarks" or "conditions." Attached hereto as Attachment C is a representative example of a recommendation from Basin 34.

After the Director's Reports for the test basins were filed, parties to the adjudication argued that remarks and conditions, if recommended, should appear immediately below the pertinent element:

The U.S. and the Companies [Idaho Power Company, Twin Falls Canal Company, and North Side Canal Company] recommend that the court should not summarily confirm or set in a decree the recommendations as configured in the director's report. The parties agree that the "remarks" section, notwithstanding its inclusion in the director's report, should not be made part of a decree unless there is substantial reason for its inclusion as part of a water right. For different reasons, both parties agreed that the inclusion of a "remarks" section in the director's report of the decree itself creates confusion and ambiguity as to the recommendation or decreed right. These parties agree that if the "remarks" somehow limit, condition or otherwise effect any of the "elements" of the water right, they should be specifically reflected in the director's report or decree as part of the section setting forth the particularized element of the right.

Memorandum Decision and Order Staying Motion for Entry of Partial Final Decree in Reporting Areas, 1 SRBA 21, 21.2 (Jan. 12, 1994).

The Department subsequently placed remarks or conditions that were necessary for describing the water right and modified a specific element directly below the affected element.¹ Attached hereto as Attachment D is a representative example of a revised recommendation from

¹ The Department has been unable to find an order issued by the SRBA District Court on this topic subsequent to the Court's January 12, 1994 order. The Department has consulted with the clerk of the Court and she too has also been unable to find a subsequent order on this topic.

Basin 34. Remarks or condition that did not modify a specific element were placed below the description of the elements of the water right under the category “Other Provisions Necessary for Definition or Administration of this Water Right.” Remarks or conditions that the Department wanted to retain within its records but did not modify or further describe an element of the water right were labeled “Explanatory Material.” Explanatory materials are visible on the Department’s recommendation and remain in its database, but do not appear on the face of the partial decree.

In 2000, the Department modified its processing so that remarks and conditions from approved water right transfers would be automatically copied to the corresponding adjudication claim or recommendation. The categories assigned by the Department’s Water Allocations Bureau to the remarks and conditions associated with approved transfer were often different than the category that would be assigned to the same remark or condition in an SRBA water right recommendation.

In 2005, the Department modified the process for inserting remarks and conditions into all of its records, applications, permits, water rights, adjudication claims, and adjudication recommendations. The result was that the distinction between a remark and a condition disappeared, and all text associated with a water right or adjudication recommendation was classified as a condition.

Attachment A

do not otherwise require a field exam, to determine what further investigation is necessary.

Adjudication Memo #32 sets forth standard remarks to be used to identify rights to geothermal water (B05 - B08).

NOTE: Beneficial use of geothermal water generally requires beneficial use of the heat resource as well as beneficial use of the water. Claims to rights to geothermal water that do not make beneficial use of the heat resource should be referred to the bureau chief for further review.

5. 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.

6. Unapproved changes in source generally

NOTE: Two sources are "separately administered", for example, where each source is subject to administration by a watermaster, but the two sources are not administered as a single system of priorities. There may be other situations in which two sources are deemed to be separately administered.

a. To a nontributary source or a source that is separately administered

A claimed unapproved change from a source to a nontributary source or a source that is separately administered will be treated as a new appropriation. If the use and the date of first use is in violation of the mandatory permit statute, the claim will be recommended for disallowal.

b. To a tributary source that is not separately administered

A claimed unapproved change to a tributary source will be reviewed as a change in use. The claimant will be required to submit the date of the change and some evidence tending to support that date, because the date of the change is essential to the injury analysis. (The analysis of proof of the date of change is

similar to the analysis of proof of priority of beneficial use claims, see Part II.D.1.) If no such evidence is submitted, then the claim will be recommended for disallowal on the basis that the claimant did not show either a change in use without injury, or an appropriation not in violation of the mandatory permit statute. (IDWR may not recommend the right as changed, because IDWR cannot find that the change occurred without injury; on the other hand, IDWR may not simply recommend the original source, because use of the original source could be a second change that might result in injury to other claimants.) The change must have occurred prior to November 19, 1987, because the accomplished transfer statute applies only to changes that occurred prior to commencement.

Where the evidence supports a finding that the change occurred after commencement, then the original source should be recommended. (NAPP photography may be useful in this regard.) If the change occurred prior to commencement, then the change may be recommended if it can be determined from the information available that the change did not result in injury to other water rights or can be conditioned to prevent injury. If such a determination cannot be made, then the change will still be recommended, but with a priority as of the date of the change to prevent injury.

Changes in source that occurred more than five years prior to commencement will not be subject to a more limited injury analysis than changes in source that occurred less than five years prior to commencement. There will be many instances in which injury will be apparent with little or no further inquiry.

NOTE: Where a change in source occurred more than five years prior to commencement and the water right has been administered by the watermaster as a right from the new source with no limitation to prevent injury to other appropriators, the claim should be referred for further review by legal staff. Any information available from the watermaster as to administration of the water right should be documented for the file prior to forwarding the file to legal staff.

7. Exchanges

See Adjudication Memo #__ for more information about recommendation of claims involving an exchange of water from one source for water from another source.

B. CLAIM BASED ON DECREE OR LICENSE

If the right has more than one source, 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

4. Description of PD by ten acre tract

See Adjudication Memo #30 as to when the PD should be described by ten acre tract.

5. Unapproved change in PD generally

a. Date of change

The claimant will be required to submit the date of the change and some evidence tending to support that date, because the date of the change is essential to the injury analysis. (The analysis of proof of the date of change is similar to the analysis of proof of priority of beneficial use claims, see Part II.D.1.) If no such evidence is submitted, then the claim will be recommended for disallowal on the basis that the claimant did not show either a change in use without injury or a new appropriation not in violation of the mandatory permit statute. (IDWR may not recommend the right as changed, because IDWR cannot find that the change occurred without injury and prior to commencement; on the other hand, IDWR may not simply recommend the original PD, because use of the original PD could be a second change that might result in injury to other claimants.) The change must have occurred prior to November 19, 1987, because the accomplished transfer statute applies only to changes that occurred prior to commencement. Where the evidence supports a finding that the change occurred after commencement, then the original PD should be recommended. (NAPP photography may be useful in this regard.)

Generally, the investigation of injury from a change in PD shown to have occurred more than five years prior to commencement will be more limited than a change in PD that occurred less than five years prior to commencement. A change in PD that occurred more than five years prior to commencement should be recommended as changed unless it is apparent from information already available to IDWR that the change resulted in substantial injury. If substantial injury is apparent, then the claim should be referred for further review by legal staff.

NOTE: The date of the change is not necessary where it can already be determined that the change occurred prior to commencement, and the change did not result in injury to other rights, no matter when the change occurred.

b. When is a change a change?

An administrator's memorandum dated May 10, 1984 states that an application for transfer is necessary only where the PD moves from one tract to another, or where a PD is added, even if the additional PD is in the same tract. A tract is a quarter-quarter unless the license, permit, or decree established the quarter-quarter-quarter. A similar rule will be followed in adjudications,

If the actual PD is the same as the claimed PD, but is not the same as the PD shown on the decree or license (as amended by any approved transfers), then proceed with the analysis in Part 3 below.

If the actual PD is different than both the claimed PD and the PD shown on the decree or license (as amended by any approved transfers), then proceed with the analysis in Part 3 below, but treat the actual PD as the claimed PD. An amended claim will not be required if the claim is to be recommended with the actual PD.

3. Date of change

Claimant contact

The claimant should be notified that the claimant must submit the date of the change and some evidence tending to support that date; otherwise the use of water from the new PD will not be recommended due to lack of evidence of a change without injury or a new appropriation not in violation of the mandatory permit statute. (If the change occurred after November 19, 1987, then a specific date is not necessary, and the evidence need only support that the change occurred sometime after that date.)

If the evidence does not support any finding as to the date of the change, and the PD of the entire right was changed, then the claim should be recommended for disallowal, and should include the following remark: "CHANGE IN USE, INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (P05 and condition P05)

If the evidence does not support any finding as to the date of the change, and the PD of a portion of the right was changed, then the portion of the right still used at the original PD should be verified and only that portion should be recommended. The claim should include the following condition: "CHANGE IN USE OF PORTION OF RIGHT; RIGHT LIMITED TO UNCHANGED PORTION DUE TO INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (C07)

If the evidence supports a finding that the change occurred after November 19, 1987, then the PD shown on the license or decree should be recommended.

If the evidence supports a finding that the change occurred prior to November 19, 1982, then the claimed PD should be recommended, and the claim should include the following remark: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION PURSUANT TO IDAHO CODE 42-1416A." (C03)

NOTE: As to change in PD more than five years prior to commencement: First, if it is apparent from information already available to IDWR that the change resulted in substantial injury, then the claim should be referred for

D. CLAIM BASED ON BENEFICIAL USE (INCLUDING STATUTORY CLAIM, POSTED NOTICE, SECOND PRESUMPTION, CRITICAL GW EXPANSION)

Note that the PD of a claim based on the second presumption or a critical GW expansion may not be different than the PD of the original claim.

1. Verify actual PD

If the actual PD is different than the claimed PD, then treat the actual PD as the claimed PD. An amended claim will not be required if the right is to be recommended with the actual PD.

2. Has change occurred?

Is there some reason to believe that there has been a change in PD since the priority date to be recommended? (If not, then review of this item is complete.)

(A different PD on a statutory claim or a posted notice is some reason to believe that the PD was different at the time of filing the claim or posting the notice.)

If so, then make a reasonable effort to determine whether a change in PD has occurred. If the evidence supports a finding that a change has occurred, then proceed to Part 3 below. Otherwise the claimed PD should be recommended.

NOTE: Where the PD is different than the PD stated on the most recent approved transfer, then a change in PD will be deemed to have occurred, and it will be deemed to have occurred no earlier than the effective date of the transfer.

3. Claimant contact

The claimant should be notified that the claimant must submit evidence either that there has been no change in PD, or must submit the date of change and some evidence tending to support that date; if no evidence is submitted then the claim will be recommended for disallowal due to lack of evidence of a change without injury or a new appropriation not in violation of the mandatory permit statute. (If the change occurred after November 19, 1987, then a specific date is not necessary, and the evidence need only support that the change occurred sometime after that date.)

If the evidence supports a finding that no change in PD occurred, then the claimed PD should be recommended.

If the evidence does not support any finding as to the date of the change, and the PD of the entire right was changed, then the claim should be recommended for disallowal, and should include the

following remark: "CHANGE IN USE, INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (P05 and condition P05)

If the evidence does not support any finding as to the date of the change, and the PD of a portion of the right was changed, then the portion of the right still used at the original PD should be verified and only that portion should be recommended. The claim should include the following condition: "CHANGE IN USE OF PORTION OF RIGHT; RIGHT LIMITED TO UNCHANGED PORTION DUE TO INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (C07)

If the evidence supports a finding that the change occurred after November 19, 1987, then the original PD should be recommended.

If the evidence supports a finding that the change occurred prior to November 19, 1982, then the claimed PD should be recommended, and the claim should include the following remark: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION PURSUANT TO IDAHO CODE 42-1416A." (C03)

NOTE: As to change in PD more than five years prior to commencement: First, if it is apparent from information already available to IDWR that the change resulted in substantial injury, then the claim should be referred for further review by legal staff. See Parts E - G below as to injury. Second, the sufficiency of the evidence as to the date of the change may vary depending on the circumstances. For example, if the claimant asserts that the change occurred in 1967, but the claimant's evidence only supports a date of 1969, but there are no junior appropriators between those two dates, then the lack of further evidence makes little difference.

If the evidence supports a finding as to a date of change on or after November 19, 1982, but before November 19, 1987, then proceed to Part E below (Injury).

NOTE: Note that the date of change may not be the same as or earlier than the effective date of the most recent approved transfer.

E. INJURY IN GENERAL

If the review has progressed to this Part E, it has been determined that there was a change in PD, and a date of change between November 19, 1982 and November 19, 1987 has been determined.

for further review. A policy determination will then be made as to whether that amount is reasonable under the circumstances. Where there are a number of such claims in an area, it may be possible to develop guidelines for "reasonable" excess diversion requirements in that area, so that referral of each such claim in the area will not be necessary.

If the excess amount is necessary due to conveyance losses, then the right should be recommended with a remark limiting that portion of the right to use for conveyance losses in delivery of the right. Careful attention should be paid where there are multiple rights and all or part of one or more of the rights is limited to use for conveyance losses. EACH of the rights should contain a conveyance loss remark of some form.

EXAMPLE: Claimant has two rights to surface water from the same point of diversion, which total 1.2 cfs for 50 acres, and one right to 1 cfs for the same 50 acres. 0.2 cfs of the surface water rights is in excess of an inch per acre; it is to be recommended due to actual, reasonable conveyance losses. The three rights will contain a combined use remark limiting the three rights to 1.2 cfs for irrigation of 50 acres (see Part VIII below as to combined use limits for multiple rights). The portion limited to use for conveyance losses will be allocated to the junior surface water right; thus, if it is later determined that this additional amount is no longer reasonable, it will be the junior right that is reduced. ALL THREE rights will contain a remark that .2 cfs of the junior surface water rights is limited to use for conveyance loss in delivery of the two surface water rights. Inclusion of this remark in all three rights indicates why the combined diversion rate for irrigation of 50 acres is 1.2 cfs instead of 1 cfs.

If the excess amount is necessary due to field requirements, then the claim should include a remark identifying the per acre rate of diversion at the field headgate.

Adjudication Memo #32 sets forth standard remarks for claims to be recommended with excessive flows for irrigation (D02, D03, D04, D08).

6. Unapproved change in NU generally

a. When has change occurred?

A change in NU may have occurred where the claim includes an additional NU, an alternative NU, or an increase in the amount claimed for any NU. (For example, if the claimant claims 10 cfs for irrigation, and 10 cfs for commercial, and the license upon which the claim is based is for 15 cfs for irrigation, and 5 cfs for commercial, then the claim includes a claim to an accomplished

change for 5 cfs that was originally licensed for irrigation and is now used for commercial, even though both the license and the claim include irrigation and commercial as an NU.) The apparent change should be reviewed as described below to determine whether the apparent change is simply an error by the claimant in describing the water right, whether it is in fact a change in use of the right claimed, or whether it is actually a new appropriation.

The claim will be deemed to match a water right record if the NU, amount for each NU, and the total amount are the same as described on the water right record. In addition, the following NU(s) will not be considered a discrepancy:

- i. the new NU is limited to use of the decreed amount for fire fighting purposes, and/or
- ii. the new NU is limited to use of the irrigation portion for incidental stockwater.

b. Alternate NU vs. additional NU

An alternate NU occurs when the original NU is ceased and the water is instead used for a new NU. An additional NU occurs when the original use continues, and the water is reused, or when the new use is made possible by conservation methods employed in making the original use. Note that a claim may include both alternate and additional NU(s).

An alternate NU is a change in use that may be recommended pursuant to the original priority if the change did not result in injury or can be conditioned to prevent injury. An additional NU is an expansion that may be recommended only as a new appropriation, if at all. An additional claim is required before the additional NU may be recommended.

c. Injury

The claimant will be required to submit the date of the change and some evidence tending to support that date, because the date of the change is essential to the injury analysis. (The analysis of proof of date of change is similar to the analysis of proof of priority of beneficial use claims, see Part II.D.1.) If no such evidence is submitted, then the claim will be recommended for disallowal on the basis that the claimant did not show either a change in use without injury or a new appropriation not in violation of the mandatory permit statute. (IDWR may not recommend the right as changed, because IDWR cannot find that the change occurred without injury; on the other hand, IDWR may not simply recommend the original NU(s), because use of water for the original purposes would in fact be a second change that might result in injury to other claimants.) The change must have occurred before November 19, 1987, because the accomplished transfer statute applies only to changes that occurred prior to commencement. Where the evidence supports a finding that the change occurred after

commencement, then the original NU(s) should be recommended. (NAPP photography may be useful in this regard.)

If the change occurred before November 19, 1987, then the change may be recommended if it can be determined from the information available that the change did not result in injury to other water rights or can be conditioned to prevent any injury. If such a determination cannot be made from information already available to IDWR, claimant contact should be made to allow the claimant an opportunity to provide such information prior to filing the report. If such a determination cannot be made, either from information already available to IDWR or from information provided by the claimant, then the change will still be recommended, but with a priority date as of the date of the change to prevent injury.

Generally, the investigation of injury from a change to an alternative NU shown to have occurred more than five years prior to commencement will be more limited than such a change that occurred less than five years prior to commencement. A change to an alternate NU that occurred more than five years prior to commencement should be recommended unless it is apparent from information already available to IDWR that the change resulted in substantial injury. If substantial injury is apparent, then the claim should be referred for further review by legal staff.

NOTE: The date of the change is not necessary where it can be determined that the change occurred prior to commencement, and the change did not result in injury to other rights, no matter when the change occurred.

7. Stored water

A change in use may include an expansion in the number of acres irrigated with stored water pursuant to Idaho Code §42-222. In addition, a change to an alternative nature of use of stored water is a change in use that will generally not result in injury to other water rights because the water, once lawfully stored, is not part of the natural flow to which junior appropriators hold rights. Therefore, the review of expansions in irrigated acreage and changes to an alternative nature of use of stored water is the same, and is generally limited to a requirement of some evidence that it occurred prior to commencement. An additional nature of use may be recommended, if at all, only as a new appropriation.

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7. Stored water

Claimant contact

If the change is an alternate NU of stored water, then claimant contact should be made. The claimant should be notified that the claimant must submit some evidence that the change occurred prior to November 19, 1987; otherwise the change will not be recommended. If the evidence supports a finding that the change occurred prior to November 19, 1987, then the change should be recommended to the extent verified. The claim should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO IDAHO CODE 42-1416A." (C04)

If the change is an additional NU of stored water, see Part 9 below.

8. Date of change

Claimant contact

The claimant should be notified that the claimant must submit the date of the change and some evidence tending to support that date; otherwise the change in NU will not be recommended. If the change occurred after November 19, 1987, then a specific date is not necessary, and the evidence need only support that the change occurred sometime after that date.

If the evidence does not support any finding as to the date of the change, and the NU of the entire right was changed to an alternative NU, then the claim should be recommended for disallowal, and should include the following remark: "CHANGE IN USE, INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (P05 and condition P05)

If the evidence does not support any finding as to the date of the change, and the NU of a portion of the right was changed to an alternate NU, then the portion of the right still used for the original NU(s) should be verified and only that portion should be recommended. The claim should include the following condition: "CHANGE IN USE OF PORTION OF RIGHT; RIGHT LIMITED TO UNCHANGED PORTION DUE TO INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (C07)

If the evidence supports a finding that the change occurred after November 19, 1987, then the original NU(s) and amounts should be recommended (except as otherwise provided pursuant to the forfeiture analysis in Part 12 below).

If the evidence supports a finding that the change occurred prior to commencement, then proceed to sub-item 10 below.

The claimant should be notified that the claimant may file an amended claim, file an additional claim, file an application for permit, or file an application for transfer for unclaimed uses and/or amounts. (The claimant may have four different options here depending on the five different scenarios: to file an amended claim if the use was initiated at the same time as the other uses claimed; to file an amended claim if the other uses may be considered a change in use and the change occurred prior to commencement; to file an application for transfer if the other uses may be considered a change in use but the change occurred after commencement; to file an additional claim if the use was initiated later than the other uses and may not be considered a change, and is not in violation of the mandatory permit statute or can be claimed as an expansion pursuant to the second presumption; or to file an application for permit if the use was initiated later than the other uses and may not be considered a change, is in violation of the mandatory permit statute, and cannot be claimed pursuant to the second presumption.)

Unclaimed NU(s) or amounts may not be recommended.

3. Reasonableness of current use

Is the amount used for each NU and the total amount used reasonable? (If so, then skip this Part 3.)

For the full amount actually used to be considered beneficially used, 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 place of use, transmission losses, and amount of return flows. (The fact that water is returned to the stream does not automatically make the diversion reasonable; the amount of water returned to the stream must also be reasonable.)

If it cannot be determined from information already available to IDWR that the amount used for each NU and the total amount used is reasonable, then claimant contact should be made. The claimant should be notified that the claimant must submit evidence showing that the amount(s) used are not unreasonable; otherwise the amount(s) recommended will be limited to the amount determined to be reasonable by IDWR. (The claimant contact letter should state the amount determined to be reasonable based on information already available to IDWR.) The amount(s) recommended should be limited to the amounts that are determined to be reasonable based on information already available to IDWR and other information submitted by the claimant.

See Part A.6 above as to claims to more than .02 cfs per acre for irrigation. If the amount claimed equals .02 cfs per acre, but fewer acres are to be recommended than claimed, then the amount to

shall be deemed to have occurred no earlier than the effective date of the transfer.

5. Stored water

Is there some reason to believe that there has been a change in NU (either an additional or alternative NU) since the priority date to be recommended? (If not, then review of this item complete.)

(A different NU or an increase in the amount of any NU from a statutory claim or posted notice is reason to believe that a change may have occurred since the statutory claim was filed or the notice was posted.)

If there is some reason to believe that there has been a change to an alternative NU, then claimant contact should be made. The claimant should be notified that the claimant must either submit evidence that there has been no change in NU, (the NU(s) and amounts claimed were the original NU(s) and amounts), or submit some evidence that the change occurred prior to November 19, 1987; otherwise the change will not be recommended.

If the evidence supports a finding that no change has occurred, then review of this item is complete. If the evidence supports a finding that the change occurred prior to November 19, 1987, then the change should be recommended to the extent verified, and the claim should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO IDAHO CODE 42-1416A." (C04) If neither, then the original NU(s) should be recommended.

If there is some reason to believe that an additional NU has occurred, then follow the analysis in Part 7 below.

6. Has change occurred?

Is there some reason to believe that there has been a change in NU (either an additional or alternative NU, or an increase in the amount of any NU) since the priority date to be recommended? (If not, then review of this item is complete.)

(A different NU or an increase in the amount of any NU from a statutory claim or posted notice is reason to believe that a change may have occurred since the statutory claim was filed or the notice was posted.)

If there is some reason to believe that an additional NU has occurred, then proceed to Part 7 below. If there is some reason to believe that a change to an alternative NU has occurred, then proceed to Part 8 below.

NOTE: Where there is a different NU or an increase in the amount of any NU than is shown in the most recent approved transfer, then a change will be deemed to have occurred, and it will be deemed to have occurred no earlier than the effective date of the transfer.

7. Additional NU

Claimant contact

The claimant should be notified that the claimant must submit evidence that there has been no change in NU (that the NU(s) and amounts claimed were the original NU(s) and amounts); or the claimant may file an additional claim for the additional NU with a priority as of the date of the expansion (including some evidence in support of the priority date claimed). Absent evidence of no increase or an additional claim for the increase, the additional amount will not be recommended due to lack of evidence of beneficial use not in violation of the mandatory permit statute.

If the claimant submits evidence that supports a finding that the current NU(s) and amounts are the original NU(s) and amounts, then review of this item is complete. If the evidence does not support such a finding, then the recommendation should be limited to the original NU(s) and amount for each original NU that remains currently in use. (If a new claim is filed, and the use is in violation of the mandatory permit statute, then the new claim should be flagged "E" because the second presumption may apply. See Adjudication Memo #16B as to the presumptions.)

8. Alternate NU

Claimant contact

The claimant should be notified that the claimant must either submit evidence that there has been no change in NU (that the NU(s) and amounts claimed were the original NU(s) and amounts), or must submit the date of the change and some evidence tending to support that date; otherwise the portion of the right that was changed will not be recommended due to lack of evidence of change without injury or a new appropriation not in violation of the mandatory permit statute. (If the change occurred after November 19, 1987, then a specific date is not necessary, and the evidence need only support that the change occurred sometime after that date.)

If the evidence supports a finding that no change in NU occurred, then review of this item is complete.

If the evidence supports a finding that the change occurred after November 19, 1987, then the original NU(s) and amounts for each NU should be recommended for the portion claimed as changed.

If the evidence does not support either finding, and the NU of the entire right was changed, then the claim should be recommended for disallowal, and should include the following remark: "NO LAWFUL APPROPRIATION SHOWN."

If the evidence does not support either finding, and the NU of a portion of the right was changed, then the recommendation should be limited to the unchanged portion of the right.

If the evidence supports a finding that the change occurred prior to November 19, 1987, then review of the change should proceed as described below.

NOTE: The date of the change may not be the same as or earlier than the effective date of the most recent approved transfer.

NOTE: The sufficiency of the evidence as to the date of the change may vary depending on the circumstances. For example, if the claimant asserts that the change occurred in 1967, but the claimant's evidence only supports a date of 1969, and there are no junior appropriators between those two dates, then the lack of further evidence makes little difference.

9. Change more than five years prior to commencement

Limited injury analysis

If the evidence supports a finding that the change occurred more than five years prior to commencement, then the new NU(s) and amounts should be recommended unless it is apparent from information already available to IDWR that the change resulted in substantial injury. (See Part 10.a below as to injury.) If the change is to be recommended, then the claim should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN PURPOSE OF USE PURSUANT TO 42-1416A." (CO4) If substantial injury is apparent, then the claim should be referred for further review by legal staff.

10. Change less than five years prior to commencement

Injury analysis

a. Standard

A change in NU will result in injury if:

i. there are other appropriators from the same source with a priority after the claimant's priority but before the date of the change, and

ii. the change has resulted in an increase in the annual volume of diversion or an increase in consumptive use.

E. CLAIM BASED ON SECOND PRESUMPTION OR CRITICAL GW EXPANSION

(Claims in this category will be referred to as "expansion claims" below.)

If the water agent has reached this point, then it has been determined that the second presumption or the critical GW expansion statute applies, that the expansion may not be considered a change in use, that the expansion is in violation of the mandatory permit statute, and that the expansion was made before November 19, 1987.

Since expansion claims are beneficial use claims, all expansion claims are to be field examined.

See Adjudication Memo #16 for more information as to quantification of claims based on the second presumption or critical GW expansion, including conditions, remarks and combined use limitations.

1. Field exam

If any part of the claimed NU(s) and/or amounts are not verified by field exam or other information already available to IDWR (such as aerial photography, etc.), then claimant contact should be made.

The claimant should be notified that the claimant must submit persuasive evidence of the unverified portion of the claim; otherwise the unverified NU(s) and/or amounts will not be recommended. (A decree, license or permit is persuasive evidence that a right exists. Verification by field exam is persuasive evidence that a use exists for which a water right might exist. Therefore, to be consistent, where a use is claimed that is not verified by decree, license, permit, or field exam, the claimant must submit other persuasive evidence that the use in fact exists.)

The analysis below should be completed as to that portion of the claim that is verified as described above. To the extent that a portion of the claim is not verified, then it should not be recommended.

NOTE: This step is unnecessary where it can be determined without a field exam that the claim will result in injury as described in Part 2 below.

2. Injury

An expansion may be recommended pursuant to the second presumption only where the expansion does not result in an increase in the rate of diversion. If the claimant claims an increase in the rate of diversion, then this is sufficient information to recommend the claim for disallowal.

D. INCREASE IN SU

Generally, an increase in SU is claimed where the claimed SU begins earlier and/or ends later than the previously decreed, previously licensed, or historically practiced SU, with the result that the total number of days in the claimed SU is greater than in the previously established SU. The most common example of an increase in SU is where the claimant claims a change in nature of use from irrigation to a nature of use that is year-round, such as municipal or commercial uses.

Generally, an increase in SU of ground water should be treated as an expansion only if the increase in SU resulted in an increase in diversion volume. Otherwise, the increase in SU should be treated as a change as described in Part E below. If the increase in SU is to be treated as an expansion, the claim should be limited to the original diversion volume and original SU; an additional claim would be required for the additional diversion volume and additional SU.

E. CHANGE IN SU

A change in SU is claimed where the SU begins earlier or ends later than the previously decreed, previously licensed, or historically practiced SU, but there is no expansion in diversion volume, even if there is an increase in number of days in the claimed SU.

As with other claims to accomplished transfers, the claimant should be contacted and required to show that the change occurred prior to commencement of the adjudication, and submit sufficient evidence of the date of change to show that no injury will result, or that the right can be conditioned to prevent injury from the change.

In such cases, injury will result from a change in SU of a surface water right if there are junior appropriators with a priority after the claimant's priority but before the date of the change, and with a season of use within the new claimed season of use. For example, if the claimant had a right with a priority of June 1, 1950, and a season of use that began March 15, and claimed a change to a season of use beginning March 1 that occurred in 1960, injury would result to a claimant with a June 1, 1955 priority and a season of use that included any of the period from March 1 to March 14. Such a claim should include a remark that the right includes a change in season of use, and that use of the water from March 1 to March 14 would be administered as if it had a priority of March 1, 1960 to prevent injury from the change in use. (In some instances, it may be more appropriate to simply split the claim, as is done for a change in use of a portion of a right that results in injury that cannot be otherwise mitigated. See, for example, Part IV.G.3 as to change in PD. In the example above, it

VII. PLACE OF USE (PU)

A. GENERAL

1. Unapproved change in PU generally

The claimant will be required to submit the date of the change and some evidence tending to support that date, because the date of the change is essential to the injury analysis. (The analysis of proof of the date of change is similar to the analysis of proof of priority of beneficial use claims, see Part II.D.1.) If no such evidence is submitted, then the claim will be recommended for disallowal on the basis that the claimant did not show either a change in use without injury or a new appropriation not in violation of the mandatory permit statute. (IDWR may not recommend the right as changed, because IDWR cannot find that the change occurred without injury and prior to commencement; on the other hand, IDWR may not simply recommend the original PU, because use of water at the new PU could be a second change that might result in injury to other claimants.)

The change must have occurred before November 19, 1987, because the accomplished transfer statute applies only to changes that occurred prior to commencement. Where the evidence supports a finding that the change occurred after commencement, then the original PU should be recommended. (NAPP photography should be useful in this regard.)

If the change occurred before November 19, 1987, then the change may be recommended if it can be determined from the available information that the change did not result in injury to other water rights or can be conditioned to prevent any injury. If such a determination cannot be made from information already available to IDWR, claimant contact should be made to allow the claimant an opportunity to provide such information prior to filing the report. If such a determination cannot be made, either from information already available to IDWR or information provided by the claimant, then the right will still be recommended with the change, but with a priority as of the date of the change to prevent injury.

Generally, the investigation of injury from a change in PU shown to have occurred more than five years prior to commencement will be more limited than changes in PU that occurred within five years prior to commencement. (This more limited review does not apply to an expansion in the number of irrigated acres.) A change in PU that occurred more than five years prior to commencement should be recommended as changed unless it is apparent from information already available to IDWR that the change resulted in substantial injury. If substantial injury is apparent, then the claim should be referred for further review by legal staff.

If a portion of the claimed change is unverified but the use is still being made at the decreed PU, then the decreed PU should be recommended.

If a portion of the claimed change is unverified, but the lack of verification does not give rise to a partial forfeiture issue, then the decreed PU should be recommended for the unverified portion.

If a portion of the claimed change is unverified, and the lack of verification gives rise to a forfeiture issue, then the forfeiture analysis should be completed as to the unverified portion. If no forfeiture is found, then the decreed PU should be recommended for the unverified portion. (See Part 8 below as to partial forfeiture.)

NOTE: If the claimant erred in describing the PU, then the actual PU should be treated as the claimed PU. Therefore, if the verified PU for each NU matches the decreed PU for each NU, then the actual/decreed PU should be recommended, except to the extent determined otherwise pursuant to the partial forfeiture analysis in Part 8 below. If the verified PU still constitutes a change or an expansion, the analysis below should be completed for the actual PU. An amended claim is required before IDWR may recommend a verified PU that is greater than the claimed PU; an amended claim is not required if the verified PU to be recommended is different but not greater than the claimed PU.

NOTE: In addition to verifying the new PU, the field exam should also verify that water is no longer used at the old PU. What if the examination indicates that use is made at the new PU, but use at the old PU has not ceased? If the claimant is making both uses, then presumably the claimant claimed both uses, and this will be covered in the expansion analysis. If someone else is using water at the old PU and filed a claim, then this gives rise to an ownership issue that is addressed in Part XI.C. If the first two determinations cannot be made, then the parcel should be added to the list for second round service, unless the parcel has already been included as part of the second round service done at the state office.

4. Stored water

Claimant contact

If the change or expansion is a change or expansion in the place of use of stored water (and the change does not include a change in place of storage), then claimant contact should be made. (See Part XI.D as to change in place of storage.) The claimant should be notified that the claimant must submit some evidence that the change or expansion occurred prior to November 19, 1987;

otherwise the change or expansion will not be recommended. If the evidence supports a finding that the change or expansion occurred prior to November 19, 1987, then the change or expansion should be recommended to the extent verified. The claim should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO IDAHO CODE 42-1416A." (C05)

5. Date of change

Claimant contact

The claimant should be notified that the claimant must submit the date of the change and some evidence tending to support that date; otherwise the use of water at the new PU will not be recommended for lack of evidence of a change without injury or a new appropriation not in violation of the mandatory permit statute. (If the change occurred after November 19, 1987, then a specific date is not necessary, and the evidence need only support that the change occurred sometime after that date.)

If the evidence does not support any finding as to the date of the change, and the PU of the entire right was changed, then the claim should be recommended for disallowal, and should include the following remark: "CHANGE IN USE, INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (P05 and condition P05)

If the evidence does not support any finding as to the date of the change, and the PU of a portion of the right was changed, then the portion of the right still used at the decreed PU should be verified, and only that portion should be recommended. The claim should include the following condition: "CHANGE IN USE OF PORTION OF RIGHT; RIGHT LIMITED TO UNCHANGED PORTION DUE TO INSUFFICIENT EVIDENCE OF DATE OF CHANGE." (C07)

If the evidence supports a finding that the change occurred after November 19, 1987, then the decreed PU should be recommended.

If the evidence supports a finding as to a date of change on or after November 19, 1982, but before November 19, 1987, then proceed to part 6 below.

If the evidence supports a finding that the change occurred before November 19, 1982, then the claimed PU should be recommended unless it is readily apparent that the change resulted in substantial injury. (See Part I below as to injury.) If the change is to be recommended, then the claim should include the following condition: "RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT TO IDAHO CODE 42-1416A." (C05) If substantial injury is readily apparent, then the claim should be referred for further review by legal staff.

If the two determinations above still cannot be made, and if the PU of a portion of the right was changed, then the portion still used at the original PU should be verified. The claim should be split, with the original claim showing the use at the original PU, and the new claim showing the use at the new PU with a priority as of the date of the change, and the claim numbers should have alpha suffixes. Both should include the following remark: "PRIORITY OF PORTION OF RIGHT CHANGED TO PREVENT INJURY FROM CHANGE IN USE, SEE RIGHT NO. _____. " (C01)

7. Expansion in irrigated acres prior to commencement

See Adjudication Memo #16B for more information as to recommendation of expansions in irrigated acreage of decreed rights under the first presumption.

Claimant contact

a. If the source is groundwater located within a critical GW area, then the claimant should be notified that the claimant must submit evidence that the expansion occurred prior to designation of the critical GW area; otherwise the expansion will not be recommended.

b. If the source is not groundwater within a critical GW area, the claimant should be notified that the claimant must submit evidence that the expansion occurred prior to November 19, 1987; otherwise the expansion will not be recommended.

If the evidence does not support a finding that the expansion occurred prior to November 19, 1987, then the expansion should not be recommended.

If the source is groundwater located within a critical GW area, and if the evidence does not support a finding that the expansion occurred prior to designation of the critical GW area, but supports a finding that the change occurred prior to November 19, 1987, then the expansion should not be recommended as part of this right, and the claimant should be contacted to allow the claimant an opportunity to file a new claim for the expansion.

Otherwise, proceed to part c.

c. Can water be beneficially used under the resulting rate of diversion per acre? If the number of acres to be recommended would result in a rate of diversion of less than 1/2 inch (0.01 cfs per acre) at the field headgate for sprinkler systems, or less than 3/4 inch (0.015 cfs per acre) at the field headgate for flood systems, then the claimant must submit information showing that a lower per acre diversion rate is beneficial. If such information is not submitted, then the recommendation should be limited to the number of acres that will result in the diversion rate stated

If the two determinations above still cannot be made, and if the PU of a portion of the right was changed, then the portion still used at the original PU should be verified. The claim should be split, with the original claim showing the use at the original PU, and the new claim showing the use at the new PU with a priority as of the date of the change, and the claim numbers should have alpha suffixes. Both should include the following remark: "PRIORITY OF PORTION OF RIGHT CHANGED TO PREVENT INJURY FROM CHANGE IN USE, SEE RIGHT NO. _____." (C01)

7. Expansion in irrigated acres prior to commencement

See Adjudication Memo #16B for more information as to recommendation of expansions in irrigated acreage of decreed rights under the first presumption.

Claimant contact

a. If the source is groundwater located within a critical GW area, then the claimant should be notified that the claimant must submit evidence that the expansion occurred prior to designation of the critical GW area; otherwise the expansion will not be recommended.

b. If the source is not groundwater within a critical GW area, the claimant should be notified that the claimant must submit evidence that the expansion occurred prior to November 19, 1987; otherwise the expansion will not be recommended.

If the evidence does not support a finding that the expansion occurred prior to November 19, 1987, then the expansion should not be recommended.

If the source is groundwater located within a critical GW area, and if the evidence does not support a finding that the expansion occurred prior to designation of the critical GW area, but supports a finding that the change occurred prior to November 19, 1987, then the expansion should not be recommended as part of this right, and the claimant should be contacted to allow the claimant an opportunity to file a new claim for the expansion.

Otherwise, proceed to part c.

c. Can water be beneficially used under the resulting rate of diversion per acre? If the number of acres to be recommended would result in a rate of diversion of less than 1/2 inch (0.01 cfs per acre) at the field headgate for sprinkler systems, or less than 3/4 inch (0.015 cfs per acre) at the field headgate for flood systems, then the claimant must submit information showing that a lower per acre diversion rate is beneficial. If such information is not submitted, then the recommendation should be limited to the number of acres that will result in the diversion rate stated

Attachment B

- i. Date of recording between February 10, 1881 and March 10, 1903, and within the following time limits from the date of posting:
 - Prior to June 1, 1887 - 15 days
 - June 1, 1887 to February 19, 1895 - 10 days
 - February 20, 1895 to March 10, 1903 - 15 days

The date of recording is the date the notice was recorded with the office of the county recorder for the county in which the land was located at the time the notice was recorded (there have been some changes in county boundaries since the posted notice statutes). A copy of the posted notice from the county recorder's office will have an endorsement by the county recorder that shows the date of recording.

If the posted notice does not meet these minimum requirements, then the basis of the claim should be changed to beneficial use and the claim should be reviewed the same as a claim based on beneficial use.

2. Does the posted notice include the right claimed?

The water right claim based upon the posted notice statute should accurately reflect the information shown on the notice. If not, the agent must examine the right carefully to determine if it is, in fact, the use intended under the posted notice statute. Keep in mind that the original right might have been transferred. If the claimed use cannot be reconciled with the posted notice, examine the claim to determine if it is for a beneficial use right.

If the claimed right is partially included in the posted notice, or may partially be considered a change in use of the appropriation described in the posted notice, then the claim may need to be separated into two claims, one based on posted notice and a second based on beneficial use.

IV. LICENSED WATER RIGHTS

A. Priority Date.

The priority date for a water right based upon the permit/license method is generally the date the application for permit was filed with IDWR. Idaho Code § 42-219.

B. Evidence of Priority.

The priority date of a licensed water right should appear on the face of the license or permit.

V. 42-1416 ENLARGEMENT WATER RIGHTS

A. Priority Date.

The priority date of a water right claimed as an enlargement under Idaho Code § 42-1416 is the date of the completion of that enlargement. The date of completion must be on or before November 19, 1987. In order to prevent injury to junior water users IDWR has also determined that all 42-1416 enlargements should also be recommended with the following subordination remark:

This water right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1416, Idaho Code. As between water rights decreed as enlargements pursuant to 42-1416, Idaho Code, the earlier priority right is the superior right.

B. Evidence of Priority.

A person claiming an enlargement right should be requested to provide evidence of the date of the completion of the enlargement in the same fashion as for beneficial use rights.

VI. 42-1416B EXPANSION WATER RIGHTS

A. Priority Date.

The priority date for a water right recommended under Idaho Code § 42-1416B is June 30, 1985.

B. Evidence of Priority.

No evidence of priority date is necessary for a water right claimed under Idaho Code § 42-1416B. So long as the water right can be recommended under this statute, the statutory priority date should be used.

VII. ACTIONS AFFECTING AVAILABLE PRIORITY

A. Decrees

The available priority dates for water rights claimed in an area that has been adjudicated may be limited. If a water right was required to be claimed in an adjudication, and was not, the claimant may be barred from claiming a water right with a priority date preceding the date of the adjudication decree. The issue of whether, or not, a water right was required to be claimed in an adjudication is complex, and agents should consult with their legal counsel when faced with this question. See Adjudication Memo #14 for the decree dates of some recent adjudications.

Generally, IDWR will place the burden on the claimant to show the claimant is not "bound" by an adjudication, either by showing that the owner at the time of the more recent adjudication was not a party to the more recent adjudication (some water right adjudications

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

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

rights will contain a combined use remark limiting the three rights to 1.2 cfs for irrigation of 50 acres.

III. EVIDENCE OF PURPOSE OF USE AND QUANTITY.

A water right's purpose of use and quantity is first determined at the time of establishment of the right, and then as it may have been changed. Although determining the purpose of use and quantity is not 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 section is concerned primarily with claimed purposes of use and quantities where there is little evidence regarding historic use, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR.

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the purpose for which water is 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 purpose of use and quantity for a beneficial use water right is based on the use when water is first appropriated by application to beneficial use. As a general matter IDWR will have little evidence of the original purpose of use and quantity for beneficial use water rights.

With the passage of the accomplished transfer statute, Idaho Code § 42-1425, the purpose of use to be recommended for most beneficial use rights is the purpose of use as of the commencement of the adjudication on November 19, 1987. The agent's initial investigation of the purpose of use claimed should consist of an evaluation of whether the purpose of use claimed under a beneficial use claim is that purpose of use of water being used on the commencement date.

IDWR will start with the 1987 information because of the accomplished transfer statute. Idaho Code § 42-1425. The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA. Therefore, IDWR generally will recommend 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 a change occurred after commencement, then the original purpose of use should be recommended.

The agent should look at available evidence to determine whether the 1987 purpose of use is an enlargement from the use when the right was initiated. Available evidence includes: aerial and other photography in IDWR's possession, county assessors records regarding irrigated land, interviews with the claimant, and interviews with neighbors or other old timers. If the agent believes that an enlargement has occurred the claimant should be contacted to submit an enlargement claim.

The quantity element for beneficial use rights is more problematic. The accomplished transfer statute does not provide a legal basis to look solely to 1987 information. The agent will need to use claimant contacts, measurements and other research to determine whether the claimed quantity was the amount diverted and put to beneficial use at the time the right was initiated. It is fair that the agent assume that the water user has followed the law and has not enlarged the quantity used in the absence of evidence to the contrary.

If the agent discovers evidence that the quantity used has enlarged over time, the claimant should be notified that the claimant must submit evidence showing that the amount currently used was the amount originally appropriated. The claimant may be urged to file an additional claim for the additional amount with a priority as of the date of the increase and submit some evidence in support of the priority date claimed, or to file an application for permit, depending on when use of the additional amount was initiated. Absent evidence to the contrary, the additional amount should not be recommended because it appears to be a beneficial use in violation of the mandatory permit statutes.

B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

If the claimed purpose of use is the same as the purpose of use 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 review reveals that the claimed purpose of use is inaccurate, the agent may wish to contact the claimant to verify the purpose of use information.

The total amount decreed or licensed should be recommended as long as reasonable; the original purpose(s) and amounts for each purpose should be recommended to the extent claimed as long as reasonable; and the recommendation should include other claimed purpose(s) and amounts for each purpose that may be recommended as a change in use pursuant to the analysis below. A total amount greater than the total amount decreed or licensed may not be recommended.

Purpose of use is the central element of a water right. The failure of a decree to include purpose of use in the listing of rights renders the decree ineffective. Claims based on such a decree should be examined as beneficial use claims.

There are some decrees in the files which list the name, source, amount, priority, and property to which the water right is appurtenant, but contain only general language as to purpose, such as: "The following rights are decreed for irrigation, culinary, livestock,

CHAPTER 8

PLACE OF USE

I. INTRODUCTION

The investigation of a water right's place of use is dependent both upon the type of use and upon which of the five legal methods under which the water right was established. Because the majority of the rights are for irrigation use, this use will receive the most attention.

II. PLACE OF USE GENERALLY.

A water right's place of use is first determined at the time of establishment of the right, and then as it may have been transferred, forfeited or abandoned. Although determining the place of use 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 Section is concerned primarily with claimed place of uses where there is little evidence regarding historic use of the place of use, such as with beneficial use rights, and accomplished transfers that have not been approved by IDWR. There are specific issues relating to irrigation and municipal water rights that are described in Sections III and IV below.

There are five different methods of obtaining a water right, each with different amounts of evidence regarding the place of use 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 place of use for a beneficial use water right is the place of use used when water is first appropriated by application to beneficial use. As a general matter IDWR will have little evidence of the original location and size of the place of use for beneficial water rights. However, with the passage of the accomplished transfer statute, Idaho Code § 42-1425, the place of use to be recommended for most beneficial use rights is the place of use used by the water user as of the commencement of the adjudication on November 19, 1987. The agent's initial investigation of the place of use claimed should consist of an evaluation of whether the place of use claimed under a beneficial use claim is that place of use of water being used on the commencement date. This should be done in the first instance by the GIS analysis of the 1987 NAPP photography.

IDWR will start with the 1987 information because of the accomplished transfer statute. Idaho Code § 42-1425. The accomplished transfer statute was a legislative attempt to protect the pattern of water use as of the date of commencement of the SRBA. Therefore, IDWR generally will recommend 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 place of use should be recommended. (NAPP photography may be useful in this regard.)

The agent should look at available evidence to determine whether the 1987 place of use is an enlargement from the use when the right was initiated. Available evidence includes: aerial and other photography in IDWR's possession; county assessors records regarding irrigated land; interviews with the claimant; interviews with neighbors or old timers. If the agent believes that an enlargement has occurred the claimant should be contacted to submit an enlargement or additional beneficial use claim. Otherwise, the agent should not include the enlargement area in the preliminary recommendation for the beneficial use right.

B. CLAIM BASED ON DECREE, POSTED NOTICE OR LICENSE

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

If the claimed place of use is not the same as the place of use shown on the decree, posted notice or license (as amended by any approved transfers), then the agent should recommend the place of use as of 1987 in the same fashion as for beneficial use claims.

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

The place of use is an essential element of a water right. The failure of a decree to include the place of use 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 place of use 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, assume that the 1987 place of use is the decreed place of use. The place of use of a claim based on a decree that does not state the place of use should therefore be analyzed the same as the place of use of a claim based on beneficial use.

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. Place of use claimed different than place of use on permit

If the place of use claimed is different than the place of use shown on the permit (as amended by any approved amendments to the permit), then the place of use shown on the permit (as amended by any approved amendments to the permit) should be recommended.

A change in place of use 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 place of use 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 evaluation of the place of use of an Idaho Code § 42-1426 enlargement claim should parallel the analysis used for beneficial use rights. The place of use should be that area that was irrigated as of 1987.

If a claim includes both the original acres and an enlargement in irrigated acres, then the claimant should be contacted to allow the claimant the opportunity to file a separate claim based on Idaho Code § 42-1426 or beneficial use for the additional acres. The original claim should be limited to the number of original acres under the water right. Where the claim includes a change in use as well as an enlargement, it may be difficult to tell which acres should be recommended. In such cases, a common sense approach should be used, taking into account any information as to where the enlargement is likely to have occurred, the nature of the diversion system, etc.

Idaho Code §42-1416B expressly provides that an expansion in irrigated acres from groundwater in a critical GW area that occurred after designation of the critical GW area may not include an increase in either diversion volume or rate. Therefore, there must be information from the claimant with which it can be determined that there has been a change in cropping or in the method of application which would allow the same volume to be spread to additional acres, and to determine the number of additional acres (up to the total number of additional acres claimed) to which the original volume can be spread. If such a determination cannot be made, then the claim should be recommended for disallowal, and should include the following remark: "NO LAWFUL APPROPRIATION SHOWN." (P01 and condition P01)

Attachment C

AJ5856NP

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAWDATE: MAY-27-1992
PAGE: A-5

RIGHT NUMBER	NAME & ADDRESS	PRIORITY DATE	PURPOSE OF USE	PERIOD OF USE FROM TO	MAXIMUM QUANTITY	BASIS OF CLAIM
-----------------	----------------	------------------	----------------	--------------------------	---------------------	----------------

SOURCE: ALDER CREEK

TRIBUTARY: BIG LOST RIVER

34-00333	JAMES C. LAMBERT RT 1 BOX 20 MACKAY ID 83251	06/30/1896	IRRIGATION	05-01 10-15	1.3	CFS	DECREED
----------	--	------------	------------	-------------	-----	-----	---------

POINT OF DIVERSION:

T06N R25E S07 LOT 3 (NWNWSW)

T07N R24E S33 NWSWNE (R)

PLACE OF USE: IRRIGATION

TOTAL QUANTITY : 1.3 CFS

T06N R24E S12 SWNW 38.0 NWSW 40.0

78.0 ACRES TOTAL

REMARKS: RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION PURSUANT TO IDAHO CODE 42-1416A.

USE OF THIS RIGHT WITH RIGHT NO. 34-10441 AND OTHER RIGHTS LISTED THEREIN IS LIMITED TO A TOTAL COMBINED ANNUAL CONSUMPTIVE USE VOLUME OF 500 AF, AND TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON.

THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF DIVERSION DESCRIBED ABOVE: 34-00682A, 34-00682B AND 34-10400. WATER DIVERTED UNDER THIS RIGHT IS EXCHANGED BY INJECTING WATER DIVERTED UNDER THIS RIGHT INTO THE DARLINGTON DITCH, AND DIVERTING AN EQUAL AMOUNT FROM THE BIG LOST RIVER AT THE POINT OF REDIVERSION DESCRIBED ABOVE.

WATER DIVERTED FROM THE BIG LOST RIVER DELIVERED THROUGH THE DARLINGTON DITCH.

THE AMOUNT OF WATER DIVERTED FROM THE BIG LOST RIVER SHALL BE REDUCED WHERE NECESSARY TO PREVENT INJURY TO APPROPRIATORS OF WATER FROM THE BIG LOST RIVER DOWNSTREAM FROM THE POINT OF REDIVERSION.

WATER MAY BE REDIVERTED FROM THE BIG LOST RIVER ONLY WHEN THERE IS CURRENT DEMAND FOR THE WATER INJECTED INTO THE DARLINGTON DITCH BY USERS OF WATER FROM THE DARLINGTON DITCH WITH CURRENTLY DELIVERABLE PRIORITIES BELOW THE POINT OF INJECTION.

Attachment D

10/12/2011

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

RIGHT NUMBER: 34-333

NAME AND ADDRESS: JAMES C LAMBERT
4300 W 4067 N
MACKAY ID 83251

SOURCE: ALDER CREEK

TRIBUTARY: BIG LOST RIVER

QUANTITY: 1.300 CFS

PRIORITY DATE: 06/30/1896

POINT OF
DIVERSION:

T06N R25E S7 NWNWSW Lot 3 Within CUSTER County
T07N R24E S33 NWSWNE Rediversion Within CUSTER County
WATER DIVERTED UNDER THIS RIGHT IS EXCHANGED BY INJECTING
WATER DIVERTED UNDER THIS RIGHT INTO THE DARLINGTON DITCH, AND
DIVERTING AN EQUAL AMOUNT FROM THE BIG LOST RIVER AT THE POINT
OF REDIVERSION DESCRIBED ABOVE.
WATER MAY BE REDIVERTED FROM THE BIG LOST RIVER ONLY WHEN
THERE IS CURRENT DEMAND FOR THE WATER INJECTED INTO THE
DARLINGTON DITCH BY USERS OF WATER FROM THE DARLINGTON DITCH
WITH CURRENTLY DELIVERABLE PRIORITIES BELOW THE POINT OF
INJECTION.

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	5/01 10/15	1.300 CFS
THE PERIOD OF USE FOR IRRIGATION DESCRIBED ABOVE MAY BE EXTENDED IN SEASONS OF UNUSUAL CHARACTERISTICS TO A BEGINNING DATE OF 04-20 AND AN ENDING DATE OF 10-31 AT THE DISCRETION OF THE DIRECTOR OF THE IDAHO DEPARTMENT OF WATER RESOURCES.		

PLACE OF USE: IRRIGATION in CUSTER County

T06N R24E S12	SWNW	38.00	T06N R24E S12	NWSW	40.00
78 ACRES TOTAL					

USE OF THIS RIGHT WITH THE RIGHTS LISTED BELOW IS LIMITED TO THE
IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE
IRRIGATION SEASON.
COMBINED RIGHT NOS.: 34-00872B, 34-10441 AND 34-10446.
THIS RIGHT IS LIMITED TO THE IRRIGATION OF 65 ACRES WITHIN THE
PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

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

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

EXPLANATORY MATERIAL: BASIS OF CLAIM - Decreed

THE FOLLOWING RIGHTS ARE ALSO DIVERTED THROUGH POINT OF
DIVERSION DESCRIBED ABOVE: 34-00682A, 34-00682B AND 34-10400.
WATER DIVERTED FROM THE BIG LOST RIVER DELIVERED THROUGH THE
DARLINGTON DITCH.

RIGHT INCLUDES ACCOMPLISHED CHANGE IN PLACE OF USE PURSUANT
TO SECTION 42-1425, IDAHO CODE.

RIGHT INCLUDES ACCOMPLISHED CHANGE IN POINT OF DIVERSION
PURSUANT TO SECTION 42-1425, IDAHO CODE.

Exhibit C

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

COPY

In Re SRBA

)

)

Subcase Nos.

Case No. 39576

)

1-4, 1-10, and 1-209

)

PER REQUEST
EXHIBITS NOT PROVIDED

DEPOSITION OF DOUGLAS JONES, PE

DECEMBER 19, 2011

REPORTED BY:

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

Notary Public

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Page 38 1 generally; is that correct? 2 A. Imagery and maps, yes. 3 (Mr. Holliday joins the proceedings.) 4 Q. (BY MS. PEMBERTON): Okay. Was any other 5 land besides the land you just identified removed from 6 the shape file? 7 A. There were areas that did not have claimed 8 irrigation use in that quarter-quarter or it was 9 ambiguous where the -- where the claimed acres were 10 located and, as such, I may have reduced areas within a 11 quarter-quarter to conform with the extent of 12 irrigation, wasteland, for instance, hilltops, 13 something that's obviously or in comparison not 14 irrigated. 15 Q. And again, your evaluation of whether 16 something was wasteland or could not be irrigated was 17 based on your review of imagery and maps? 18 A. That is correct, the comparative analysis 19 was between different years of irrigation because not 20 everything is clear in 1987 imagery what the land use 21 practice occurring in that location are. I did utilize 22 1992 and 2004 imagery to help me understand what the 23 land use practice was in any location. 24 Q. And I'd like to talk to you about that 25 imagery in a moment. I just have a couple more	Page 40 1 file to me. And then I'd evaluate their feedback. And 2 so that's where the iterative process came from. 3 Does that answer your question? 4 Q. Yes. Did you investigate the number of 5 acres irrigated in 1987? 6 A. That was my bright line that I was 7 evaluating for, is the claim was made in 1988 or close 8 thereto, soon after the commencement of the 9 adjudication. And our statutory authorization is to 10 acknowledge what was irrigated as of 1987 and in 11 relation to what's claimed. 12 Q. Did you investigate the number of acres 13 irrigated in every year prior to 1987? 14 A. No, ma'am. 15 Q. In any year prior to 1987? 16 A. No, ma'am. 17 Q. All right. As you described a minute ago, 18 you stated that you reviewed some imagery from 1992 and 19 2004. 20 Can you explain the purpose of reviewing 21 that information. 22 A. Yes. Our 1987 imagery, the one -- the base 23 layer that we're using to create the recommendation for 24 the adjudication is -- is -- the imagery is digitized. 25 And -- and the administrative decision at the time that
Page 39 1 questions about the base shape file. 2 A. Okay. 3 Q. Besides what you've identified in the 4 report and here today, did you consider any other 5 information in creating the base shape file? 6 A. In certain circumstances I did examine 7 whether there were overlapping private irrigation water 8 rights that overlapped the claimed area of the Twin 9 Falls Canal Company. 10 Q. So after you created the base shape file, 11 did you investigate further, as you've just described, 12 irrigation on the claimed acres? 13 A. I -- 14 Q. Let me rephrase. 15 A. Yeah, please. 16 Q. After you created the base shape file, what 17 did you do? 18 A. Every iteration involved examining 19 basically on a quarter-quarter by quarter-quarter basis 20 the number of claimed acres by the Twin Falls Canal 21 Company, whether -- and what the land use practices 22 were for the quarter-quarter. 23 And then I'd submit them back to the Twin 24 Falls Canal Company for review, and they would make 25 adjustments to my conclusions and submit another shape	Page 41 1 we developed the Geographic Information System 2 applications for the Department, which was in 1997, 3 prohibited us from having high enough resolution 4 digitization to be very clear. 5 And so essentially when imagery is 6 digitized it pixilates the value -- the appearance of a 7 cell, a pixel, by averaging the -- I guess the 8 reflectance or what the image actually is appearing, 9 light and dark areas and so forth. 10 So in the case of 1987, it was fairly 11 coarse rectification -- or excuse me, digitization. 12 And then -- but the 1992 imagery is somewhat better. 13 And 2004 -- but it's black and white. In 2004 it's a 14 good resolution, number of dots per inch, if you will, 15 pixels, and it's in color, real color, as opposed to 16 the 1987, which is a false color infrared image. 17 I know this is a lot of words, but you 18 asked an open question. And so as a result of the 19 coarseness of the 1987 image, I utilized a better 20 imagery in subsequent years to tell -- to see if I can 21 tell what land-use practice was occurring. Is it 22 desert land? Is it canyon bottom? Is it irrigated or 23 is it not? 24 Q. So when you reviewed this information, were 25 you trying to determine the number of irrigated acres

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1 in 1987 or the number of irrigated acres after 1987?

2 A. My bright line focus was the land-use
3 practice and the extent of irrigation in 1987.

4 Q. Were there any instances in which the
5 number of recommended irrigated acres was affected by
6 the 1992 and 2004 imagery?

7 A. Yes.

8 Q. Can you describe what was affected?

9 A. There may have been circumstances across
10 the service area where it appeared that irrigation was
11 not -- was ambiguous anyways. I couldn't tell if it
12 was or it wasn't irrigated in 1987, that subsequent
13 year imagery illuminated the land-use practice and
14 confirmed that it was irrigated. But conversely, it
15 also confirmed that no, it was not irrigated.

16 Q. So if I understand what you just said, when
17 the 1987 imagery was not clear, you relied on the 2004
18 and 1992 imagery to clear up any ambiguity?

19 A. That is correct.

20 Q. In determining the number of acres to
21 recommend for these claims, did you conduct any field
22 investigations?

23 A. No, ma'am.

24 Q. Did you visit any of the claimed acres?

25 A. No, ma'am.

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1 Q. Did you interview any farmers or water
2 users on the ground?

3 A. No, ma'am.

4 Q. All right. The supplemental report
5 identifies some examples of when the claimed and
6 recommended numbers of acres differed; in other words,
7 where Twin Falls Canal Company claimed certain acres in
8 a quarter-quarter section and the number of acres you
9 recommended in that quarter-quarter ultimately
10 differed.

11 If you turn to I believe it is page 8 of
12 Exhibit 5, in that last paragraph is something
13 identified as "Example 1." Can you please explain that
14 example to me.

15 A. "In Example 1, three quarter-quarters in
16 Section 35 were claimed, but sixteen quarter-quarters
17 were recommended. All of Section 35 was recommended
18 because the unclaimed lands were subsequently
19 identified by Twin Falls Canal Company during the
20 review process as having shares transferred there by
21 the City of Twin Falls."

22 And I refer to my attachment, if that's
23 what it is, the map that you asked me to identify
24 earlier. And it's the color map with the false color
25 imagery. And Example 1 is -- is shown in the big

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1 circle at the top of the page. And that -- go ahead.

2 Q. You're referring to what I believe is
3 Exhibit 11?

4 A. That is correct, Mitra.

5 Q. And I'm sorry to interrupt you, Mr. Jones.

6 A. That's fine.

7 MS. PEMBERTON: I just noticed that it appears
8 somebody has joined us in the back of the courtroom.

9 Can that person be identified?

10 MR. BROMLEY: It's Michael Holliday.

11 MS. PEMBERTON: Thank you.

12 Q. So, Mr. Jones, if you can just bear with me
13 for a moment. When you say that shares were
14 transferred to those acres by the City of Twin Falls, I
15 don't understand what that statement has to do with the
16 change in acreage there.

17 Can you elaborate a little bit.

18 A. Thank you for the opportunity.

19 During our -- oh, boy. During the
20 iterative review with Twin Falls Canal Company, I was
21 having issues with claimed acres within the Twin --
22 city of Twin Falls and city of Buhl and city of
23 Kimberly. There were -- appeared to be shares located
24 on properties within the city limits that I was having
25 a hard time figuring out where the irrigation was

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1 occurring.

2 And as a result of the iterative process,
3 Twin Falls Canal Company, is my understanding, reviewed
4 their -- their claims and where they had shares
5 recorded for a place-of-use. And they submitted prior
6 to deadline two pages that I brought to Chris'
7 attention earlier and Ray Williams' attention too that
8 essentially they're asserting kind of amending the
9 place-of-use where their shares were identified as
10 being used.

11 So they moved them from within the city
12 limits of the municipalities and sought permission of
13 the Twin Falls Canal Company to locate them in a new
14 location.

15 And one of those is in Section 35 as
16 portrayed in the Example 1 on Exhibit 11. And I will
17 make photocopies for everybody because I --

18 Q. So I understand you're referring to a
19 couple pieces of paper that you've got there in your
20 hand.

21 Is it my understanding that we haven't seen
22 those yet --

23 A. You know --

24 Q. -- is that correct?

25 A. -- I don't believe you do.

Page 46 1 Q. Okay. Well, let's take that up at our next 2 break. 3 A. Okay. 4 Q. When you say that the shares were moved at 5 the City's request, do you know if those shares were 6 continued to be used for irrigation purposes? 7 A. After -- yes, they were used for irrigation 8 purposes, and the imagery from 1987 confirms that 9 irrigation was occurring to the extent identified 10 within those areas, the new recommended areas. 11 Q. Thank you. 12 On page 9 is identified an Example No. 2, 13 it appears that there was some error in the 14 transcribing of data there. 15 Can you briefly explain what Example 2 -- 16 what occurred. 17 A. Well, the Twin Falls Canal Company 18 submitted an original claim to the Department of Water 19 Resources. And that original claim was then 20 transcribed, if you will, into our computer system so 21 that reference could be -- you know, it could be 22 queried and further analyzed down the line. 23 And I do not know where the error occurred. 24 I did not strictly verify that they were -- that those 25 quarter-quarters were not claimed, but it's my	Page 48 1 I consulted with Dave Tuthill, then bureau 2 chief for the adjudication, and -- to determine whether 3 that was a correct application of our guidance. 4 And he indicated that really the measure of 5 extent of beneficial use of that place should be the 6 extent that irrigation is occurring in that 7 quarter-quarter. So since there were 40 acres being 8 irrigated, I recommended 40 acres. 9 Q. When you say "there were 40 acres being 10 irrigated," what are you basing that statement on? 11 A. The Geographic Information System is a 12 powerful tool that helps an agent evaluate the actual 13 areal extent of a feature. And you can describe it in 14 many different units, but the one we use is acres. 15 And so the computer can calculate the area 16 within a feature and display that for the agent to 17 apply if that's their conclusion. 18 Q. And I guess I should have been a little bit 19 more specific with my question. 20 Did you base that 40 acres on the GIS 21 imagery you had from 1987? 22 A. Yes. 23 Q. Thank you. 24 Example No. 4, same question. Can you walk 25 me through what happened in Example 4?
Page 47 1 impression that they were not, that somewhere in the 2 data entry by IDWR we inadvertently included those two 3 quarter-quarters in the Twin Falls Canal Company 4 place-of-use. 5 And in earlier versions of the review 6 process, they may have been included in the total 7 number of acres. But once the review advanced to the 8 State, you know, toward the end, it was found that 9 those two quarter-quarters were indeed not irrigated 10 and in fact are owned by the Bureau of Land Management, 11 or at least managed by them, and I excluded them from 12 the final shape, place-of-use shape. 13 Q. So this error has been corrected in the 14 recommendations as they currently stand? 15 A. That is correct. 16 Q. Thank you. 17 Example 3, can you -- maybe with Example 3 18 it makes the most sense for you to turn to Exhibit 11 19 and explain what happened in Example 3, and to the 20 extent you can describe what Exhibit 11 shows on 21 Example 3. 22 A. Yes. The original filing by the Twin Falls 23 Canal Company identified 37 acres of irrigation within 24 that quarter-quarter. And in an earlier edition of 25 the -- of my review, I identified only 37 acres there.	Page 49 1 A. In Example 4, it was a complicated little 2 deal there, a lot of detail occurring. The extent of 3 irrigation within the claimed areas is less than the 4 number of shares that are identified as -- as irrigated 5 in there. 6 And so it was my conclusion that in this 7 circumstance, since the extent of irrigation is less 8 than the claimed number of acres, that I applied what 9 the actual extent of irrigation determined should be. 10 In this case it was less than the claimed number of 11 acres. 12 Q. And when you say the actual extent of 13 irrigation, are you again basing that statement on 1987 14 GIS imagery? 15 A. That is correct. But I -- it -- this 16 particular area was used because there may actually be 17 overlapping private irrigation rights and -- and maybe 18 differing ownerships of the land. So I made a 19 determination and recommended the extent of irrigation 20 that appeared to be delivered by the Twin Falls Canal 21 Company and not by the private irrigation water right. 22 Q. Thank you. 23 Let's go ahead and turn to Example No. 5. 24 Can you please explain Example No. 5 to me. 25 A. This is a further example of what the

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1 effect of the private overlapping water right impacts
2 are in that in those two quarter-quarters there were a
3 total of two shares claimed, one in each
4 quarter-quarter, and -- but the full area was
5 irrigated. And there is a private overlapping
6 irrigation water right.

7 In that circumstance I concluded that one
8 share of water apportioned to a 40 that's fully
9 irrigated is not a reasonable amount of irrigation to
10 occur in that area, and recommended the extent that was
11 claimed, in other words, 1 acre per quarter-quarter.

12 Q. When you just said that you decided it was
13 not a reasonable amount of water to allow irrigation to
14 occur, can you elaborate.

15 A. Twin Falls Canal Company has a certain flow
16 rate allocated to them. And they have an historical
17 delivery duty, if you will, that they represent as an
18 amount of water per share of stock. And that quantity
19 of water spread over an entire 40 as being a sole
20 source of irrigation water would not support the
21 irrigation of a full 40 acres of irrigation.

22 And so in that case I guess my conclusion
23 was that I should recommend the extent of irrigation
24 that Twin Falls Canal Company identified as the
25 quantity that they -- as the number of acres that they

1 water rights.

2 Q. And you only investigated overlapping
3 private water rights when Twin Falls Canal Company had
4 claimed less than the acreage that appeared irrigated
5 to you on the 1987 imagery?

6 A. Yes.

7 Q. In making your place-of-use recommendation,
8 on page 11 of Exhibit 5 it discusses the Surface Water
9 Coalition delivery call.

10 In the work that you conducted on these
11 recommendations, did you consider any information from
12 the Surface Water Coalition delivery call?

13 A. No, ma'am.

14 Q. Did you consider any information regarding
15 reductions in Twin Falls Canal Company's irrigated
16 acres after 1987?

17 A. I'm sorry. Could you restate the question?

18 Q. In making your recommendations, did you
19 consider whether Twin Fall Canal Company's irrigated
20 acres were reduced after 1987?

21 A. No, ma'am.

22 MS. PEMBERTON: All right. If it's all right
23 with everyone there, we'd like to take a short
24 five-minute break and then resume the questioning.

25 THE WITNESS: Works for me.

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1 should be able to irrigate. That's a lot of words.

2 Q. All right. Can you refer to page 9 of
3 Exhibit 5. And the second-to-last paragraph begins
4 previously. Can you please read me that first
5 sentence.

6 A. "Previously it was mentioned that
7 consideration was given to overlapping private water
8 rights where fewer acres were claimed and many more
9 were irrigated."

10 Q. So I'm directing you to that sentence
11 because I'm a little bit confused.

12 Did you investigate overlapping water
13 rights? Under what circumstances did you investigate
14 overlapping water rights?

15 A. When there was a vast discrepancy between
16 what is being irrigated in a quarter-quarter and what
17 was claimed by the Twin Falls Canal Company as being
18 irrigated in a quarter-quarter, then I looked at
19 whether there was indeed overlapping private water
20 rights. And Example 5 was one of those circumstances.

21 Q. Did you investigate whether there were
22 overlapping private water rights on all the claimed
23 acres?

24 A. I did not evaluate all of Twin Falls Canal
25 Company claimed acres for overlapping water -- private

1 MS. PEMBERTON: All right. Thank you.

2 (Recess.)

3 (Mr. Holliday not present.)

4 MS. PEMBERTON: Let's go back on the record.

5 Do we have everyone back there? It looks
6 like it.

7 Mr. Jones, I'm going to go ahead and turn
8 the questioning over now to Ms. McHugh and Mr. Budge.
9 If I do think of any more questions today, I'll reserve
10 the right to ask them at that point. Thanks very much.

11 THE WITNESS: Thank you.

12 MR. BUDGE: Okay. Thank you.

13 Can you guys hear me fine if I'm speaking
14 this direction?

15 MS. PEMBERTON: Yes.

16 MR. BUDGE: Okay.

17 EXAMINATION

18 BY MR. BUDGE:

19 Q. Mr. Jones, I'm TJ Budge, as you know. I
20 represent the ground water districts who are
21 participating in this case. The ground rules that
22 Mitra went over at the beginning will apply to my
23 questions as well. So if you have any questions or
24 don't understand anything, just let me know.

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1 I do want to ask before we get into
2 specifics just some general questions about director's
3 reports generally. There is a statute in the water
4 code that I'm sure you're familiar with. It's Idaho
5 Code 42-1411. It's entitled "Report of the Director,"
6 and in subpart (2) it says "The Director shall
7 determine the following elements to the extent of
8 Director deems appropriate and proper to define and
9 administer the water rights acquired under state law,"
10 colon, and then it has subparts: The name and address
11 of the claimant, the source of water, the quantity of
12 water, and so on and so forth.

13 Today there's been placed into record
14 Exhibits 2, 3, and 4, which are the Department's
15 recommendations for these Twin Falls Canal Company
16 water rights.

17 I just want to confirm on the record that
18 these recommendations, Exhibits 2, 3, and 4, are the
19 Department's implementation of this statutory duty to
20 make reports of water rights.

21 A. Yes, they are, to some extent.

22 Q. Okay.

23 A. There are statutory provisions that provide
24 for generally described places of use for irrigation
25 entities. And I believe 1411 describes making

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Page 57

1 recommendations of irrigated acres per quarter-quarter.

2 Q. Okay. So I mean there may be some
3 supplemental statutes that further provide rights or
4 obligations of the Department in making these
5 recommendations?

6 A. Yes, that's my understanding.

7 Q. Okay. We've discussed three water rights
8 at Twin Falls Canal Company: water right Nos. 1-4,
9 1-10, and 1-209.

10 Do you know if Twin Falls Canal Company has
11 filed any other water right claims in the Snake River
12 Basin Adjudication?

13 A. Yes, I believe they did. I recall
14 inquiring our databases spatially and tabularly that
15 other water right numbers in the name of Twin Falls
16 Canal Company come up.

17 Q. Do you know what those are offhand?

18 A. I do not know the numbers offhand. I do
19 not believe any of them were recommended valid if
20 they're irrigation rights.

21 Q. Okay. Do you know if Twin Falls Canal
22 Company filed any of what are commonly referred to as
23 enlargement water-right claims?

24 A. I do not believe they filed enlargement
25 water-right claims.

1 Q. Okay. Thank you.

2 You mentioned earlier that you had been
3 working in the adjudication portion of the Department's
4 responsibility since I believe 1995 or 1996.

5 A. 1995.

6 Q. Okay. Have your responsibilities since
7 that time involved preparing Director's Reports for
8 other water rights in the Snake River Basin
9 Adjudication?

10 A. Yes, sir.

11 Q. Do you have any idea how many you've
12 prepared during that time?

13 A. I do not have even a remote, foggy clue.
14 It includes both domestic and stock water rights,
15 irrigation, municipal, commercial.

16 Q. What's your guess ballpark? In the tens?
17 or hundreds? or thousands?

18 A. Several thousands, anyways.

19 Q. The processes that you've discussed this
20 morning that you went through in recommending Twin
21 Falls Canal Company's water rights, are those the same
22 procedures you've used to recommend other irrigation
23 water rights in the SRBA?

24 A. Yes, with respect to other delivery
25 organizations, irrigation delivery organizations. I

1 gave examples earlier of A & B Irrigation Company,
2 Burley Irrigation District, and Minidoka Irrigation
3 District and some others.

4 Q. Okay. So is there anything particularly
5 unusual or unique in the way that you recommended these
6 water rights as compared to other delivery organization
7 water rights?

8 A. Well, each set of claims is somewhat
9 unique, but I think the process that we utilized is --
10 is very similar. We try and do a cooperative,
11 collaborative, iterative approach to arrive at a final
12 determination.

13 Q. Okay. You mentioned earlier that your
14 focus in recommending acreage was to determine the
15 acreage irrigated as of 1987.

16 Is that the same process you've used in
17 making other water right recommendations in the SRBA?

18 A. Yes.

19 Q. Before I go on to any further questions,
20 there were a number of documents that you brought with
21 you today that we haven't discussed. But I do want to
22 make those part of the record and have them marked as
23 exhibits.

24 Chris, has a copy of these already been
25 provided to the reporter?

Page 78 1 nonperfected water rights. 2 Q. Is that location specific, then, not a 3 general -- you didn't have a set of images for the 4 entire set of Twin Falls County, it would have been 5 different areas? 6 A. That's correct. It was primarily areas 7 that had beneficial-use claims filed on them so that 8 there may have been questions. We didn't have enough 9 resources to get, say, countywide coverage for the 10 whole Basin 47 or in Cassia County Basin 45. 11 Q. Okay. 12 A. But we did have -- obtained some coverage, 13 yes. 14 Q. And stepping back -- 15 MS. PEMBERTON: Travis, sorry to interrupt. I'm 16 having a little bit of trouble hearing your questions. 17 Can you speak up just a little bit? 18 MR. THOMPSON: I'll try. 19 MS. PEMBERTON: Thank you. 20 Q. (BY MR. THOMPSON): Now, stepping back to 21 those other entities you performed some review for, did 22 you use the 1987 photography, the aerial images for the 23 place-of-use for those entities? 24 A. Yes, sir. 25 Q. And I guess looking at the '87 photos, you	Page 80 1 Q. And -- 2 A. And may I -- 3 Q. Sorry. 4 A. -- expand on that just a little bit? 5 Q. Sure. 6 A. Such that if it was ambiguous in '87 and it 7 was definitely not irrigated in '92, might we have 8 looked back in time to see if it was irrigated prior to 9 '92 -- or excuse me, '87? And possibly we might have, 10 but that's speculation. 11 Q. And I guess informing you as of '92, I 12 think Ms. Pemberton asked you this morning whether or 13 not you looked at lands post '87 and reduced the number 14 of irrigated acres based upon that review of the '92 or 15 the '04 photo? 16 A. I guess I don't recall that specific 17 question from this morning. 18 Would I -- if it was not irrigated -- if it 19 was claimed and it was ambiguous in '87 and it was not 20 irrigated in '92 or 2004, we may not have recommended 21 it. I don't recall a specific circumstance. 22 Q. Okay. I understand that. And I guess if 23 those areas didn't appear irrigated in '87, it was a 24 questionable call, you went to the '92 or 2004 photos 25 and it didn't show irrigation, you didn't recommend it;
Page 79 1 said when it was unclear, when there was ambiguity on 2 whether or not it was irrigated based upon the '87 3 review you went to '92 and 2004. 4 Were those just years that the Department 5 had available to it? 6 A. That is correct. 7 Q. And I guess based upon that type of review, 8 if you would have had years prior to '87, would you 9 have reviewed it or would that have been useful? 10 A. It certainly would have been useful in a 11 comparative point of view. Again, whether something 12 was irrigated or not, assuming that the place-of-use 13 for Twin Falls Canal Company was maybe fairly static, 14 we didn't, you know, seek or contemplate, you know, 15 going back in time to tell whether something's 16 irrigated or not. 17 Q. So looking at I guess the land-use pattern 18 or a particular question, if you couldn't tell in '87, 19 you went to '92, and that may show it was irrigated or 20 it was not, and depending upon that might confirm your 21 view of '87; is that -- 22 A. That is correct. 23 Q. Would the same process have been used if 24 you had prior years' photos? 25 A. Potentially.	Page 81 1 is that correct? 2 A. But I can't recall a specific circumstance. 3 But that would have been the thought process. 4 Q. And if you would have had evidence of 5 irrigation based upon prior years' photos, would that 6 have -- 7 A. I don't know. 8 Q. -- affected the process? 9 A. I don't know how that would have fit in. 10 Q. And I -- 11 A. Perhaps, if I may. I might have asked, in 12 speculative, whether the Twin Falls Canal Company had 13 authorized a transfer of shares from that land at some 14 point. 15 Q. So I guess just in general, if it was 16 clearly irrigated in '87, you didn't have a question 17 about it, you didn't have to perform any post review 18 based upon other photos that you might have had? 19 A. That's correct, sir. 20 Q. Okay. And if it wasn't irrigated as of '87 21 and it was clear, there was no questions, you didn't go 22 look at the '92 or 2004 photos to see if it was 23 irrigated at that time? 24 A. There may have been times that I had. 25 Q. Okay.

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1 A. But I don't recall them specifically.

2 Q. So I guess my general understanding of how
3 you used '92 and 2004 was a particular spot-check on
4 certain lands that you had questions about?

5 A. Correct.

6 Q. Did you have any particular guidance from
7 the Director or the Adjudication Bureau Chief -- was
8 that Dave Tuthill at the time when you were performing
9 this review?

10 A. Directions that -- what?

11 Q. I guess regarding irrigated acres or how
12 you were to perform your review.

13 A. Yes. The e-mails that we entered into
14 exhibit describe some further direction from the Bureau
15 Chief on how I should look at/interpret extent of
16 beneficial use in the claimed area.

17 Q. Did they have any general guidance they
18 provided, I guess, for any claims not specific to Twin
19 Falls but in performing some sort of claim review for
20 irrigation entities how you're to go about it or --

21 A. No, there was no further or other specific
22 directions provided or general directions provided.

23 Q. Okay. And you said that you probably
24 worked on thousands of other recommendations?

25 A. Over the years, yes.

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1 Q. And I guess for irrigation claims, be it
2 from a surface water source or a ground water source,
3 if, I guess, the irrigated acres hadn't been previously
4 defined if it was a beneficial-use claim or if it was
5 previously decreed without the number of irrigated
6 acres, what was the year you used to review those
7 claims?

8 A. I attempted to use 1987 and -- however,
9 beneficial-use claims had additional difficulties
10 because there were a -- mandatory permit dates, say for
11 1963 for ground water and 1971 for surface water. And
12 IDWR needed to confirm the extent of irrigation in the
13 time frame of their priority date.

14 And if it was irrigated say in 1963
15 imagery, then we felt comfortable recommending that
16 extent of irrigation in -- as of 1987 and solicited
17 enlargement claims from claimants if there was an
18 increase in the extent of irrigation.

19 Q. So some use of prior years in other
20 instances --

21 A. Yes.

22 Q. -- depending upon the specifics?

23 A. Yes. Which is why we had obtained early
24 '60s and late '60s imagery for Basin 47, 45, where
25 there were beneficial-use claims, and Basin 37. Excuse

1 me.

2 MR. THOMPSON: Okay. I think that's all the
3 questions I have. Thank you.

4 MR. BROMLEY: I don't have anything.

5 MR. BUDGE: Mitra, do you have any other
6 questions?

7 MS. McHUGH: No. I can -- no.

8 MR. BUDGE: I just got a couple other questions.

9 MS. PEMBERTON: I do have two final questions.

10 MS. McHUGH: I'm sorry. I thought you were
11 talking to me.

12 MS. PEMBERTON: I'm sorry to interrupt, and then
13 I promise I'll be done with you, Mr. Jones.

14 FURTHER EXAMINATION

15 BY MS. PEMBERTON:

16 Q. Just to go back to what Travis just asked
17 you about the 1992 and the 2004 information, I just
18 want to make sure I really understand.

19 So the Director's Report and the Director's
20 recommendations reflect the Director's best estimate of
21 the number of acres that the imagery you reviewed
22 reflects as irrigated in 1987?

23 A. That is correct.

24 Q. And when you reviewed information from 1992
25

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1 and 2004, you reviewed imagery there to clarify that
2 there was a discrepancy in the 1987 imagery?

3 A. Maybe not a discrepancy so much as an
4 ambiguity of land-use practices that are occurring.

5 Q. Okay. So when there was an ambiguity in
6 the 1987 imagery, you looked at the 2004 and 1992
7 imagery to determine what was happening in 1987?

8 A. That is correct.

9 Q. And it wasn't an attempt to review post '87
10 irrigation practices?

11 A. No, ma'am.

12 MS. PEMBERTON: Okay. Thank you.

14 FURTHER EXAMINATION

15 BY MR. BUDGE:

16 Q. Mr. Jones, I just have a few questions
17 about enlargement claims that were just mentioned.

18 You stated that when investigating
19 water-right claims you sometimes solicited enlargement
20 claims.

21 Could you explain what an enlargement claim
22 is.

23 A. Yes. In the enabling legislation for the
24 adjudication, it was a legislative determination that
25 individuals may not have fully complied with statutes

Exhibit D

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

In Re SRBA

COPY

)

)

Subcase Nos.

Case No. 39576

)

1-4, 1-10, and 1-209

)

PER REQUEST
EXHIBITS NOT PROVIDED

DEPOSITION OF MICHAEL WARREN HOLLIDAY

DECEMBER 19, 2011

REPORTED BY:

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1 any other diversion records?
 2 A. No, I did not.
 3 Q. Did you review the Water District 1 annual
 4 reports, also known as the Black Books?
 5 A. Not for these particular water rights.
 6 Q. Did you review IDWR's electronic daily
 7 diversion data?
 8 A. I did not.
 9 Q. Are you aware of whether IDWR has daily
 10 diversion data in electronic form prior to 1977?
 11 A. I'm not aware of there being any electronic
 12 data prior to 1977.
 13 Q. Are you aware of any other diversion
 14 records in IDWR's possession involving Twin Falls'
 15 claims that we're discussing today?
 16 A. No.
 17 Q. In making your recommendation regarding
 18 quantity, did you examine the total diversions of any
 19 other water rights available to Twin Falls Canal
 20 Company?
 21 A. No.
 22 Q. Did you examine whether the entity member
 23 shareholders hold any individual ground water rights
 24 separate from the claims we're discussing today?
 25 A. No.

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1 Q. Did you examine headgate deliveries to
 2 members or shareholders?
 3 A. No.
 4 Q. Did you review any diversion records after
 5 1987?
 6 A. No.
 7 Q. Just one moment, please. Thank you.
 8 Sorry. I'd like you to turn to page 10 of
 9 the supplemental report, Exhibit 5.
 10 Are you there?
 11 A. Yes.
 12 Q. Can you please read the "Quantity" section
 13 of that page to me.
 14 A. "Twin Falls Canal Company previously
 15 decreed water rights authorize a combined diversion
 16 rate of 3,780 cfs. Water District 1 delivery records
 17 show historical delivery of Twin Falls Canal Company's
 18 three previously decreed water rights in amounts
 19 consistent with the prior decrees. Therefore, the
 20 diversion rates were recommended as claimed and
 21 previously decreed."
 22 Q. And when you referred to the diversion
 23 rates to make sure they were consistent with the prior
 24 decrees, you've already described what you looked at
 25 the diversion records for, do you have anything to add

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1 to that description. Let me rephrase.
 2 Did you do anything else in examining the
 3 diversion records in making this recommendation?
 4 A. No.
 5 Q. And did you confirm that the recommended
 6 diversion rate was diverted every year on every day
 7 during the period of use?
 8 A. No.
 9 Q. Did you consider the operation of Murtaugh
 10 Lake in making your recommendation regarding the flow
 11 rate analysis?
 12 A. No, I did not.
 13 Q. Did you consider the capacity of the lake
 14 or any of the inlet or outlet structures?
 15 A. No, I don't think so.
 16 Q. Are you aware of whether Twin Falls' claims
 17 include a right for storage?
 18 A. Claim 1-10509 is a claim for storage.
 19 Q. And that's the only storage claim you're
 20 aware of?
 21 A. They also have filed claims -- competing
 22 claims with the Bureau of Reclamation for storage in
 23 Jackson and American Falls and Palisades, I believe.
 24 Q. Any other claims that you're aware of?
 25 A. I don't -- I'm not aware of any other

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1 claims, no.
 2 Q. Did you make an evaluation of whether based
 3 on the number of acres recommended that this diversion
 4 rate was necessary to irrigate those acres?
 5 A. No.
 6 Q. Did you consider whether Twin Falls leased
 7 any of the claimed water rights at any point in the
 8 past?
 9 A. No.
 10 Q. Did you make any historical-use analysis
 11 beyond your review of the delivery records previously
 12 described?
 13 A. No.
 14 Q. Did you investigate what crops Twin Falls
 15 Canal Company grows?
 16 A. No.
 17 Q. Did you make any investigation of water
 18 demands regardless of crop?
 19 A. No.
 20 Q. Did you investigate lands being fallowed?
 21 A. No.
 22 Q. Did you consider or investigate any
 23 hardening of acres?
 24 A. No.
 25 Q. Did you make any investigation or consider

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FURTHER EXAMINATION

BY MS. PEMBERTON:

Q. I just have a couple short follow-up questions for you, Mr. Holliday.

If I can refer you to Exhibit 5, page 11.

In making your recommendations on any of the elements that you worked on, did you consider any information or evidence from the Surface Water Coalition delivery call?

A. No.

Q. And beyond your review of the diversion records represented by Exhibit 20, did you make any other investigation of Twin Fall Canal Company's system capacity?

A. No.

Q. Headgate capacity?

A. No.

Q. Canal and lateral capacities?

A. No.

Q. And with respect to any of the elements that you worked on that we've discussed today, did you consider any post-1987 evidence of use with respect to those elements?

A. No.

MS. PEMBERTON: All right. That's all I have

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MS. PEMBERTON: All right. Mr. Holliday, I think we'll go ahead and continue the deposition at this time so that we have a chance to go through the documentation you've produced today. And we'll renote at a later time after talking to your attorney about your availability.

Is that okay with you?

THE WITNESS: Yeah. I guess -- I guess I don't have a whole lot of choice in the matter.

MR. THOMPSON: You could say no.

MS. PEMBERTON: Okay. Let's go off the record at this time.

(Deposition adjourned at 3:42 p.m.)

(Signature requested.)

-oOo-

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for right now. I suspect Travis will have some follow-up questions.

MR. THOMPSON: Yeah.

FURTHER EXAMINATION

BY MR. THOMPSON:

Q. Just two follow-ups Mr. Holliday.

The questions Ms. Pemberton asked, did you review any post-'87 data for any other Basin 01 claims besides Twin Falls? I know you said you just didn't, but...

A. I guess there's a difference between reviewing the data in terms of reviewing it for the purpose of making a recommendation and being exposed to it. I'm exposed to post-'87 data, but my recommendations were based on the decrees and on the -- on the 1987 and prior use.

MR. THOMPSON: Thank you.

MS. PEMBERTON: I don't have any other questions.

TJ?

MR. BUDGE: I don't have any other questions.

MR. BROMLEY: Nothing from me.

MS. PEMBERTON: I'm sorry?

MR. BROMLEY: Nothing from me.

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CERTIFICATE OF MICHAEL WARREN HOLLIDAY

I, MICHAEL WARREN HOLLIDAY, being first duly sworn, depose and say:

That I am the witness named in the foregoing deposition; that I have read said deposition and know the contents thereof; that the questions contained therein were propounded to me; and that the answers contained therein are true and correct, except for any changes that I may have listed on the Errata Sheet attached hereto.

DATED this ____ day of _____ 20____.

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MICHAEL WARREN HOLLIDAY

SUBSCRIBED AND SWORN to before me this ____ day of _____ 20____.

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