

Party's Name: Faulkner Land and Livestock Company

Attorney's Name and Address

Josephine P. Beeman
DILLION BOSCH DAW & BOCK Chtd.
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242 N. 8th Street, Suite 200
Boise, Idaho 83702

8-18

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

In Re: SRBA	)	
	)	Case No. 36-00049
Case No. 39576	)	
	)	RESPONSE TO McFADDEN
_____	)	OBJECTION

I. GENERAL INFORMATION

95-12-0058

1. Person responding to objection:

Name: Faulkner Land and Livestock Company

Address: 1989 South 1875 East
Gooding, Idaho 83330

Briefly describe your interest in this water right:

Faulkner Land and Livestock Company, an Idaho corporation, is a water claimant in reporting area 3 (Basin 36) who diverts from a common aquifer with McFadden.

2. Person who filed objection:

Name: Dan H. And Irma R. McFadden

Address: Route 1, Box 406
Hagerman, ID 83332

3. If this response is filed by an attorney:

Attorney Name: Josephine P. Beeman

Attorney Address: DILLION BOSCH DAW & BOCK Chtd.
Fidelity Building
242 N. 8th Street, Suite 200
BOISE, ID 83702

Attorney Phone No.: (208) 344-8990

II. STATEMENT OF THE RESPONSE

3. ☒ Quantity: I respond to the objection concerning:
- a. ☒ the total quantity of water used in cubic feet per second; or
8. ☒ Period of Year: I respond to the objection concerning the period of year when water is used or is necessary for the purpose stated.
9. ☒ Place of Use: I respond to the objection concerning:
- a. ☒ the legal description of the place of use; or
10. ☒ Consumptive Use: I respond to the objection concerning the annual volume of consumptive use.
11. ☒ Remarks: I respond to the objection concerning the "remarks" listed with the water right.
14. ☒ Other: I respond to the objection concerning:

All matters raised in the claimant's answer, affirmative defenses, and prayer for relief.

REASONS SUPPORTING EACH BOX CHECKED

A. Statement of Objections 3 and 3a. In response to Statement of Objections 3 and 3.a., and all allegations of the objection regarding those items, Faulkner Land and Livestock Company responds as follows: (1) it recommended the amount of water it determined was being beneficially used; (2) the claimant is not entitled to any amount greater than that which is beneficially used (Idaho Code Secs. 42-104 and 42-1402); (3) the recommendation of the Director to the SRBA Court

as to how the right should be decreed does not constitute a taking because it is simply a recommendation and not a final determination of the right; and (4) the eventual decree by the SRBA Court of the amount of water beneficially used, even if less than the amount previously decreed, will not constitute a taking because the right is limited to that amount beneficially used.

B. Statement of Objection 3.b. In response to Statement of the Objection item 3.b., and all allegations of the objection regarding that item, Faulkner Land and Livestock Company responds as follows: Although this item was identified as an item being objected to, no reason for the objection was stated. Faulkner Land and Livestock Company further responds that the recommended water right was not claimed, and therefore could not be recommended, as a storage right either in whole or in part. The claimant's objection to this item is in error.

C. Statement of Objection 7. In response to Statement of the Objection item 7., and all allegations of the objection regarding that item, Faulkner Land and Livestock Company responds that it recommended irrigation, domestic, and stockwater uses that were identified on the notice of claim and that were found when the claim was investigated. By identifying in the objection aesthetics as an additional use that the claimant did not list on the notice of claim, the claimant improperly seeks to use the objection process to amend the claim. A claimant must obtain leave of the court to amend a claim after a Director's report is filed, just as a party must obtain leave of the court to file a late claim after the Director's report is filed. Once leave of the court is granted, Faulkner Land and Livestock Company can investigate the amended claim and make an appropriate recommendation to the court. Faulkner Land and Livestock further responds that it did not recommend fish propagation or commercial as purposes of use because those uses were found to constitute an expansion of use to which neither Idaho Code section 42-1416 nor 42-1416A apply.

D. Statement of Objection 8. In response to Statement of the Objection item 8., and all allegations of the objection regarding this item, Faulkner Land and Livestock Company responds as follows: The decree asserted by the claimant does not contain a period of use decreed for this water right. Idaho Code 42-1411(2)(g) requires the Director to determine the period of use of each water right acquired under state law that is recommended in the Director's report. Faulkner Land and Livestock Company has developed irrigation season of use standards for various climatic areas throughout the state based on a 75% chance of a 24 degree Fahrenheit frost. The irrigation season of use cannot exceed the period in which water may be beneficially used. The period of the year

during which this water right may be used is consistent with the standard irrigation season of use for the area in which the place of use of this water right is located. Water may be used for irrigation outside the standard season of use, subject to the conditions set forth in general provision 12b of the Director's report.

Faulkner Land and Livestock Company further responds that for each use recommended it recommended the same season of use that was claimed. By now seeking a year around season of use for irrigation the claimant improperly seeks to use the objection processes to amend the claim. A claimant must obtain leave of the court to amend a claim after a Director's report is filed, just as a party must obtain leave of the court to file a late claim after the Director's report is filed. Once leave of the court is granted, Faulkner Land and Livestock Company can investigate the amended claim and make an appropriate recommendation to the court.

E. Statement of Objections 9 and 9a. In response to Statement of the Objection 9 and 9a., and all allegations of the objection regarding those items, Faulkner Land and Livestock Company responds that the recommended water right accurately describes the place of use of the right.

F. Statement of Objection 10. In response to Statement of the Objection item 10 and all allegations of the objection regarding this item, Faulkner Land and Livestock Company responds as follows: (1) The decree asserted by the claimant did not set an annual volume of consumptive use for this water right. (2) Idaho Code Sec. 42-1411(2)(i) requires the Director to determine the annual volume of consumptive use for each water right acquired under state law and recommended in the Director's report. (3) Idaho Code Sec. 42-1401A(2) provides that the quantification of consumptive use "is included as a rebuttable presumption in a decree only for the purpose of transfers pursuant to section 42-222, Idaho Code", therefore, the consumptive use recommended for this water right is included solely for use in future transfer proceedings. (4) The annual volume of consumptive use recommended for this right is 3 acre feet per acre. This is the maximum volume of water consumed by the most water consumptive crop (pasture) that can be grown in the area during the period of year when water is used for irrigation, as provided for by Idaho Code Sec. 42-1401A(2). (5) The recommendation of the Director to the SRBA Court as to how the right should be decreed does not constitute a taking because it is simply a recommendation and not a final determination of the right (6) The eventual decree by the SRBA Court of the amount of water beneficially used, even if less

than the amount previously decreed, will not constitute a taking because the right is limited to that amount beneficially used.

G. Statement of Objection 11. In response to Statement of the Objection item 11, and all allegations of the objection regarding that item, Faulkner Land and Livestock Company responds as follows: There is an error in the remarks in description of this right in the Director's report. The recommendation should be corrected as shown in the attachment entitled "Recommended Water Rights Acquired under State Law". In further response to this objection item, Faulkner Land and Livestock Company responds as follows: As to the remaining remarks, it has authority pursuant to Idaho Code Sec. 42-1411(2)(j) to include in its recommendations of water rights acquired under state law and recommended in the Director's report "such other matters as are necessary to define the right." The remark or remarks objected to are necessary to adequately describe and define this water right.

H. Statement of Objection 14. In response to Statement of the Objection item 14, and all allegations of the objection regarding that item, see attached "Faulkner Land and Livestock Company's Response to Answer Affirmative Defenses and Prayer for Relief of Claimant".

I. General Objection. In response to the sentence listed in Changes to the Director's Report, whereby the claimant attempts to "reserve the right to claim all purposes of use and quantities of use as shown by the evidence at trial," Faulkner Land and Livestock Company responds as follows: Insofar as this purported reservation of rights may constitute an attempt to reserve the right to amend at trial the claimant's notice of claim, the claimant improperly seeks to use the objection process to amend the claim. A claimant must obtain leave of the court to amend a claim. A claimant must obtain leave of the court to amend a claim just as a party must obtain leave of the court to file a late claim after the Director's report is filed.

CHANGES TO THE DIRECTOR'S REPORT

Faulkner Land and Livestock Company proposes no changes to the description of this claim in the Director's report.

- ☒ Check here if you are submitting documents. Please list each document by the title and number of pages. You may use additional pages if necessary:

Faulkner Land and Livestock Company's Response to Answer, Affirmative Defenses and Prayer for Relief of Claimant.

Notice of Claim No. A36-0049 to the extent available to Faulkner Land and Livestock Company. The two photocopy pages remaining in the file show multiple staple marks indicting the claim may have been photocopied many times. The two photocopy pages were all that remained on January 21, 1993, when the documents in the file were microfilmed.

VERIFICATION

State of IDAHO)
: SS
County of ADA)

Mike Faulkner being first duly sworn, upon oath, deposes and says:

I am a principal in Faulkner Land and Livestock Company, a party to this proceeding, as defined by I.C. § 42-1401A(1) and (7); that Josephine P. Beeman is my attorney in fact for these matters and is authorized to verify this response; and I have read the foregoing response, know its contents and that the statements contained therein are true to the best of my knowledge and belief.

FAULKNER LAND AND LIVESTOCK COMPANY

By: /s/

DILLION BOSCH DAW & BOCK, Chtd.

By: /s/
Josephine P. Beeman, Attorney signing in
Representative capacity

Subscribed and sworn to before me this 18th day of August, 1995 .

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Notary Public for _____
Residing at: _____
My Commission expires: _____

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of August, 1995, I mailed the original and copies of the foregoing response, including all attachments, to the following persons, by mailing the original and/or true and correct copies, postage prepaid and addressed as follows:

1. Original to:

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

2. Copies to:

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, Box 33
Boise, Idaho 83734

Patrick D. Brown
HEPWORTH LEZAMIZ & HONHORST, Chtd.
P.O. Box 389
Twin Falls, ID 83303-0389

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JOSEPHINE P. BEEMAN

**MOVANT'S RESPONSE TO ANSWER, AFFIRMATIVE DEFENSES AND PRAYER
FOR RELIEF OF CLAIMANT**

This portion of the response addresses the multi-page attachment to the objection (hereinafter "the attachment"), wherein the claimant admits or denies all sections of Parts I, II, and III of the director's report, asserts 27 affirmative defenses, and alleges a prayer for relief. The attachment contains the following sections, corresponding to the various sections of the director's report:

- (1) I. **GENERAL RESPONSE**
- (2) II. **DESCRIPTIVE SUMMARY**, (first unnumbered page of Part I of the director's report)
- (3) III. **TABLE OF CONTENTS** (second and third unnumbered pages of Part I of the director's report)
- (4) IV. 1. **INSTRUCTIONS FOR USING THIS REPORT PART I** (page 1 of Part I of the director's report)
- (5) IV. 2. **SCOPE OF THE ADJUDICATION** (pages 1-3 of Part I of the director's report)
- (6) IV. 3. **PURPOSE OF THIS REPORT PART I** (pages 3-4 of Part I of the director's report)
- (7) V. 1. **BOUNDARIES OF BASIN** (pages 4-6 of Part I of the director's report)
- (8) V. 2. **WATER SOURCES** (page 6 of Part I of the director's report)
- (9) V. 3. **DEVELOPMENT OF WATER USE** (pages 6-9 of Part I of the director's report)
- (10) VI. **GENERAL PROVISIONS 1-8 APPLY TO ALL WATER RIGHTS IN BASIN 36** (page 9 of Part I of the director's report)
- (11) VI. General Provision 1. **EFFECT OF ADJUDICATION** (page 9 of Part I of the director's report)
- (12) VI. General Provision 2. **GENERAL ADMINISTRATIVE PROVISIONS** (pages 9-10 of Part I of the director's report)
- (13) VI. General Provision 3. **CONJUNCTIVE ADMINISTRATION** (page 10 of Part I of the director's report)
- (13) VI. General Provision 4. **ADMINISTRATION OF GROUND WATER RIGHTS** (page 10 of Part I of the director's report)
- (14) VI. General Provision 5. **ADMINISTRATION OF BASIN 36 RELATIVE TO THE SNAKE RIVER** (page 10 of Part I of the director's report)
- (15) VI. General Provision 6. **ADMINISTRATION OF SMALL DOMESTIC AND STOCK WATER RIGHTS** (page 11 of Part I of the director's report)

- (16) VI. General Provision 7. **MEASURING DEVICES AND CONTROL WORKS** (page 11 of Part I of the director's report)
- (17) VI. General Provision 8. **FIRE FIGHTING PURPOSES** (page 11 of Part I of the director's report)
- (18) VI. General Provision 9. **CONSUMPTIVE USE** (page 12 of Part I of the director's report)
- (19) VI. **GENERAL PROVISION 10 APPLIES TO ALL WATER RIGHTS IN BASIN 36 SHOWN WITH DOMESTIC USE AS A PURPOSE OF USE** (page 12 of Part I of the director's report)
- (20) VI. General Provision 10. **DOMESTIC USE** (page 12 of Part I of the director's report)
- (21) VI. **GENERAL PROVISION 11 APPLIES TO ALL WATER RIGHTS IN BASIN 36 SHOWN WITH STOCK WATER USE AS A PURPOSE OF USE** (page 13 of Part I of the director's report)
- (22) VI. General Provision 11. **STOCK WATER USE** (page 13 of Part I of the director's report)
- (23) VI. **GENERAL PROVISIONS 12-16 APPLY TO ALL WATER RIGHTS IN BASIN 36 SHOWN WITH IRRIGATION AS A PURPOSE OF USE** (page 13 of Part I of the director's report)
- (24) VI. General Provision 12. **IRRIGATION USE** (pages 13-14 of Part I of the director's report)
- (25) VI. General Provision 13. **DIVERSION VOLUME FOR IRRIGATION** (page 14 of Part I of the director's report)
- (26) VI. General Provision 14. **CONSUMPTIVE USE FOR IRRIGATION** (pages 14-15 of Part I of the director's report)
- (27) VI. General Provision 15. **AMOUNT OF COMBINED WATER RIGHTS FOR IRRIGATION** (page 15 of Part I of the director's report)
- (28) VI. General Provision 16. **DIVERSION RATES IN EXCESS OF .02 CFS PER ACRE** (pages 15-16 of Part I of the director's report)
- (30) VI. 17. **INSTRUCTIONS FOR USE OF LIST OF RECOMMENDED WATER RIGHTS** (pages A-i through A-iii of Part I of the director's report)
- (31) VI. 18. **IDAHO DEPARTMENT OF WATER RESOURCES RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW** (pages A-1 through B-25 of Part I of the director's report)
- (32) **DIRECTOR'S REPORT FOR REPORTING AREA 3 (BASIN 36). (DIRECTOR'S REPORT PART II)**
- (33) **DIRECTOR'S REPORT FOR REPORTING AREA 3 (BASIN 36). (DIRECTOR'S REPORT PART III)**

The attachment also contains part VIII, **AFFIRMATIVE DEFENSES** (pp. 20 through 28) and a **PRAYER FOR RELIEF** (untitled, p. 28).

In response to each of the items enumerated above Movant responds that pursuant to Section 4 a.(2)(c) of SRBA Administrative Order 1, Rules of Procedure, Movant generally denies each and every allegation, if any, contained in each enumerated portion of the attachment. Movant affirmatively responds that neither SRBA Administrative Order 1, Rules of Procedure, nor Title 42, Chapter 14, Idaho Code, make provision for Movant to affirm, amplify, or otherwise respond to the claimant's admissions, or to deny the claimant's denials, and that Movant therefore does not believe that it is required to do so. Title 42, Chapter 14, Idaho Code solely defines the content and scope of the director's report. It is to contain a description of the water system and is to provide a recommendation as to each water right claimed and as to those matters necessary for administration of those water rights. Therefore, the content and scope of the objection is limited to those same matters. The attachment to the present objection asserts or otherwise raises matters not directly addressing the elements of the water right as recommended, the description of the water system, or the general provisions. Rather, the attachment raises broad issues as to the constitutional, statutory and administrative efficacy of the entire adjudication process. All such issues should be raised by means of motions to designate basinwide issues and similar procedural vehicles specifically designed to provide for basinwide notice and participation. They should not be permitted to divert the focus of any individual subcase away from the issues directly connected to the elements of the water right and the administration thereof. Therefore, because the attachment to the present objection is not within the scope of the statutory purpose of an objection it should be stricken.

However, in the event that the court should determine that all or part of the attachment is properly within the scope of the objection, Movant further responds as follows:

Movant affirmatively responds that all statements within the director's report are properly included therein pursuant to Title 42, Chapter 14, Idaho Code, and in particular pursuant to Idaho Code §§ 42-1411 and 42-1412(8); and that the provisions of the Idaho Rules of Civil Procedure regarding pleadings are inapplicable to the extent that they are in conflict with the statutory requirements. Therefore Movant denies all allegations directed at the contents of the director's report.

As to the enumerated portions of the attachment addressing the listings of recommended water rights, abstracts of federal reserved water right claims, or negotiated agreements, other than the individual recommendation that is the subject of this objection, Movant responds that such claims or agreements are not brought before this court by this objection.

Responding to the 27 affirmative defenses asserted in the attachment, Movant generally denies each and every affirmative defense asserted. Movant further responds that affirmative

defense numbers 1, 2, 4, 5, 10, 11, 12, 18, and 22, asserting various violations of civil or constitutional rights, fail to comply with the requirements I.R.C.P. 9(b) providing that in all averments of violation of civil or constitutional rights the factual circumstances constituting such violation must be stated with particularity. Accordingly, Movant asserts that those affirmative defenses should be stricken.

In response to that portion of the multi-page attachment to the objection wherein the claimant asserts a prayer for relief, Movant responds as follows:

1. Movant denies that the director's report asserts any claims against the claimant; rather, the director's report contains only the recommendation of the director as to how the claimant's water right should be decreed and administered.
2. Movant denies that the claimant is entitled to have the water right decreed as claimed unless in the director's report the water right has been recommended as claimed.
3. Movant denies that any acts upon its part constitute the taking of private property for which just compensation should be allowed and awarded.
4. Movant denies that the claimant is entitled to recover court costs and reasonable attorney fees.
5. Movant denies that the claimant by this objection has raised any claims entitling such claimant to any relief other than the eventual judicial determination and decree of the various elements of the claimant's water right, if any, and of those related matters necessary to describe and administer that water right.