

In the District Court of the Fifth Judicial District of the  
State of Idaho, in and for the County of Twin Falls

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OCT 11 2012

DEPARTMENT OF  
WATER RESOURCES

**RE: SRBA Case No. 39576**

**Subcase 65-23481**

**Motion to Alter or Amend Special Master's  
Recommendation on Motion to File Late  
Notice of Claim in regards to stockwater.**

This Motion to Alter or Amend is submitted in response to Special Master Theodore R. Booth's recommendation to conditionally grant Allen Ranch LLP's Motion to File Late Notice of Claim for stockwater, reflected on the SRBA Docket Sheet September 21, 2012.

The recommendation was based, in part, on the fact that stockwater has been a beneficial and/or historical use during the non-irrigation season for the claimant's decreed irrigation water right 65-3111X. This is an *error of fact*; historically livestock are not present at the place of use, legally described as T13N, R3E, SEC03, during the non-irrigation season due to snowfall and winter weather conditions. The source of water for the existing water right is Rock Creek. Both, Rock Creek and Little Rock Creek naturally flow through the place of use for water right 65-3111X, and are accessible to livestock without diversion, prior to reaching Payette River North Fork (Cascade Reservoir). This fact makes instream stockwatering practical in the rare instance livestock are present during the non-irrigation season. The availability of instream stockwater and the right to incidental stockwater during the irrigation season, make this Late Notice of Claim unnecessary and the purpose for filing questionable.

The Special Master's report states that there are no provisions of Idaho law that would prevent the claimant from seeking to have stockwater use memorialized in a partial decree in the SRBA, and that allowing the claim to proceed will not prejudice other parties to the SRBA, including the objectors.

However, this case is unique, in that the applicant has erroneously described points of diversion in the Notice of Claim to Water Right 65-23481 and on the map submitted with the Late Notice of Claim. The claim reflects 2 points of diversion from Rock Creek that are not currently part of the original decreed<sup>1</sup> irrigation water right 65-3111X. The use of one of these diversion points (labeled as "upper diversion" T13N, R3E, Sec 3, NWSW) will injure other water rights. The location of this diversion is upstream from the decreed POD for this right, and all other water rights from this water source.

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<sup>1</sup>Reference 1961 map from PRBA in exhibits submitted by Chess, reflecting decreed POD as T13N, R3E, Sec3, NWSE.

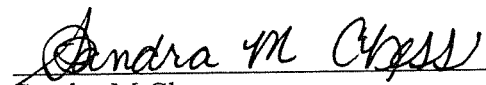
Section 42-222, Idaho Code<sup>2</sup>, requires a transfer application to be filed with the Idaho Department of Water resources, for changes in points of diversion, and requires the department to evaluate whether there would be injury to other water rights. Allen Ranch LLP, through its attorney, Bruce Smith, filed transfer application 77121<sup>3</sup> with Idaho Department of Water Resources, requesting a change in the decreed point of diversion to the said “upper diversion”, on March 15, 2011. Under this same code, 19 parties<sup>4</sup>, including the objectors, protested the transfer application. The transfer application was withdrawn by the applicant on May 3, 2012, leaving the matter unresolved and the decreed POD unchanged for water right 65111X.

Thereby, based on *Idaho Statutes*, allowing a partial decree for stockwater in subcase 65-23481, to include documents that erroneously describe the points of diversion, would prejudice other parties to the SRBA, including the objectors.

This motion requests that the Late Notice of Claim be recommended as disallowed, based on the errors of fact, the lack of historical or beneficial use for non-irrigation season stockwater, and based on Section 42-222 of Idaho Code. OR that it be altered and amended to reflect the correct point of diversion, as previously decreed for water right 65-3111X, in T13N, R3E, Sec3, NWSE, and sited in Section III, A (5) of the Special Master’s Report and Recommendation.

Respectfully Submitted,

This 9<sup>th</sup> Day of October, 2012.

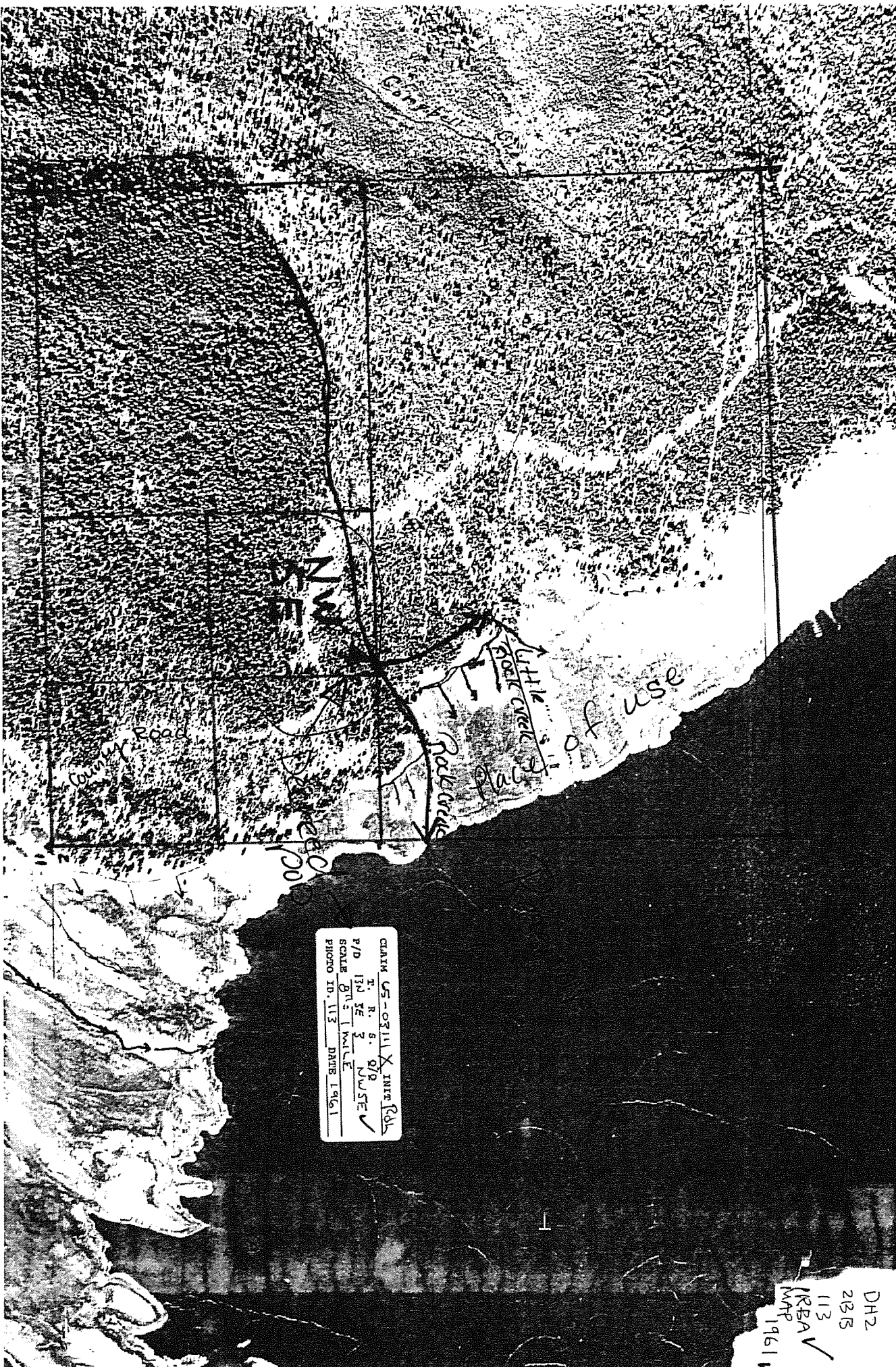
  
Sandra M Chess  
Objector  
1200 Lizaso Ave  
Boise, ID 83709

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<sup>2</sup> Attached exhibit A – Section 42-222, Idaho Code

<sup>3</sup> Copy of application for Transfer App 77121 as included in objection submitted by Chess.

<sup>4</sup> Consolidated mailing list of parties/protestants as submitted with the objection submitted by Chess.



CLAIM 45-0211 X INT Rob  
T. R. S. 9/9  
P/D 13N 1E 3 N 5E ✓  
SCALE 2000' = 1 MILE  
PHOTO ID. 113 DATE 1961

DH2  
23B  
113  
KBA ✓  
MAP  
1961

**Idaho Code 42-222 - Change In Point Of Diversion, Place Of Use, Period Of Use, Or Nature Of Use Of Water Under Established Rights -- Forfeiture And Extension -- Appeals**

*Idaho Code > Title 42 > Chapter 2 > § 42-222 - Change In Point Of Diversion, Place Of Use, Period Of Use, Or Nature Of Use Of Water Under Established Rights -- Forfeiture And Extension -- Appeals*

Current as of: 2010

Check for updates

(1) Any person, entitled to the use of water whether represented by license issued by the department of water resources, by claims to water rights by reason of diversion and application to a beneficial use as filed under the provisions of this chapter, or by decree of the court, who shall desire to change the point of diversion, place of use, period of use or nature of use of all or part of the water, under the right shall first make application to the department of water resources for approval of such change. Such application shall be upon forms furnished by the department and shall describe the right licensed, claimed or decreed which is to be changed and the changes which are proposed, and shall be accompanied by the statutory filing fee as in this chapter provided. Upon receipt of such application it shall be the duty of the director of the department of water resources to examine same, obtain any consent required in section 42-108 , Idaho Code, and if otherwise proper to provide notice of the proposed change in a similar manner as applications under section 42-203A , Idaho Code. Such notice shall advise that anyone who desires to protest the proposed change shall file notice of protests with the department within ten (10) days of the last date of publication. Upon the receipt of any protest, accompanied by the statutory filing fee as provided in section 42-221 , Idaho Code, it shall be the duty of the director of the department of water resources to investigate the same and to conduct a hearing thereon. He shall also advise the watermaster of the district in which such water is used of the proposed change and the watermaster shall notify the director of the department of water resources of his recommendation on the application, and the director of the department of water resources shall not finally determine the action on the application for change until he has received from such watermaster his recommendation thereof, which action of the watermaster shall be received and considered as other evidence. For applications proposing to change only the point of diversion or place of use of a water right in a manner that will not change the effect on the source for the right and any other hydraulically-connected sources from the effect resulting under the right as previously approved, and that will not affect the rights of other water users, the director of the department of water resources shall give only such notice to other users as he deems appropriate.

Exhibit A.

When the nature of use of the water right is to be changed to municipal purposes and some or all of the right will be held by a municipal provider to serve reasonably anticipated future needs, the municipal provider shall provide to the department sufficient information and documentation to establish that the applicant qualifies as a municipal provider and that the reasonably anticipated future needs, the service area and the planning horizon are consistent with the definitions and requirements specified in this chapter. The service area need not be described by legal description nor by description of every intended use in detail, but the area must be described with sufficient information to identify the general location where the water under the water right is to be used and the types and quantity of uses that generally will be made.

When a water right or a portion thereof to be changed is held by a municipal provider for municipal purposes, as defined in section 42-202B , Idaho Code, that portion of the right held for reasonably anticipated future needs at the time of the change shall not be changed to a place of use outside the service area, as defined in section 42-202B , Idaho Code, or to a new nature of use.

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B , Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B , Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area. The transfer of the right to the use of stored water for irrigation purposes shall not constitute an enlargement in use of the original right even though more acres may be irrigated, if no other water rights are injured thereby. A copy of the approved application for change shall be returned to the applicant and he shall be authorized upon receipt thereof to make the change and the original water right shall be presumed to have been amended by reason of such authorized change. In the event the director of the department of water resources determines that a proposed change shall not be approved as provided in this section, he shall deny the same and forward notice of such action to the applicant by

certified mail, which decision shall be subject to judicial review as hereafter set forth. Provided however, minimum stream flow water rights may not be established under the local public interest criterion, and may only be established pursuant to chapter 15, title 42 , Idaho Code.

(2) All rights to the use of water acquired under this chapter or otherwise shall be lost and forfeited by a failure for the term of five (5) years to apply it to the beneficial use for which it was appropriated and when any right to the use of water shall be lost through nonuse or forfeiture such rights to such water shall revert to the state and be again subject to appropriation under this chapter; except that any right to the use of water shall not be lost through forfeiture by the failure to apply the water to beneficial use under certain circumstances as specified in section 42-223 , Idaho Code.

(3) Upon proper showing before the director of the department of water resources of good and sufficient reason for nonapplication to beneficial use of such water for such term of five (5) years, the director of the department of water resources is hereby authorized to grant an extension of time extending the time for forfeiture of title for nonuse thereof, to such waters for a period of not to exceed five (5) additional years.

(4) Application for an extension shall be made before the end of the five (5) year period upon forms to be furnished by the department of water resources and shall fully describe the right on which an extension of time to resume the use is requested and the reasons for such nonuse and shall be accompanied by the statutory filing fee; provided that water rights protected from forfeiture under the provisions of section 42-223 , Idaho Code, are exempt from this requirement.

(a) Upon the receipt of such application it shall be the duty of the director of the department of water resources to examine the same and to provide notice of the application for an extension in the same manner as applications under section 42-203A , Idaho Code. The notice shall fully describe the right, the extension which is requested and the reason for such nonuse and shall state that any person desiring to object to the requested extension may submit a protest, accompanied by the statutory filing fee as provided in section 42-221 , Idaho Code, to the director of the department of water resources within ten (10) days of the last date of publication.

(b) Upon receipt of a protest it shall be the duty of the director of the department of water resources to investigate and conduct a hearing thereon as in this chapter provided.

(c) The director of the department of water resources shall find from the evidence presented in any hearing, or from information available to the department, the reasons for such nonuse of water and

where it appears to the satisfaction of the director of the department of water resources that other rights will not be impaired by granting an extension of time within which to resume the use of the water and good cause appearing for such nonuse, he may grant one (1) extension of five (5) years within which to resume such use.

(d) In his approval of the application for an extension of time under this section the director of the department of water resources shall set the date when the use of water is to be resumed. Sixty (60) days before such date the director of the department of water resources shall forward to the applicant at his address of record a notice by certified mail setting forth the date on which the use of water is to be resumed and a form for reporting the resumption of the use of the water right. If the use of the water has not been resumed and report thereon made on or before the date set for resumption of use such right shall revert to the state and again be subject to appropriation, as provided in this section.

(e) In the event the director of the department of water resources determines that a proposed extension of time within which to resume use of a water right shall not be approved as provided in this section, he shall deny same and forward notice of such action to the applicant by certified mail, which decision shall be subject to judicial review as hereafter provided.

(5) Any person or persons feeling themselves aggrieved by the determination of the department of water resources in approving or rejecting an application to change the point of diversion, place, period of use or nature of use of water under an established right or an application for an extension of time within which to resume the use of water as provided in this section, may, if a protest was filed and a hearing held thereon, seek judicial review pursuant to section 42-1701A (4), Idaho Code. If no protest was filed and no hearing held, the applicant may request a hearing pursuant to section 42-1701A (3), Idaho Code, for the purpose of contesting the action of the director and may seek judicial review of the final order of the director following the hearing pursuant to section 42-1701A (4), Idaho Code.