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Department of Water Resources
Adjudication Bureau

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ATTORNEY GENERAL

Claimants:

Dan H. and Irma R. McFaddan
Fred and Susan Walmsley
Robert Brailsford
Hagerman Water Users Association
Walten E. Mildren
Harry R. Gisler
Ya-Ta-Hay Investments, Inc.

Attorney Name and Address:

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED
133 Shoshone St. North
P.O. Box 389
Twin Falls, ID 83303-0389
Telephone: (208)734-7510

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

) Subcase Nos. 36-00048A, 36-00049,
) 36-02169, 36-00039D, 36-04260B,
) 36-15168, 36-00051A, 36-00021 &
) 36-10283A
)
)

Case No. 39576

) AFFIDAVIT OF COUNSEL
)
)

* * * * *

STATE OF IDAHO

)

County of Twin Falls

) ss.
)

Patrick D. Brown, being first duly sworn upon oath, deposes and says:

1. I am an attorney licensed to practice in the State of Idaho. I practice with the law firm of Hepworth, Lezamiz and Hohnhorst, Chartered, and represent the above named claimants. I make the foregoing and following statements based upon my personal knowledge. I am otherwise competent to testify to the following.

2. The following attachments are true and accurate copies of documents filed with this court in the above-enumerated subcases of which the court may take judicial notice:

a. Affidavit of Mike Faulkner (the affidavit of Ralph May and of Tom Ambrose make identical assertions except with regard to paragraph 3 and the change names concerning a specific water right);

b. Objection and Motion to Strike Affidavit of Mike Faulkner (Objections and Motions to Strike of essentially the same content were filed concerning the affidavits of Ambrose and May);

c. Affidavit of Michael C. Creamer;

d. Motion to Strike (affidavit of Michael C. Creamer);

e. Claimant's Memorandum in Support of Objection and Motion to Strike Affidavits and Preclude Intervention (the original depositions to which the citations in the brief refer are lodged with the court);

f. Claimant's Consolidated Memorandum Opposing Intervention.

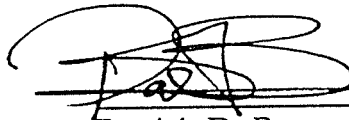
3. I represent several claimants to water rights in the Big Lost River, Basin 34, including Lola Coates, San Felipe Ranches, and G. David Nelson. Through that representation I have been involved in motion practice in subcases presided over by Special

Master Brigitte Bilyeu. Master Bilyeu has applied the Idaho Rules of Civil Procedure and Evidence to all motions in which I have been involved.

4. In practicing law on behalf of claimants in the S.R.B.A., it is both costly and confusing to my clients to have to follow motion practices which are different before different Masters. It also causes many issues to arise concerning whether each client is treated consistently under the equal protection and due process clauses of the state and federal constitutions. The result is additional costs to the claimants.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this 26 day of December, 1995.



Patrick D. Brown

SUBSCRIBED and SWORN to before me this ____ day of December, 1995.



NOTARY PUBLIC FOR IDAHO
Residing at: Twin Falls

My Commission Expires: 7/19/99

Movant's Name
Faulkner Land & Livestock Company

Attorney's Name & Addresses
JOSEPHINE P. BEEMAN
C. A. DAW
Dillion, Bosch, Daw & Bock
Chartered
Fidelity Building
242 N. 8th St., Suite 200
Boise, ID 83702
Tel. (208) 344-8990
Fax. (208) 344-9140

**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. 36-00048A
	)	
Case No. 39576	)	AFFIDAVIT OF MIKE
	)	FAULKNER IN SUPPORT
	)	OF MEMORANDUM
_____	)	

Mike Faulkner, duly sworn on oath, states as follows:

1. I am an officer of Faulkner Land & Livestock Company, the Movant in this matter
2. Faulkner Land & Livestock Company is the owner of water rights located in Basin 36 of the Snake River Basin Adjudication ("SRBA").
3. Dan McFaddan ("McFaddan") has objected to the Director's Report with respect to its water right number 36-10283A in Basin 36. The source of the water is Billingsley Creek. The water right has a claimed priority date of June 26, 1881. The differences between the Director's Report and McFaddan's objection are significant. The IDWR file for 36-00048A shows that Dan H

AFFIDAVIT OF MIKE FAULKNER - 1

Exhibit A

McFaddan and Irma R. McFaddan claimed 10 cfs (500 inches of water) for the irrigation of 178.5 acres. This is equivalent to 2.8 inches to the acre. After an examination of the McFaddan property and the applicable diversion and delivery system, the Director recommended 1.04 cfs for the irrigation of 104 acres within a permissible place of use of 175.5 acres. The claim verification report in the IDWR file for 36-00048A shows that the delivery system for McFaddan under this right is limited by a pump with a capacity of 1.04 cfs. McFaddan claimed a season of use from March 15 to November 15 and the Director recommended March 15 to November 15. The McFaddan objection seeks a year round use for irrigation. McFaddan's claim is in excess of the beneficial use of the water, Cf. IDAHO CODE § 42-220 and the capacity of McFaddan's diversion and delivery apparatus. Reputable studies, including the Department's, indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as McFaddan's. These facts, if established, would constitute a meritorious defense to the McFaddan objection.

4. Based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, Faulkner Land & Livestock Company decided not to participate in this subcase, choosing instead to rely on the Director's report and IDWR's defense of its pleading. The facts of this situation show that the IDWR, had it remained a party to this subcase, would have been, without substantial outside assistance, able to defend its report and significantly reduce the claimed diversion rate by McFaddan.

6. With the removal of IDWR and the Director as a party to the SRBA and all subcases, parties such as Faulkner Land & Livestock Company who opted to rely on IDWR to litigate and advocate in favor of the Director's Report are unable to do so.

DATED: August 18, 1995

LSI
Mike Faulkner, officer

STATE OF IDAHO)
) ss
County of Ada)

Subscribed and sworn before me on August 18, 1995.

LSI
Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires: _____

1
2
3 Claimants:

Dan H. and Irma R. McFaddan

4 Attorney Name and Address:

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED
133 Shoshone St. North
P.O. Box 389
Twin Falls, ID 83303-0389
Telephone: (208)734-7510

7
8 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
9 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

10 * * * * *

11 In Re SRBA

) Subcase No. 36-00049

)

)

12 **OBJECTION AND MOTION**
13 **TO STRIKE AFFIDAVIT**
14 **OF MIKE FAULKNER**

Case No. 39576

)

)

15 * * * * *

16 COME NOW, the Claimants, by and through their attorneys of record,
17 Hepworth, Lezamiz & Hohnhorst and pursuant to Idaho Rules of Civil Procedure including
18 Rules 1, 6(d), 12(f) and 56(e) and the Idaho Rules of Evidence and objects and moves the
19 court for an order striking the Affidavit of Mike Faulkner. Several grounds support this
20 motion:

21 1. The Affidavit is not based on the personal knowledge of the affiant, nor
22 does it purport to be, and as such violates I.R.C.P. Rule 56(e) and I.R.E. Rule 602.
23

1 Dated this 21st day of November, 1995.

2 HEPWORTH, LEZAMIZ & HOHNHORST,
3 CHARTERED

4 By: Suzanne McIntosh for
5 Patrick D. Brown
6 Attorneys for Plaintiffs

7 CERTIFICATE OF SERVICE

8 The undersigned, a resident attorney of the State of Idaho, with offices at 133
9 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for
10 the claimants in this matter, certifies that on the 21st day of November, 1995, he served a
11 true and correct copy of the foregoing document by the method indicated below, and
12 addressed to the following:

13 Chief, Natural Resources Div. ☐ U.S. Mail
14 Office of the Attorney General ☐ Hand Delivered
15 State of Idaho ☐ Overnight Mail
P. O. Box 44449 ☒ Telecopy (Fax)
Boise, ID 83711-4449

16 Jeffrey C. Fereday ☐ U.S. Mail
17 Givens, Pursley & Huntley ☐ Hand Delivered
P. O. Box 2720 ☐ Overnight Mail
Boise, ID 83701-2720 ☒ Telecopy (Fax)

18 Josephine P. Beeman ☐ U.S. Mail
19 Dillion, Bosch, Daw & Bock, Chtd. ☐ Hand Delivered
Fidelity Building ☐ Overnight Mail
20 242 N. 8th Street, Suite 200 ☒ Telecopy (Fax)
Boise, ID 83702

21 Suzanne McIntosh for
22 Patrick D. Brown

23 (WATER\600049.MSA)H

Movant's Name
Faulkner Land & Livestock Company

Attorney's Name & Addresses
JOSEPHINE P. BEEMAN
C. A. DAW
Dillion, Bosch, Daw & Bock
Chartered
Fidelity Building
242 N. 8th St., Suite 200
Boise, ID 83702
Tel. (208) 344-8990
Fax. (208) 344-9140

**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	)	AFFIDAVIT OF MIKE
	)	FAULKNER IN SUPPORT
	)	OF MEMORANDUM
_____	)	

Mike Faulkner, duly sworn on oath, states as follows:

1. I am an officer of Faulkner Land & Livestock Company, the Movant in this matter
2. Faulkner Land & Livestock Company is the owner of water rights located in Basin 36 of the Snake River Basin Adjudication ("SRBA").

3. Dan McFaddan ("McFaddan") has objected to the Director's Report with respect to its water right number 36- 00049A in Basin 36. The source of the water is Billingsley Creek. The water right has a claimed priority date of June 26, 1881. The differences between the Director's Report and McFaddan's objection are significant. The IDWR file for 36-00049 shows that Dan H

AFFIDAVIT OF MIKE FAULKNER - 1

000005D

Mc Faddan and Irma R. McFaddan (McFaddan) claimed 9.7 cfs ($(50 \text{ inches/cfs} \times 9.7 \text{ cfs}) = 485 \text{ inches}$) for irrigation of 178.5 acres. This is equivalent to 2.72 inches to the acre ($485 \text{ inches}/178.5 \text{ acres} = 2.72 \text{ inches to the acre}$). Following a field examination of the McFaddan property and diversion works, the Director recommended 4.04 cfs ($(50 \text{ inches/cfs} \times 4.04) = 202 \text{ inches}$) for irrigation of 175.5 acres. This is equivalent to 1.15 inches to the acre. ($202 \text{ inches}/175.5 \text{ acres} = 1.15 \text{ inches to the acre}$). Mc Faddan claimed a season of use for irrigation from March 1 to November 15 and the Director recommended March 15 to November 15. The Mc Faddan objection asks that the period of use be year round for irrigation. McFaddan's claim is in excess of the beneficial use of the water. Cf. IDAHO CODE § 42-220.. Reputable studies, including the Department's, indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as McFaddan's. These facts, if established, would constitute a meritorious defense to the McFaddan objection.

4. Based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, Faulkner Land & Livestock Company decided not to participate in this subcase, choosing instead to rely on the Director's report and IDWR's defense of its pleading. The facts of this situation show that the IDWR, had it remained a party to this subcase, would have been, without substantial outside assistance, able to defend its report and significantly reduce the claimed diversion rate by McFaddan.

5. With the removal of IDWR and the Director as a party to the SRBA and all subcases, parties such as Faulkner Land & Livestock Company who opted to rely on IDWR to litigate and advocate in favor of the Director's Report are unable to do so.

DATED: August 18, 1995

151
Mike Faulkner, officer

STATE OF IDAHO)
) ss
County of Ada)

Subscribed and sworn before me on August 18, 1995.

151
Notary Public for Idaho
Residing at Boise, Idaho
Commission Expires: _____

Party: Cranney Bros.

Jeffrey C. Fereday
Michael C. Creamer
GIVENS PURSLEY & HUNTLEY, LLP
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, ID 83701
(208) 342-6571
(208) 343-9492 (fax)

**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	)	Subcase Nos. A36-04260B, A36-00048A,
	)	A36-00049, A36-02169, A36-00039D,
	)	
Case No. 39576	)	
	)	AFFIDAVIT OF
	)	MICHAEL C. CREAMER

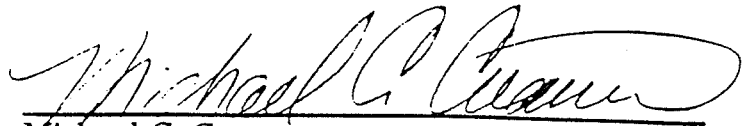
AFFIDAVIT

Michael C. Creamer, being first duly sworn and upon oath, states as follows:

1. I am one of the attorneys representing Cranney Bros. in the above captioned proceeding.
2. On November 3, 1995, I attended the Deposition of Mike Cranney, taken by Mr. Patrick Brown in Burley, Idaho.
3. On November 15, 1995, I received from Maureen Messley, C.S.R., a copy of the Title Page, Certificate of Court Reporter and Exhibits 1 through 4 of the Mike Cranney Deposition, together with a computer disk containing an ASCII version of the balance of the transcript of the Mike Cranney Deposition.
4. Attachment A hereto, consisting of 28 pages, and including Deposition Exhibit 1, are true and correct copies of the transcript of the Mike Cranney Deposition which my office received from Ms. Messley, or of the ASCII file retrieved from the computer disk provided by Ms. Messley.

Further your Affiant sayeth not.

Dated this 20th day of November, 1995.


Michael C. Creamer

CERTIFICATE OF SERVICE

I certify that on this 20th day of November, 1995, I caused to be served a true and correct copy of the foregoing AFFIDAVIT OF MICHAEL C. CREAMER by overnight mail or hand delivery to:

Patrick D. Brown
Hepworth, Lezamiz & Hohnhorst, Chartered
133 Shoshone Street North
P.O. Box 389
Twin Falls, ID 83303-0389

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

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

A handwritten signature in cursive script, reading "Michael C. Creamer", written over a horizontal line.

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

In Re SRBA,

Case No. 39576

Subcase No. A36-00048A

DEPOSITION OF

MIKE CRANNEY

* * * * *

Deposition held at the Cassia County Courthouse

November 3, 1995, 10:10 a.m.

APPEARANCES:

PAT BROWN, ESQ., of the law firm of Hapworth, Lezamiz & Hohnhorst,
Chtd., P.O. Box 389, Twin Falls, ID 83303-0389,

appearing on behalf of the Claimants.

MICHAEL CREAMER, ESQ., of the law firm of Givens, Pursley &
Huntley, P.O. Box 2720, Boise, ID 83711-4449,

appearing on behalf of the Cranney Brothers.

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NOV 15 1995

Givens, Pursley & Huntley

Reported by:
Maureen Messley, C.S.R.
P.O. Box 474
Rupert, ID 83350
(208) 436-9042

CERTIFICATE OF COURT REPORTER

THE STATE OF IDAHO)
)
COUNTY OF MINIDOKA)

I, MAUREEN MESSLEY, Official Court Reporter, and Notary Public, in and for the Fifth Judicial District of Minidoka County, Idaho, do hereby certify that the above and foregoing typewritten pages contain a full, true and correct transcription of my shorthand notes, taken upon the occasion set forth in the caption hereof, as reduced to computer-aided transcription, by me or under my direction.

Witness my hand, this the 13th day of November, 1995.


MAUREEN MESSLEY, Official Court
Reporter and Notary Public,
State of Idaho.
My Commission expires:

9/10/2000

CERTIFICATE NO. 321

1 a director or officer or otherwise been involved in active
2 management?

3 A. I've been the director of the Idaho Ground Water
4 Appropriators group.

5 Q. And how long have you been a director?

6 A. Just since Southwest went in the group, and I think
7 that's been about two years.

8 Q. I understand that you're seeking permission to
9 object to the rights of Mr. Brailsford and Mr. Walmsley and
10 Mr. McFadden. Why are you doing that?

11 A. I guess basically the main reason is we're in a
12 critical ground water area and have been restricted in use
13 in our basin for some time. And we was kind of following
14 this thing and we just felt like the State was going to be
15 -- when I filed my adjudication filings for the farm --

16 Q. The notices of claim?

17 A. Yeah, notices, you know. That I asked them. I
18 said, how is this thing going to proceed? And they said,
19 Well, the State's going to go through and we'll review your
20 water rights and we'll make recommendations to the court,
21 and unless there's some objections, you know, we're going
22 to -- we'll just basically -- shouldn't be more than a
23 administrative proceeding and the State would basically
24 represent us in that.

25 And then as this thing's progressed -- you know,

1 sit back and kind of watched it as it's progressed -- and
2 when the judge ruled that the State was not any longer a
3 party, then I become concerned of who was going to represent
4 me in this issue -- you know, several issues. And I guess
5 I've had some concern about anyone that was exceeding a
6 minor inch to the acre, that I guess I was -- I'd been
7 really concerned that if a call was made -- and I'm not
8 saying they'd call me -- but if they did at some point in
9 time, whether I would be able to -- if we suffered further
10 restriction on our pumping in our valley as a result of
11 someone giving someone water rights that exceed what the
12 State has recommended, what the department recommended, then
13 that could put us possibly in jeopardy on our water rights.
14 And we're pumping 500 feet deep in some of these wells and
15 probably somewhat less than an inch to the acre in all
16 cases, and running the spud, beet, grain in an intensive
17 irrigated operation.

18 Q. So do I correctly understand your concern is you
19 don't want anyone who might receive more than an inch an
20 acre to be able to make a call on your --

21 A. Well, I just think you're opening up a real can of
22 worms if you start allowing people to exceed what the State
23 law is and what the Department has recommended as far as
24 consumptive use of water.

25 Q. Who is it that -- you mentioned before that someone

1 had told you about how to proceed when you filed your
2 notices of claim. Who is it that informed you of that?

3 A. Loren Holmes and the officer that was reviewing our
4 documents. I might be able to drag out who he was. I
5 haven't had a chance to do that. But Loren Holmes was the
6 one that I talked to and I just said. How is this thing
7 going to come down? And that was -- so I guess I felt that
8 the State was basically going to be kind of running
9 interference for us on this stuff and that the court in most
10 cases would adhere to the recommendations of the Department.

11 Q. So Loren Holmes and the other person you're
12 referring to were both employees with Idaho Department of
13 Resources?

14 A. Right. It was in Twin Falls where I met with them.

15 Q. And this would have been in about what time frame?

16 A. I think about '89 is when we filed our documents.

17 I think that's when we filed the documents.

18 Q. So it would be --

19 A. In the spring.

20 Q. -- in the time frame when you signed your notices
21 of claim?

22 A. Right. We were right up close to the deadline and
23 so I just took them over there and went over it with them.

24 Q. What else did Loren or the other employee of Water
25 Resources tell you about the adjudication at that time?

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of
law

1 A. Just that they would come out. The procedure that
2 he explained was they'd come out and they were going to come
3 and review the described acres and the different
4 appurtenances and everything and then they would make a
5 recommendation. And they didn't really feel in our area,
6 where we'd been under such scrutiny, that there was going to
7 be a lot of change at that point. But --

8 Q. And when you say your area has been under scrutiny,
9 you mean --

10 A. Where it's been a restricted pumping area for so
11 long, you know.

12 Q. When did that become a critical ground water area?

13 A. In 1963 I think is when they shut off the drilling,
14 and then they opened it back, you know, in the early '70s.
15 Parts of the valley -- out in 21 -- range 21 they opened
16 some pumping back up. But the range 22 area, all down
17 through the canyon and clear from the BID boundaries, we've
18 been restricted since 1963.

19 Q. You said you'd been following this thing and hoping
20 and understanding that water resources would be monitoring
21 things, and can you tell me particularly what you've been
22 doing to follow the thing since you filed your claims?

23 A. Well, when they've had hearings, you know, I've
24 tried to be involved, to go and just find out what's going
25 on. And when we had the conjunctive management rules that

1 that they use the water in some cases; and also the number
2 of days that they use it.

3 And I guess the Cottonwood thing I talked about
4 kind of brought that to mind because we were being
5 restricted here -- or the State had come in and intervened
6 and told us that we were being restricted on a similar-type
7 situation on decreed water rights; and yet over there
8 they're claiming that there shouldn't be any limitation.

9 Q. Why is it that you're concerned with how much water
10 they get?

11 A. If this thing -- if they could ever put a call
12 towards the rest of the state, it could cost either water or
13 money or both. It could cost us water or money or both.
14 And I guess another little pet theory I have is if you open
15 this up, what happens over in eastern Idaho where they have
16 dual rights? Where they have an inch to the acre of surface
17 rights and they have an inches to the acre of ground water
18 rights? Are we going to give them two acre feet to the acre
19 over there and I'm restricted to less than an inch to the
20 acre where I farm, and then somebody comes and tries to put
21 a call on me and tax me or restrict me water?

22 Q. So you're concerned that people from eastern Idaho
23 might --

24 A. I'm just saying that once you open the thing up to
25 where people exceed the consumptive use of water, if they do

1 it in Hagerman Valley, then it isn't going to take a smart
2 man to know that they'll be doing it elsewhere in the state
3 just as quick as they can. And I just -- I felt like the
4 State of Idaho was -- you know, that the recommendations
5 that they made were going to be adhered to, and that was
6 kind of the way -- the directors report would be kind of the
7 way it was going to go, and it's fallen out of that realm
8 now. They've changed the game. Changed the rules.

9 Q. So it's your understanding that the director would
10 not give anyone more than an inch per acre?

11 A. I'm willing -- If they deem with consumptive use
12 that they can exceed that recommendation -- I don't have any
13 real problem with it if it's backed by, like, the State or
14 somebody that's got some know-how and some say. But for all
15 of us to just go out and claim whatever we want instead of
16 what's legal, I think we're circumventing the -- at the
17 expense of others.

18 Q. So I understand you have a general concern. What
19 is your specific concern about any effect that Mr.
20 ^aMcFadden's use of water would have on you?

21 A. Well, if you go to some of his cases here, and you
22 go in, in a lot of cases they're -- like, in their original
23 filing, they're filing for substantially over the inch to
24 the acre. And if you took the three filings that he has
25 together, you know, it was substantially above the inch to

1 the acre.

2 Q. Do you have any reason to believe that Mr.
3 McFadden's use of water could in any way effect your use of
4 water?

5 A. I do if they put a call. which Musser has, right?

6 Q. Yes.

7 A. And if the court upheld and said that -- I'm not
8 saying that they -- I guess that would be another day in
9 court. proving whether I'm related to them or vice versa.
10 But I have that concern of the potential of a call coming
11 in, either causing me a mass amount of legal fees to protect
12 my rights, or else the potential of an assessment of further
13 restriction of water so that we can maintain that flow of
14 water there. which I think is unreasonable.

15 And then secondly the -- every one of these
16 hearings you're going through, they're all chirping, Well,
17 we're going to have to maybe make an assessment on the
18 ground water; in money or else through water, we're going to
19 have to restore that.

20 Q. I take it that you're saying that you don't believe
21 that Mr. McFadden's use of water is hydrologically related
22 to your use; would that be fair?

23 MR. CREAMER: Objection. Misstates the prior
24 testimony.

25 THE WITNESS: I'm not a hydrologist so I can't

1 answer that. And right now we're just trying to intervene.

2 And I guess if we're -- if we get into this thing further.

3 then I guess we would find those things out, you know. But

4 at this point we're just trying to step in and try to fill a

5 void that the State --

6 BY MR. BROWN:

7 Q. As you sit here today you have no reason to believe
8 that Mr. McFaddan is hydrologically interconnected with your
9 rights.

10 A. I don't know whether we are or whether they aren't.

11 Q. Tell me about all information you have which could
12 lead you to believe that they are.

13 A. If they move on the Snake River Plain aquifer, then
14 there's a good possibility of us being drug into it.

15 Q. Tell me, as you sit here today, what facts do you
16 know of that in any way show that Mr. McFaddan's water is
17 hydrologically connected to yours.

18 A. The USGS in 1985 did a mass water study south of
19 the river and up until that time we were led to believe that
20 most of our water was coming from the South Hills. And at
21 that time they determined through isotopic study -- they did
22 an isotopic breakdown of the water and followed the movement
23 of the water, and there is Snake River Plain water south of
24 the river, moving, and I guess that's why we got drug
25 into --

1 I don't have any problem with what Mr. McFaddan was trying
2 to do.

3 Q. Please read back the question.

4

5 Question read back.

6

7 MR. CREAMER: Objection. Asked and answered.

8 BY MR. BROWN:

9 Q. Please answer the question.

10 A. I guess the point that I'm trying to make in
11 answering the question is that in the directors report he
12 says, first off there was water rights. If you take water
13 rights -- the 2169 -- the directors report says the claim
14 did not identify on the claim which decreed right pursuant
15 to the New Mortgage Bank v. Idaho Power was being claimed.
16 Also the claim included a water right number on the claim
17 that identified the right as the licensed water right.
18 Number 36-02169.

19 And they go through that and then they go down ,
20 here and they say, it's recommended the amount of water that
21 was being beneficially used. And the fact that if you go
22 back over here again, you have the water that's being of
23 beneficial use. If they aren't using the water
24 beneficially, then we can't allow -- I feel I can't -- I'm
25 being injured if I allow somebody to use five acre feet to

1 the acre and he can only beneficially use, you know, one
2 inch to the acre.

3 Q. Without regard to where that person's use is in
4 this state?

5 A. I don't care. I really don't care where he lives,
6 a crop will only use so much water, and there's only so much
7 that can be beneficially used. And I guess you've got to
8 assume the directors report, that they have some expertise
9 and have some background in gathering that information.

10 Q. Did you make that assumption?

11 A. Well, I'm saying that they're probably the one
12 that's going to be the expert witness in a lot of these
13 situations, right?

14 Q. So you made that assumption?

15 A. Yes, I have.

16 Q. I'm not asking you any legal questions about who
17 has a right or doesn't have a right. I want to ask you
18 solely about factual connections, hydrological connections.
19 Do you understand what I've just said I'm going to be asking
20 you about?

21 A. Uh-huh.

22 Q. Yes?

23 A. Yes.

24 Q. What hydrologic information, other than the USGS
25 report, do you have which suggests that there's any factual

1 BY MR. BROWN:

2 Q. Why haven't you not objected to other claimants who
3 are seeking more than one inch per acre?

4 MR. CREAMER: Object to the form of the question.

5 THE WITNESS: Do you want to rephrase that? What
6 are you saying?

7 BY MR. BROWN:

8 Q. I would like an answer.

9 A. Repeat the question.

10

11 Question read back.

12

13 THE WITNESS: Well, frankly, up until this, I
14 thought the department was intervening in our behalf. And
15 until the judge ruled that they weren't a party, then — You
16 know, I didn't really want to fight the battle. I thought
17 the State should be doing it for us.

18 BY MR. BROWN:

19 Q. You have known people, other than the three
20 gentlemen here today, who have got more than one inch per
21 acre since the time the director has been taken out of the
22 litigation, correct?

23 A. I didn't know that.

24 Q. You didn't know that?

25 A. I don't know that. I don't know whether anybody

1 A. No, I don't.

2 Q. But you do maintain that more than an inch an acre
3 is too much?

4 A. Yes.

5 Q. And please tell me why you believe more than an
6 inch an acre is too much.

7 A. I guess I'm basically citing what come out of the
8 directors report.

9 Q. So you're relying on the directors investigation
10 and report for your contention that they're not entitled to
11 more than one inch per acre?

12 A. That's right.

13 Q. Are you relying on anything else?

14 A. Well, common sense.

15 Q. Please explain that.

16 A. Well, on my farm, like I say, we're using probably
17 less than -- we're probably using two and a half acre feet
18 to the acre on the average on our farm. And some of the
19 lighter soils, we do not -- You know, on potatoes, you know,
20 we're yielding high yield, where we get yields of 450 to 500
21 sacks to the acre and do it on less than three acre feet to
22 the acre.

23 Q. What period of the year do you water your potatoes?

24 A. Pardon me?

25 Q. What period of year -- tell me when you begin or

1 the area.

2 Q. If you had sandy soil a quarter mile from the
3 river, where do you think the excess water you applied on
4 sandy soil would go?

5 A. I think there's a lot of factors there. I assume
6 it would go to the river, but I don't know.

7 Q. Okay. With that assumption do you have any
8 objection to these gentlemen applying more than an inch per
9 acre?

10 A. I really haven't changed my position. I don't want
11 to be subject to the possibility of a call or something to
12 furnish water for somebody to soak away in a ditch or to
13 keep the water in a pipe from freezing during the winter.

14 Q. Let's go back to the question I asked you before
15 with respect to Mr. McFadden: Whether you had any facts
16 which would tend to show that there was a hydrologic
17 connection between your use of water and his?

18 A. Uh-huh.

19 Q. You mentioned a USGS report, correct?

20 A. Uh-huh.

21 Q. Do you know the particulars of what the report you
22 were referring to are?

23 A. They did a mass water study in -- I think it was in
24 '85 and it's been published, and basically if you refer to
25 this map, this is kind of what -- this is when I got on

1 point, is when your Musser case took place. And I got a
2 notice from the Department of Water Resources saying that we
3 may be subject to a call, that we could be reduced of the
4 flow of our water rights or pay mitigation costs, depending
5 on what the department worked out. And I think everybody
6 else in this whole basin got that. And so that made us
7 where we were involved in the issue.

8 And up until then we kind of thought, Well, we're
9 kind of up here where we're not going to get bothered. But
10 the USGS report shows -- see, you've got this -- this is
11 your river and then you've got the BID system coming in
12 here.

13 Q. BID?

14 A. Burley Irrigation District. But that thing came
15 clear up. It comes up into where -- this is where some of
16 our lands are, right in through here.

17 MR. CREAMER: When you say "this", could you tell
18 us for the record?

19 THE WITNESS: The map shows that the water flows
20 along here, past Antelope Hill, comes up into some of the
21 area where our farm is, and so that puts us where according
22 to this map we are effected. And I guess my presumption is,
23 you know, I haven't been to their farm or anything, but
24 their farm is in the Snake River Plain aquifer, according to
25 the Musser case. And the State sends me a notice and says

1 I'm tied in, and the man says I'm tied in, so I guess my
2 presumption is I'm tied in. That's about all I can say.

3 Q. So you're presuming from the fact that you received
4 a notice from Water Resource and you've seen this map which
5 is entitled "Water Table Elevation and Direction Flow for
6 the Eastern Snake River Plain --

7 I'll get back to the question, but for the record
8 let's just identify this. It's a Department of Water
9 Resources map dated December 17th, 1992, prepared by the
10 Idaho Geographic Information Center of the Idaho Department
11 of Water Resources.

12 So based upon receiving notice and a map --

13 MR. CREAMER: Do you want this left out?

14 MR. BROWN: Let's leave it out for a minute.

15 BY MR. BROWN:

16 Q. You believe that there may be a hydrologic
17 connection between your water and the water of the three
18 gentlemen from Hagerman, is that right?

19 A. I'm led to believe that by that information and the
20 fact that the department served me notice, yes.

21 Q. Have you ever asked a hydrologist or anyone else to
22 look at the map or to look at any other information and give
23 you an opinion as to whether your water is connected?

24 A. Yes. I have.

25 Q. And who have you asked to do that?

1 A. Bill Young with the USGS that helped do the mass
2 study.

3 Q. Bill Young. Do you know where he works or --

4 A. He --

5 Q. -- lives?

6 A. He works out of Boise and we've done -- -- with our
7 water recharge thing we've done a -- he's been doing a
8 ground water study, monitoring the wells to see if the
9 recharge is working and the water quality and all that. A
10 monitoring program on some of the wells that, you know, out
11 in this area where they've been doing some recharge. And
12 I've asked him specifically and they said that the wells on
13 the USGS report, it has some and it shows the chemistry on
14 some of them, has the isotopic breakdown and shows some
15 interchange between the two systems through the Snake River
16 Plain system. And they've found that in some of the wells
17 up in this area and that's why they've programmed it in.
18 Frankly, I wish that they hadn't have found it and somebody
19 else could be playing this game.

20 Q. So what you're saying is it's your understanding
21 that from the map and the report, water available to your
22 wells would be water that may show up at Hagerman?

23 A. It may.

24 Q. Okay. Have you ever asked anyone if the aquifer
25 you're on would extend across the river and effect spring

1 MR. CREAMER: Objection. Foundation.

2 THE WITNESS: I think you're cutting hairs there.

3 That's what the law has been or that's what we were always

4 told: You couldn't apply for more than an inch to the

5 acre all my life. Any permit I've ever filed has always

6 said the maximum allowed by law is an inch to the acre.

7 Some of these rights are stacked on top of each other,

8 they're different rights, and everything else.

9 BY MR. BROWN:

10 Q. You have not objected to anyone who the department
11 recommended receive one inch per acre?

12 A. No.

13 Q. Did you review any claims filed in the Big Lost
14 River Basin?

15 A. I've had a casual review of some of that
16 information.

17 Q. Did you review any of those claims for the purpose
18 of determining whether any of those people were receiving
19 more water than they could reasonably beneficially use?

20 MR. CREAMER: Objection. Relevance.

21 THE WITNESS: At that point the department was in
22 the thing and I was comfortable with letting the department
23 work that out. I wasn't really that aware of it or -- like
24 I say, I did see some of that information. But the
25 department was handling it then and that's the only reason

1 I'm in it now is the because the department was asked to
2 step out.

3 Q. Have you looked into the experience of any of the
4 department -- the experience or training of any of the
5 department personnel who made recommendations in these three
6 cases?

7 A. No.

8 Q. So on what grounds do you believe that their
9 recommendations are by someone who knows, as you said
10 earlier?

11 A. I think they have a public trust to try to present
12 a non-biased opinion and treat everybody fairly. You know,
13 as fairly as they say. And I'm not saying they haven't made
14 mistakes; but I'm not saying they did make any mistakes
15 either.

16 Q. You're saying you haven't looked into whether they
17 made any mistakes or not?

18 A. I don't know what their credentials are. I guess I
19 would trust them as much as I would you or even Mike over
20 here. I'm not sure an attorney ought to be determining what
21 my water rights are either.

22 Q. Do you believe in order to be fair the department
23 had a responsibility to go out and perform field tests to
24 determine how much water was required?

25 A. I don't know what they did or what they didn't do

1 A. Yes, they did.

2 MR. BROWN: I object. He has no personal
3 knowledge of any of this.

4 BY MR. CREAMER:

5 Q. Let me ask you: In your review of the records in
6 these claims, did you find any indication that the
7 department had examined the acres that were irrigated for
8 these claims?

9 A. Well. Off of the reports that the director gave on
10 each water right, they showed that they had physically
11 examined the property, examined the acres, and tried to
12 establish a beneficial use.

13 Q. Did you see any indication in that record of what
14 the department found in comparison with what was claimed by
15 the claimants in terms of irrigated acres?

16 A. In general terms, without going through the
17 specifics, they reduced the claimant's claim substantially
18 on what they could prove as beneficial use.

19 Q. What about for the number of irrigated acres?

20 A. From the irrigated acres there was some reduction.

21 Q. Did your review of the documents in this case show
22 that the department had looked at the season of use and the
23 conditions in the Hagerman Valley in making their
24 recommendation on season of use?

25 A. I thought it was apparent that they had used that

1 as part of their determination.

2 Q. Did you find any documentation that that had
3 occurred?

4 A. Yes.

5 Q. With respect to the Brailsford right, did you find
6 any particular documentation regarding whether the
7 department had looked at the soils or the crops or the
8 number of acres irrigated?

9 A. Yes, there was.

10 Q. Can you show me what documents you've seen that
11 indicate that?

12 A. Okay, there's reference to Robert Brailsford and
13 employee Lorie White. It says, Mentioned to Bob Brailsford
14 that he had original 10.5 cfs to work with since Johnson was
15 allocated point four in 1959. And it goes on, I asked him
16 how he put it to beneficial -- put the 10.1 to beneficial
17 use. I mentioned that his use consists approximately of 198
18 acres, and domestic .04 cfs, stock water .07, for a total of
19 4.07, leaving 6.03 not beneficially used. Bob stated that
20 he was decreed that amount and that Bob Flamer (sic) told
21 him it would hold up in court.

22 And then it goes on and he says that he talked
23 with Bob Flamer. He stated he didn't realize the property
24 involved was only 198 acres and that Bob would have to
25 submit a statement as to why he needs that much water for

1 irrigation. And then it goes on. Bob F. stated that Bob B.
2 was originally decreed that amount because that's what the
3 pipe held.

4 The problem is that the department had recognized
5 originally 10.5 cfs and based other decisions involving
6 other parties Pierce and Hill on that amount.

7 Then he references, Talked with Loren Holmes. He
8 stated that Bob B. did not have a decree, just a private
9 agreement, and that's why they had Bob B. file for statutory
10 claim on the stock pipeline.

11 So anyway, it goes through some of the visits back
12 and forth and the research that they did as they tried to
13 walk through that. Also --

14 Q. Why don't you turn to the next item in your
15 notebook.

16 MR. BROWN: Counsel, I'm going to object to any of
17 this. I'm not sure it's calculated to lead to discovery of
18 anything.

19 THE WITNESS: Okay.

20 There's a memorandum from Alan Laird here on a
21 letter dated 20th of October 1992, in reference to file
22 36-04260 B. Meeting 10-20 with Robert Brailsford regarding
23 the NOE. On this day I met with Robert Brailsford in my
24 office to discuss the issues that he raised in his NOE. In
25 our discussion I went over the calculations he made to

1 justify more than one inch per acre. He went over the
2 analysis procedure and the assumption that it was observed
3 that beans could not be irrigated with very good efficiency,
4 and Mr. Brailsford indicated that the crop was a major
5 source since he had contracted several years with the bean
6 producers, and he indicated the contracts are dependent on
7 sufficient water.

8 In our discussion he indicated that for several
9 years he had raised at least 88 acres out of 164 acres of
10 beans. A preliminary calculation of using beans with 55
11 percent of the area and without alfalfa as the remaining 45
12 percent, the crop acres would increase the recommended cfs
13 per acre rate. I told him I would write up the calculations
14 and revise our recommendation.

15 BY MR. CREAMER:

16 Q. Have you seen any calculations that are referenced
17 in that write up report by the department employee?

18 A. Yeah, there's a page here that goes through and
19 tracks that through.

20 Q. Now, assuming that the department had made such
21 calculations and evaluations, and assuming that the
22 Brailsford right claimed or requested more of the
23 department's evaluation calculation found, would that cause
24 concern for you, or how would that effect you if the right
25 were decreed as claimed rather than as recommended?

1 A. Well, if it was ever determined that if he or
2 another party in that Hagerman area decided to make a call,
3 then I interpret that to jeopardize my position on our farm.

4 Q. Do you see a difference in having to respond to a
5 call for one inch per acre versus a claim for one-and-a-half
6 inch per acre?

7 MR. BROWN: Counsel, I'm not sure why we're doing
8 this. It's leading and it's absolutely inadmissible. If
9 you want your client to sign an affidavit, you don't need to
10 take our time to do that.

11 MR. CREAMER: Thank you.

12 BY MR. BROWN:

13 Q. Do you see a difference between having to respond
14 to a call for one inch, versus having to respond to a call
15 for an inch and a half per acre?

16 A. Well, I feel the inch per acre is what the law
17 allows. The other exceeds what --

18 Q. Would there be any difference in the effect of your
19 operation in having to respond to a call for an inch and a
20 half per acre versus an inch per acre?

21 A. It could be of some significance.

22 Q. Would there be any difference in the impact on your
23 operation if you had to respond to a call to provide five
24 and a half inches per acre rather than one inch per acre?

25 A. Well, if I had to shorten my pumping so that I

1 could help fill that call. yes. I guess that's kind of the
2 crux of the whole situation.

3 Q. Do you have any opinion as to if the department's
4 recommendations are true or correct that you would -- do you
5 have an opinion as to whether if the department's
6 recommendations are correct you would be impacted in one way
7 or the other if they were ignored?

8 MR. BROWN: Counsel, he's already stated that he
9 does not have any expertise in that area.

10 THE WITNESS: I would say that I feel I could be
11 impacted. But, you know, when you talk about the department
12 being correct, you know, if you go through the -- if you go
13 through the procedures that the department has on file here,
14 they went through the fact that there was some riparian
15 acres that was added into the thing, there's also the
16 cropping patterns. And they try to calculate based on the
17 field slopes and dimensions and the cropping pattern of the
18 farm, the weather data, and they did refer to Bliss and it
19 says the area in the Hagerman Valley within the Snake River
20 Canyon and Milner, has been determined the irrigation period
21 is from 3-15 to 11-15.

22 So they did try to go through in a systematic
23 manner and try to approach the thing as they should.

24 BY MR. CREAMER:

25 Q. Mr. Cranney, in earlier responding to a question

1 from Mr. Brown I believe you stated that you didn't know
2 specifically where Mr. McFadden's point of conversion was.
3 That you hadn't been there. Do you recall that testimony?

4 A. Yes.

5 Q. Do you know where Mr. McFadden's water use in his
6 claim asserts points of conversion in relation to the
7 eastern Snake River Plain aquifer that has been designated
8 by USGS?

9 A. Yes, I do.

10 Q. Do you know whether it is inside that?

11 A. Yes, it is.

12 Q. Are any of your water rights that are claimed in
13 the Snake River Basin Adjudication located inside of this
14 eastern Snake River Plain aquifer?

15 A. Yes.

16 Q. That's all the questions I have.

17 Thank you.

18

19 FURTHER EXAMINATION

20 BY MR. BROWN:

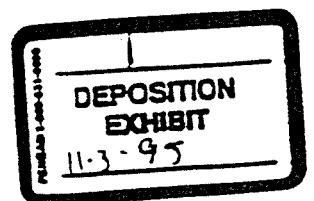
21 Q. Mr. Cranney, you stated earlier that you understand
22 that the Idaho Department of Water Resources, from your
23 review of the record, has done a careful study or
24 investigation of these claims, isn't that correct?

25 A. Yes.

Cranney Bros.

PROPERTY COVERED WITH ADJUDICATION CLAIMS:

- A45-04107 ✓
- A45-07242 ✓
- A45-02431 ✓
- A45-07064 ✓
- A45-02028C ✓
- A45-07307 ✓
- A45-00516 ✓
- A45-07055 ✓
- A45-02594 ✓
- A45-02431 ✓
- A45-02432 ✓
- A45-07355 ✓
- A45-02413 ✓
- A45-07150 ✓
- A45-04045 ✓
- A45-00423A ✓
- A45-00423B ✓
- A45-00424 ✓
- A45-00425D ✓
- A45-00433 ✓
- A45-00434 ✓
- A45-00435A ✓
- A45-00442 ✓
- A45-00514A ✓
- A45-02042 ✓
- A45-02260
- 45-02642
- 45-02668
- 45-20450



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3 Claimants:

Dan H. and Irma R. McFadden and Fred and
Susan Walmsley and Robert Brailsford

4 Attorney Name and Address:

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8 P.O. Box 389
9 Twin Falls, ID 83303-0389
10 Telephone: (208)734-7510

11
12 IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
13 STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS
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15

16 * * * * *

17 In Re SRBA

18) Subcase No. 36-00048A,
19) 36-04260B, 36-00049,
20) 36-02169, 36-00039D
21)

22 Case No. 39576

23) MOTION TO STRIKE
)
)

24 * * * * *

25 COME NOW, the Claimants in the above-captions subcases by and through
26 their attorneys of record, Hepworth, Lezamiz & Hohnhorst, and pursuant to the Idaho Rules
27 of Civil Procedure including Rule 1 and 6(d), object and move to strike the Affidavit of
28 Michael C. Creamer dated November 20, 1995, and the attached portion of the deposition
29 of Mike Cranney.

30 On November 21, 1995, at about 2:30 p.m. counsel for the Claimants

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1 Creamer and attachments including portions of the deposition of Mike Cranney. The
2 Claimants object and move to strike the Affidavit and its attachments under I.R.C.P. 6(d).
3 That rule provides that motions of the type before the court, a Motion for Leave to File Late
4 Response, "SHALL BE SERVED NOT LATER THAN FIVE(5) DAYS BEFORE THE TIME
5 SPECIFIED FOR HEARING . . ." The rule continues, "WHEN A MOTION IS SUPPORTED
6 BY AFFIDAVIT, THE AFFIDAVIT SHALL BE SERVED WITH THE MOTION;"

7 The Creamer affidavit and its attachments clearly violate the mandatory
8 language of Rule 6(d). Cranney's counsel has offered no reason to excuse its failure to
9 submit any affidavit or other evidentiary documents in support of its motion when the
10 motion was filed and should not be allowed to do so in violation of Rule 6(d), the day
11 before the hearing.

12 The attempt to inexcusably file the affidavit and attachments in support of the
13 motion further violates SRBA Administrative Order 1, Rule 6.d.;

14 All subcases shall be governed by the I.R.C.P., including the
15 filing of motions, briefs, and requests for oral argument.

16 Administrative Order 1 does not provide any exception from I.R.C.P. Rule 6(d). Therefore,
17 the Claimants respectfully request that the affidavit and attachments in support of the motion
18 be stricken.

19 Oral argument is requested before the time when this court takes up Cranney's
20 Motion to File Late Responses.

1 Dated this 21 day of November, 1995.

2 HEPWORTH, LEZAMIZ & HOHNHORST,
3 CHARTERED

4 
5 BY: _____
6 Patrick D. Brown
7 Attorneys for Claimants

8 CERTIFICATE OF SERVICE

9 The undersigned, a resident attorney of the State of Idaho, with offices at 133
10 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for
11 the claimants in this matter, certifies that on the 21 day of November, 1995, he served a
12 true and correct copy of the foregoing document by the method indicated below, and
13 addressed to the following:

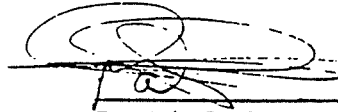
14 Chief, Natural Resources Div. _____ U.S. Mail
15 Office of the Attorney General _____ Hand Delivered
16 State of Idaho _____ Overnight Mail
17 P. O. Box 44449 Y Telecopy (Fax)
18 Boise, ID 83711-4449

19 Environment & Natural Resources Div. _____ U.S. Mail
20 United States Department of Justice _____ Hand Delivered
21 550 West Fort Street, Box 033 _____ Overnight Mail
22 Boise, ID 83724 Y Telecopy (Fax)

23 Jeffrey C. Fereday _____ U.S. Mail
Givens, Pursley & Huntley _____ Hand Delivered
P.O. Box 2720 _____ Overnight Mail
Boise, ID 83701-2720 Y Telecopy (Fax)

Josephine P. Beeman
Dillion, Bosch, Daw & Bock, Chtd.
Fidelity Building
242 N. 8th Street, Suite 200
Boise, ID 83702

☐ U.S. Mail
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Patrick D. Brown

(WATER\600048A.MS)!!

MOTION TO STRIKE - 4

Claimants:	Dan H. and Irma R. McFaddan, Walten E. Mildren, Hagerman Water Users Association, Harry R. Gisler, Ya-Ta-Hay Investments, Inc.
Attorney Name and Address:	HEPWORTH, LEZAMIZ & HOHNHORST, CHARTERED 133 Shoshone St. North P.O. Box 389 Twin Falls, ID 83303-0389 Telephone: (208)734-7510

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	)	Subcase No. 36-00048A, 36-10283A,
	)	36-00051A, 36-0021B, 36-15168,
	)	36-00049
	)	
	)	CLAIMANT'S MEMORANDUM IN
	)	SUPPORT OF OBJECTION AND
	)	MOTION TO STRIKE AFFIDAVITS
Case No. 39576	)	AND PRECLUDE INTERVENTION
	)	

* * * * *

Claimants in each of the subcases submit the following in support of their objections, motions to strike and opposition to granting leave to file late objections or responses in the subcases. Because Faulkner, May, and Ambrose have each submitted affidavits which should be stricken for the same reasons, what the claimants say below about

CLAIMANT'S MEMORANDUM IN SUPPORT OF OBJECTION AND MOTION
TO STRIKE AFFIDAVITS AND PRECLUDE INTERVENTION - 1

one affidavit is equally applicable to all. Additionally, the deposition testimony of each affiant and the deposition testimony of Mike Cranney, provides further evidence for denying intervention or participation by any of the four entities who seek to participate in these subcases.

1. EACH AFFIDAVIT CONTAINS NEITHER EVIDENCE NOR ALLEGATION OF PERSONAL KNOWLEDGE OF THE AFFIANT AND THEREFORE MUST BE STRICKEN AS INSUFFICIENT.

Pursuant to Idaho Rules of Evidence 602, "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that a witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness." Personal knowledge is defined in Black's Law Dictionary as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay. ... In the laws of evidence [personal knowledge] means something which the witness actually saw or heard, as distinguished from something he learned from some other person or sources." BLACK'S LAW DICTIONARY 873 (6th ed.1990).

Idaho Rule of Civil Procedure 56(e) provides substance to the term "personal knowledge" by enumerating the necessary requirements for affidavits to support or oppose summary judgment motions. The rule states: "supporting or opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein." The general requirements of Rule 56(e) regarding the affiant's competency and personal knowledge of admissible facts when combined with the Idaho Rules of Evidence are reasonable requirements for every affidavit.

Personal knowledge is the backbone of any valid affidavit, and is lacking in each subject affidavit. No affidavit includes a statement of the affiant's competency and personal knowledge, nor any additional allegations from which to infer personal knowledge regarding the claims to which the affiant is objecting. Additionally, as pointed out below, each affiant admits during his deposition that he has no personal knowledge of the contents of the Director's Report, the IDWR files, or the "reputable studies" upon which the department purportedly relied, which form the basis of each objection.

Because each affidavit is silent as to the affiant's personal knowledge of the facts in his affidavit as required by I.R.E. 602, and because each affiant concedes that he has no personal knowledge of the water rights claimed by the claimants, each affidavit must be stricken.

2. EACH AFFIDAVIT CONTAINS STATEMENTS OF HEARSAY AND ARE THEREFORE INADMISSIBLE

Hearsay is defined by I.R.E. 801(c) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pursuant to I.R.E. 802, hearsay is not admissible unless it falls within an accepted exception to the hearsay rule.

Each affidavit is full of statements that qualify as hearsay. For example, each affiant claims in an affidavit that "reputable studies, including the Department's, indicate that the statutory standard of one inch per acre is sufficient, on average, to irrigate property such as [claimant's]." This blatant offer of truth is hearsay, just as much as the assertions that the Department determined what the beneficial use is.

I.R.E. 803(8) lays out a hearsay exception for public records and reports, which are presumed by the rule to be trustworthy. The IDWR Director's Report, may be considered a public record or report of a public agency. Each affiant states that "based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, [we] decided not to participate in this subcase, choosing instead to rely on the Director's Report and IDWR's defense of its pleading." Even if each affiant relied on information from the Director's Report, an IDWR official statement, each affiant in his deposition admitted he had not read the Director's Report and therefore there is no applicable hearsay exception. Additionally, the Director's Report may not be within this exception, since Rule 803(8)(D) excludes "factual findings resulting from special investigation of a particular complaint, case, or incident". The Director's Report consists of factual findings in particular water right claims, and as such is excluded from the Rule 803(8). Each affidavit should be stricken.

3. EACH AFFIDAVIT CONSISTS OF CONCLUSORY STATEMENTS OF LAW AND FACT AND THEREFORE MUST BE STRICKEN.

"The averment of facts in an affidavit to be used in a judicial proceeding must be sufficiently definite to warrant the judicial action sought, and such facts must be stated as warrant the court in drawing the legal conclusions sought to be established. Averments which merely state opinions or legal conclusions or characterizations, speculations, and inferences, instead of facts are insufficient." State v. Snyder, 88 Idaho 479, 483, 401 P.2d 548 (1965).

Each affiant improperly reaches legal conclusions within his affidavit, claiming for example that a movant's "claim is so unreasonable as to be facially invalid." These legal conclusions must be stricken. Further, each affiant attempts to predict what the IDWR would have done if it had remained a party to the suit, when he alleges that "the facts of this situation show that the IDWR, had it remained a party to this subcase, would have been, without substantial outside assistance, able to defend its report and significantly reduce the claimed diversion rate by [the movant]." This is speculation, which renders the affidavits insufficient. And the assertion that there was reliance on the Director's party status and pleadings is nothing more than a vague characterization, floating in some unknown time zone, which lacks any factual basis. There are no facts from which to conclude that reliance was in anyway manifested by particular conduct.

4. NO AFFIDAVIT CONTAINS AN ALLEGATION THAT THE AFFIANT HAS AUTHORITY TO ACT FOR THE ENTITY OF WHICH HE IS AN OFFICER OR PARTNER, OR ALLEGATIONS THAT THE AFFIANT DID ACT FOR THE ENTITY OF WHICH HE IS AN OFFICER OR PARTNER IN SIGNING THE

AFFIDAVIT, AND THIS LACK OF AUTHORITY RENDERS THE AFFIDAVIT IRRELEVANT AND INCOMPETENT EVIDENCE.

For a court to consider evidence, that evidence must "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401. In the terms of I.R.E. 402, "evidence which is not relevant is not admissible."

Each affidavit indicates that the affiant is either a partner or an officer which is the Movant in this matter, but does not indicate the affiant's authority to act for that entity. Because there is no information from which the Court may deduce each affiant's authority to speak for the Movant, each affidavit is irrelevant and should be stricken. Moreover, the lack of testimony concerning the affiant's authority to speak for the entity renders each affidavit incompetent, and each should therefore be stricken.

5. EACH AFFIDAVIT VIOLATES THE IDAHO RULES OF EVIDENCE RELATING TO OPINION TESTIMONY.

Opinion testimony by lay and expert witnesses is allowed by the Idaho Rules of Evidence. I.R.E. 701 relating to lay testimony allows opinion testimony that is "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Experts who are qualified by knowledge, skill, experience, training, or education may be utilized "to assist the trier of fact understand the evidence or to determine a fact in issue" pursuant to I.R.E. 702.

There is no reference in any affidavit to any "perception" of the affiant: no affiant alleged to have seen a claimant's claims or to know what amount would be reasonably necessary to irrigate each claimant's land. The opinions stated in the affidavits, such as that a claim is "facially invalid", for example, therefore are not supported by the affiants' perception, and would not be helpful to the trier of fact, and should not be heard.

Further, the affiants did not lay the necessary foundation within the affidavits to qualify themselves as experts in the subject matter. For this reason, the opinions as contained in each affidavit will not assist the trier of fact to either understand the evidence or determine a fact in issue. Accordingly, each affidavit should be stricken.

6. IN THE DEPOSITION TESTIMONY OF MAY, FAULKNER, AMBROSE AND CRANNEY, EACH ADMITS THAT THEY HAVE NO PERSONAL KNOWLEDGE CONCERNING THE HAGERMAN VALLEY RIGHTS AND REFUSED TO DISCLOSE THE HEARSAY INFORMATION THEY POSSESS PURSUANT TO THE ATTORNEY-CLIENT PRIVILEGE.

The deposition of Ralph May reveals that he personally has no information concerning the cases in which he seeks to intervene and has never personally reviewed any of the files or the actual water use to which he seeks to intervene; in short, that he has no personal knowledge and is therefore not competent to have filed an affidavit meeting the requirements of the Rules of Evidence. For example, he admitted he had not ever looked at any of the IDWR studies or anything relating to such a study by IDWR (May Depo, p. 41, L. 6); stated he had never personally looked at the Director's Report (May Depo, p. 49,

L. 13), and had only had hearsay conversations with farmers who had read the Director's Report, although he had never personally read it (May Depo, p. 49, L. 6). May admitted, "I have no personal hands-on knowledge" of the water use of either the Ya-Ta-Hay or Gisler Farm (May Depo, p. 51, L. 22).

In May, 1993, when objections were due, May had not reviewed any pleadings (May Depo, p. 54, L. 22), didn't know then whether the IDWR's pleadings were or were not accurate (May Depo, p. 55, L. 23), and even as of yesterday when deposed, still didn't know since he had no personal knowledge nor review of the file (May Depo, p. 56, L. 5). He admitted that May Farms had not done anything before August 17, 1995, to obtain information about any of the subcases (May Depo, p. 26, L. 2), and instead waited until August 17, 1995, to ask the group's attorney to put together objections that would be filed on the deadline of August 18, 1995 (May Depo, p. 24, LL. 4-17). But, when asked specifically about the information that was the basis for intervention, May refused to answer, claiming that the attorney work product privilege precluded answering the following questions: What information did you look at in the process you undertook to determine what subcases to object to? (May Depo, p. 20, L. 23 - p. 21, L. 4); Tell me how May Farms determined which cases it would intervene in? (May Depo, p. 24, LL. 18-22). The inconsistency and unfairness of these claims to privilege from answering are best illustrated by May's testimony wherein he admitted that the information utilized in determining what subcases to attempt to intervene came solely from counsel (May Depo, p. 26, L. 22), but then stated:

Q. Do you assert that you have a privilege from disclosing what that information is because you obtained it from an attorney?

A. Yes.

(May Depo, p. 26, L. 23 - p. 27, L. 1). In other words, the affiant had no personal knowledge, had not personally reviewed anything and wouldn't disclose the basis of his position for trying to intervene based on the attorney-client privilege, i.e. I don't know and I won't tell you what is there to be known. Interestingly, what there is to be known, though, was not known in 1993. He had not been represented by counsel during the objection and response period in 1993. Further, when asked about his legal standing to filing such a motion based upon a claimed hydrological connection between his water and the water in Hagerman in which he sought to intervene, May admitted that any such alleged interconnection was speculation (May Depo, p. 37, L. 18) and that he didn't have any hard and fast information that the objections to water filings ever affected his water rights or vice versa (May Depo, p. 38, L. 8).

Similarly, the deposition of Tom Ambrose on behalf of Sand Springs Ranches revealed that he too lacked any personal knowledge, had not read any of the studies or pleadings to which reference was made in his deposition, and that, at best, the affidavit was based on inadmissible hearsay. When asked about the Mildren claim, Mr. Ambrose stated he had no personal knowledge (Ambrose Depo, p. 28, L. 14). He had no personal knowledge of what the Director's Report said as he had never read it (Ambrose Depo, p. 28, L. 21) and the only information he had about what may be contained in the Director's Report was hearsay information wherein "I've been told what it says." (Ambrose Depo, p.

30, L. 11). Mr. Ambrose explained, "I told you, I didn't read it. I don't know whether it's accurate. My attorney told me it was." (Ambrose Depo, p. 31, LL. 1-3). However, when asked the following specific questions about the water rights for which intervention was sought, Mr. Ambrose was instructed not to answer, claiming the following questions were protected by the attorney/client privilege: "For each of those cases, please tell me when you first became aware of any facts that suggest that the amounts they have is more than they can reasonable use." (Ambrose Depo, p. 23, L. 12); "And you claim the information you have is privileged . . . (Ambrose Depo, p. 24, L. 8) how do you know that the Department's position has any basis in fact at all" (Ambrose Depo, p. 28, L. 24). Even after explaining that the sole factual basis concerning the Director's Report was based upon what his attorneys had told him, the deponent was repeatedly told not to answer questions about the basis for objecting based on the attorney/client privilege. No answer was allowed when asked, "Why is it that you selected these two water rights to object to" (Ambrose Depo, p. 36, L. 21), or why Sand Springs had not objected in other subcases where the claimant sought more water than an inch per acre (Ambrose Depo, p. 36, L. 5). Like the others who were deposed, Mr. Ambrose had no personal knowledge about whether or not water used by Sand Springs Ranch did or did not affect the Hagerman Water Users Association or Mildren. (Ambrose Depo, p. 11, L. 15).

Mike Faulkner testified on behalf of Faulkner Land & Livestock, and admitted that despite the statement in his affidavit claiming he was testifying from personal knowledge, Faulkner admitted that he didn't even know IDWR's position regarding the Dan

McFaddan claim until he read it in the affidavit he was asked to sign (Faulkner Depo, p. 33, LL. 10-22). Despite the affidavit's statement that IDWR's position was based on reputable studies, Faulkner had not even looked at the studies and had no idea what study they had or had not done (Faulkner Depo, p. 34, LL. 1-7) and, in fact, did not even know if such a study had been done (Faulkner Depo, p. 34, L. 12). Faulkner's legal incompetence to filing an affidavit because of his lack of knowledge was also illustrated by the following questions and answers in his deposition:

Q. When was the first time that you read any part of IDWR files regarding Dan McFaddan's water rights?

A. Never have.

(Faulkner Depo, p. 28, L. 21-23). When asked how he could claim in an affidavit that the IDWR information was accurate, since he had never even read it, counsel again instructed the witness not to answer claiming attorney/client privilege. Similar unfounded attorney/client privilege claims were asserted to proper questions such as: "What did you do leading up to your decision that you would want to attempt to intervene or participate in the McFaddan cases?" (Faulkner Depo, p. 15, LL. 13-19); and "How is it that you selected Dan McFaddan's claims to object to in the Hagerman Valley?" (Faulkner Depo, p. 31, LL. 1-6). This witness, like the others before him, had no idea whether Mr. McFaddan's water rights had any impact on his claimed water rights, saying: "You know I really don't know" "I have no idea." (Faulkner Depo, p. 20, LL. 3-9). Interestingly, recently in a prior water transfer hearing, Faulkner Land & Livestock had hired an expert who asserted that a person had to live southwest of Wendell, Idaho, to impact spring rights in the Hagerman

Valley (Faulkner Depo, p. 20, L. 10 - p. 21, L. 12), and all of Faulkner's land is north of Wendell.

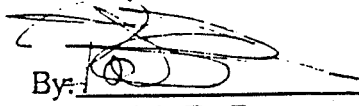
Concerning the three objections filed by Mr. Cranney against three separate water right claimants, it was established that intervention was being sought even though Mr. Cranney had never been to the McFaddan property (Cranney Depo, p. 102, L. 10), hadn't seen the Walmsley farm (Cranney Depo, p. 102, L. 19), and he explained that as of the time of his deposition (November 20, 1995), no investigation had been conducted of any of the elements of these three gentlemen's claims (Cranney Depo, p. 73, L. 9). Like the others, Mr. Cranney also sought to shield inquiry into the unfounded basis for his claimed intervention by invoking the attorney/client privilege to questions such as: "What rights have you looked at?" (Cranney Depo, p. 46, L. 8). Similarly, when asked the basis for his claim for legal standing to assert a right of intervention, Mr. Cranney stated he didn't know whether his water right was or was not hydrologically connected to that of Mr. McFaddan (Cranney Depo, p. 34, L. 10). He stated he had no proof that he was connected to Mr. McFaddan's water (Cranney Depo, p. 36, L. 22) and opinioned this was something a hydrologist would have to address and to date one had not been consulted. (Cranney Depo, p. 37, LL. 6-11).

CONCLUSION

Based upon the facts and authorities cited above, the claimants' objections and motions to strike should be granted.

Dated this 21st day of November, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: _____

Patrick D. Brown
Attorneys for Claimants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 21 day of November, 1995, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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

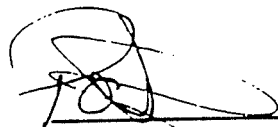
☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy (Fax)

Jeffrey C. Fereday
Givens, Pursley & Huntley
P. O. Box 2720
Boise, ID 83701-2720

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Telecopy (Fax)

Josephine P. Beeman
Dillion, Bosch, Daw & Bock, Chtd.
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☐ Hand Delivered
☐ Overnight Mail
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Patrick D. Brown

(WATER\600048A.MSM)lt

Claimants:

Dan H. and Irma R. McFadden
Fred and Susan Walmsley
Robert Brailsford
Hagerman Water Users Association
Walten E. Mildren
Harry R. Gisler
Ya-Ta-Hay Investments, Inc.

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

* * * * *

In Re SRBA

) Subcase Nos. 36-00048A, 36-00049,
) 36-02169, 36-00039D, 36-04260B,
) 36-15168, 36-00051A, 36-00021 &
) 36-10283A
)

Case No. 39576

) CLAIMANTS' CONSOLIDATED
) MEMORANDUM OPPOSING
) INTERVENTION
)

* * * * *

THE MOVANTS HAVE FAILED TO MAKE THE ESSENTIAL SHOWING REQUIRED IN ORDER TO SUPPORT AN ORDER GRANTING LEAVE TO FILE LATE OBJECTIONS OR RESPONSES.

A. THE STANDARD.

In his *Order Granting in Part, and Denying in Part, Joint Motions for Amendment of Administrative Order 1* ("the Order"), Judge Hurlbutt opened the door for the filing of late objections and responses in specific subcases by parties to the main case who had not complied with the May 1, 1993 filing deadline imposed by A.O.1. The reason for his decision to grant this accommodation is central to understanding (1) what showing is required in order to secure this privilege; and (2) determining whether the moving parties have surmounted the standard in these subcases.

The *Order* was designed to deal with the effect of the statutory amendments to the adjudication statutes adopted by the 1994 Idaho Legislature, which removed the Director of IDWR as a party, and which recharacterized the Director's Reports as something other than adversary pleadings. See, Idaho Code §§ 42-1401B and 42-1412. The Court noted that "Because the Director was previously a party to the SRBA and to all subcases, some parties assumed that IDWR would participate and litigate in defense of the Director's Report" in connection with certain specific subcases. *Order*, p. 1. The Court was concerned that as a result, "[S]ome parties decided not to participate in certain subcases, choosing instead to rely on the Director's Report and IDWR's defense to its pleading." Id. The Court noted that given IDWR's newly-constituted status as a "non-party," and the decharacterization of the Reports as "pleadings," "Those . . . who opted to rely on IDWR

to litigate and advocate in favor of the Director's Report are now unable to do so," Id., p. 2. and found this unusual scenario "[N]ecessitates special consideration for some parties to the adjudication." Id., p. 1.

It is clear the Court did not intend the *Order* to constitute an "open amnesty" which indiscriminatorily permits every party to lodge a late objection or late response in any and every subcase. Rather, the Court noted that motions to file late responses and objections would be reviewed "under a criteria similar to that contained in I.R.C.P. 55(c). The proponent must show both good cause for untimeliness and the existence of a meritorious position." Id., p. 2 (emph. original).¹

B. THE REQUIREMENT OF A SHOWING OF "GOOD CAUSE".

The Court's requirement that a party seeking leave to file a late objection or response make a showing of "good cause" for not having filed the objection or response in a timely fashion is directly analogous to the showing of "mistake, inadvertence, surprise or excusable neglect" required to secure relief under Rule 55(c). Accordingly, it is appropriate to apply the additional subsidiary concepts adopted by the Idaho courts in evaluating whether a party's showing is sufficient.

In order to secure relief, the showing required to establish excusable neglect is measured against an objective, external criteria; it must constitute "conduct that might be expected of a reasonably prudent person under the same circumstances." Reeves v.

¹The standard under I.R.C.P. 55(c), which permits the Court to relieve a party from a default requires a two-fold showing of (1) "mistake, inadvertence, surprise or excusable neglect"; and (2) "facts which, if established, would constitute a meritorious defense" as against the claim in question. Clear Springs Trout Co. v. Anthony, 123 Idaho 141, 143, 845 P.2d 559 (1992).

Wisenor, 102 Idaho 271, 272, 629 P.2d 667 (1981); Hearst Corp. v. Keller, 100 Idaho 10, 11, 592 P.2d 66 (1979). The determination of whether the standard has been surmounted is one which "invokes both the fact-finding and law-applying functions of the trial court." Avondale on Havden, Inc. v. Hall, 104 Idaho 321, 325, 658 P.2d 992 (Ct. App. 1983). The trial court's determination is deferentially reviewed; its factual component will not be set aside unless "clearly erroneous," and its application of the law will be set aside only if it constitutes a clear "abuse of discretion." Clear Springs Trout Co. v. Anthony, *supra*, 123 Idaho at 143-44; Avondale on Havden, Inc. v. Hall, *supra*, 104 Idaho at 325.

Given the clear purpose of the special dispensation granted by the *Order*, it seems entirely clear that a litigant seeking to take advantage of the "mechanism" must, at a minimum, demonstrate the existence of a "good cause" for untimeliness by showing that the untimeliness was, as a matter of fact, the product of the moving party's earlier reasonable and justifiable "rel[iance] on IDWR to litigate and advocate in favor of the Director's Report . . ." If such a showing were not required, then the dispensation granted by the *Order* would become nothing more than a "general amnesty" automatically permitting every litigant to lodge late objections and responses at will; the two-part showing expressly required by the *Order* would become entirely superfluous. It is clear that that was not what the Court intended.

Of necessity, it is logical to conclude that in order to make the showing required by the *Order*, a party seeking leave to file untimely objections or responses must demonstrate that his earlier failure to file was a product of a deliberate, cognitive decision, rather than an ordinary omission due to lack of attention, or the like. If the central thesis

for granting the dispensation was the protection of parties against the consequences of an earlier decision to rely on IDWR, based upon the change in circumstances occasioned by the legislature's action, it stands to reason that the decision not to file an objection/response had to be a cognitive one, based upon the motivational considerations described in the *Order*.

The movants have fallen far short of even attempting to demonstrate, let alone establishing the existence of "good cause" of this nature.

The moving parties' view of "good cause" seems to consist of nothing more than the premises that (1) IDWR was formerly a party to this case; (2) filed a Director's Report making a specific recommendation concerning every water right claimed within Basin 36; and (3) IDWR could presumably be counted upon to "defend" the recommendations contained in the Director's Report. Therefore, they conclude, they relied to their detriment upon IDWR's anticipated participation, and given the change effected by the amending legislation, should now be afforded a second opportunity to weigh into the litigation.

This view would effectively constitute the *Order* as the "open amnesty" described above. Were this the entire showing of "good cause" required, then it is clear that every party, regardless of circumstances, would have the unquestionable right to intervene in an untimely way, in every subcase, merely by mouthing the magic word "reliance." This is clearly not what the Court expected, or what the *Order* was intended to require by way of a showing of "good cause."

The claimants submit that the moving parties should be required to make some showing of cognitive deliberation which amounts to an informed decision not to participate in the subcases in question, and that this decision was somehow motivated by reliance on IDWR's presumed intent to litigate for the purpose of sustaining the recommendations set out in the Director's Report. This is clearly a showing which they have not, and indeed cannot, make.

The depositions of the individual moving parties reveal that until recently, none of the moving parties were familiar with the claims or the claimants involved in these subcases, and none had even read the recommendations contained in the Director's Report for Basin 36. This is not a situation in which the movants had concerns with respect to the claims, but expecting IDWR to litigate the discrepancies between the claims and the recommendations, opted not to duplicate its efforts. Rather, this is a situation in which the movants had no actual knowledge about the claimants, or the claims, or the recommendations; there was no "assumption" as to IDWR's intent to litigate, and indeed no thought as to its role at all.

The movants also apparently seek to justify their failure to lodge timely pleadings on the premise that until the decision in Musser v. Higginson, 125 Idaho 392, 871 P.2d 809 (1994), they did not fully appreciate the importance of joining the fray in these specific subcases. However, they assert, once Musser became the law of the land on February 28, 1994, it became clear that those who appropriated groundwater tributary to the Snake Plain Aquifer had an immediate stake in the outcome of claims by others relating to ground or spring-water sources tributary to the aquifer.

The difficulty with their position is several-fold. First, it appears to be their supposition that until the Idaho Supreme Court issued its opinion in Musser, they were entirely ignorant of that proceeding and its potential ramifications. However, Musser was filed with the SRBA Court on June 22, 1993, and the Court's decision issuing the writ of mandate to Director Higginson was issued on August 5, 1993. If the "ominous portent" of Musser was the justification for the movants' delay, they, as parties to the case, both could and should have concluded that its pendency gave rise for concern long before August of 1995.

Even if we are to assume that until the Supreme Court released its opinion on February 28, 1994, the movants were blithely unappreciative of the risks to which it gave rise, they do not explain why they continued to delay requesting leave to participate in the pending subcases. Ordinary arithmetic tells us that from March 1, 1994 to August 18, 1995, when their motions were filed, a period of over 18 months elapsed.

If we tie the dawn of movants' ability to appreciate the existence of the "problem" to the date legislative action was completed in connection with amendments to the adjudication statutes, we can ascertain that as of April 12, 1994, they became aware that the Director was no longer a party to whom they could look for support, and the Director's Reports were no longer pleadings upon which movants could reasonably rely. 1994 Idaho Sess. Laws, ch. 454, § 35, p. 1478, and ch. 455, § 8, p. 1491. The 17-month delay is unexplained.

Simply put, the election to advance Musser and/or the pendency of the proposed revisions to the legislation as an explanation for movants' "decision" not to file

timely objections or responses is, as a matter of fact, singularly insincere and unpersuasive.

More importantly, the moving parties' failure to grasp the significance of these purely-legal developments vis-a-vis their own claims would not, as a matter of law, constitute the form of showing of "mistake" or "excusable neglect" which would entitle them to relief under Rule 55(c), nor, by parity of reasoning, can it constitute the showing of good cause "under a criteria similar to that contained in I.R.C.P. 55(c)." *Order*, p. 2 (emph. added). Where a party requests relief under Rule 55(c) based upon "mistake," the mistake must be one of fact, not one of law. See, e.g., Reeves v. Wisenor, *supra*, 102 Idaho at 272 ("Where, as here, mistake is alleged as grounds for relief, such must be factual rather than legal . . ."); Hearst Corp. v. Keller, *supra*, 100 Idaho at 11 ("A mistake sufficient to warrant relief setting aside a default judgment must be of fact and not of law.").

Suggesting that they cognitively elected not to file a timely objection because until the Supreme Court decided Musser, or until the legislature revised the adjudication statutes, they did not appreciate that their participation was advisable does not amount to a showing of "good cause" based upon some understandable lack of factual knowledge or information, or mistake of fact. Rather, it constitutes nothing more than a miscalculation, from a purely legal perspective, of the potentially significant result of a given subcase. That is clearly not the showing of good cause the *Order* contemplates.

C. THE SHOWING OF A "MERITORIOUS POSITION".

The second part of the standard announced in the *Order* is a showing of facts which, if proven, would establish "the existence of a meritorious position." *Order*, p. 2. The showing of a "meritorious position" is analogous to the showing required by Rule 55(c),

which requires that a party seeking relief from a default "[P]lead facts which, if established, would constitute a meritorious defense" to the underlying claim. Clear Springs Trout Co. v. Anthony, *supra*, 123 Idaho at 143.

This second requirement is both logical and practical; as the Supreme Court has explained in connection with requests for relief under Rule 55(c), "It would be an idle exercise for the court to set aside a default if there is in fact no justifiable controversy." Hearst Corp. v. Keller, *supra*, 100 Idaho at 12.

In earlier memoranda, the movants have relied heavily upon the concept that the determination of the existence of a "meritorious position" must be determined exclusively by reference to their allegations, standing alone, and that they are not required to prove the existence of the alleged facts at this juncture in order to secure relief. While it is true, as movants claim, that the focus must be upon the facts pleaded, this does not mean that movants may simply advance allegations, and those opposing the motion must blindly accept them as immutably true in every respect.

Rather, the facts advanced as demonstrating the existence of a "meritorious position," and which compels the conclusion that there is a real "justiciable controversy" which would justify permitting the filing of late objections or responses must go well beyond the mere allegational conclusion that movants "have a meritorious position." Borrowing from the standards which apply under Rule 55(c), it is clear that substantially more is required:

The facts constituting the defense, whether disclosed by answer, affidavit or both, must also be detailed and must be sufficient, when established, to constitute a defense to the action on its merits. The conclusion of the party or his attorney that the

defendant has a good defense in not sufficient. Whether the pleaded facts are sufficient to constitute a defense is also one for the trial court. (Citation omitted.)

Thomas v. Stevens, 78 Idaho 266, 271, 300 P.2d 811 (1956) (emph. added).

See also, Hearst Corp. v. Keller, *supra*. 100 Idaho at 12 ("The defense matters must be detailed."); Baldwin v. Baldwin, 114 Idaho 525, 528, 757 P.2d 1244 (Ct. App. 1988) ("As before noted, [the moving party] must also show a meritorious defense. Factual details must be shown with particularity.").

In this context, the moving parties must allege the existence of facts which demonstrate the existence of a real, genuine and justiciable controversy between themselves and the specific claimants in these specific subcases. In this context, that means advancing at least a detailed factual allegation that the moving parties have a genuine interest in the outcome of the pending controversy in the subcases. Put another way, movants must, as a condition precedent to relief, leave the Court with enough information to demonstrate the existence of standing with regard to the subcase issues.

Here, that means, at a minimum, factual allegations which are at least sufficient to give rise to a genuine issue whether the claims asserted in the subcase, if resolved in favor of the claimant, would work some genuine loss or injury in fact to the moving party in relation to the moving party's own competing claim. Idaho law does not recognize standing based upon a mere generalized interest in the outcome of a case; rather, standing requires a showing of "injury in fact" peculiar to the specific litigant, and which is "uncommon to other similarly situated [parties]." Scott v. Buhl Joint School Dist. No. 412, 123 Idaho 779, 781, 852 P.2d 1376 (1993).

Here, there is no meaningfully-detailed allegation or showing that the moving parties will suffer injury particular to themselves and which would confer standing to assume the role of a full-blown litigant against the specific claimants, and with respect to the specific claims at issue in the denominated subcases. In point of fact, the results of the recent depositions clearly confirm that the moving parties are possessed of no personal knowledge which suggests the existence of an injury, or even a potential injury, which would justify according them an opportunity to litigate at length with these claimants concerning their rights.

In this instance, we were afforded the additional benefit of knowing that the moving parties seek leave to file late objections/responses for the purpose of attempting to overcome an earlier ruling which denied them "organizational standing," as the "North Snake Pumpers," to lodge late objections/responses on a collective basis. The preliminary showing made by the moving parties in these "individualized" motions are no more satisfactory than they previously advanced on an organizational basis.

While it may be entirely true that the moving parties are appropriators who claim beneficial rights to water tributary to the Snake Plain Aquifer involved in Musser, the situation before the Court is fundamentally different than that presented in Musser. In Musser, the petitioners both alleged, and ultimately proved, that the actions of the Director in refusing to comply with his statutory duty to deliver water to their unobjected-to rights created direct, immediate and significant consequences. Here, these moving parties have done neither.

Here, the moving parties apparently ask the Court to simply assume, *ala Musser*, that it is an established matter of fact that the Snake Plain Aquifer is inextricably interconnected at every juncture, and that any withdrawal of water, by any claimant, at any location, at any time of year, in any amount, for any purpose, *ipso facto* operates to the direct and immediate loss of any other appropriator, regardless of location, despite the nature of use, and without respect to competing priority.

Neither this Court, nor the Supreme Court, made a determination to that effect in Musser. Rather, both courts merely determined that the Director had a statutory duty under former Idaho Code § 42-602 to deliver water in accordance with the prior appropriation doctrine, and that he had failed to do so. Regardless of movants' view concerning the significance of Musser, it cannot be understood as sanctifying litigation between aquifer appropriators based solely upon the single fact that they are aquifer appropriators.

Simply stated, it is clear that the moving parties have failed to come forward with particularized and detailed factual allegations which, if proven, would entitle them to relief in these subcases, as against these subcase claimants, with regard to these claimed rights. The limited discovery permitted takes the matter even one step further, demonstrating the proof of these preliminary but-indispensable facts does not exist, and even if the movants were permitted to belatedly join the litigation, proof of their existence will not be forthcoming.

D. METHOD AND BURDENS OF PROOF.

A word also needs to be said concerning the proper method by which the moving parties should be required to present the proof necessary to justify relief under the *Order*. Proceedings for relief from a default under Rule 55(c) are, by nature, on the record, in the form of the motion, supporting affidavits and other materials; hearings under Rule 55(c) are not evidentiary, and do not entail the taking of testimony from witnesses in open court. See, e.g., Thomas v. Stevens, *supra*, 78 Idaho at 271 ("The facts constituting the defense, whether disclosed by answer, affidavit or both, must also be detailed . . ."). See also, State ex rel. Frohnmyer v. Low, 105 Or. App. 357, 804 P.2d 1217, 1219-20 (1991) (in the absence of statute or rule, trial court's resolution of motion for relief from default was properly confined to motion, affidavits and other matters of record, and there was no error in refusing to take oral testimony).

On an equally important score, it is clear that the moving parties have, and at all times retain, the burden of making the two-fold showing required by the *Order* to justify the relief requested. The moving parties suggest that the Court should apply the long-standing principle applied to motions under Rule 55(c), which provides that "[I]n doubtful cases a standard of liberality rather than strictness must be applied." Federal Land Bank of Spokane v. Wright, 120 Idaho 32, 35, 813 P.2d 371 (Ct. App. 1991).

The "standard of liberality," assuming it is the correct standard to be applied, does not alter the allocation of burdens of proof, or obligate the Court to merely "assume" that a party is entitled to relief merely because relief has been requested. Rather, the party who requests relief "bears the burden of proving his right to relief." Matter of Adoption of

A Male Child, 102 Idaho 225, 227, 628 P.2d 1059 (1981) (emph. added). Here, that means establishing, upon the record, both of the requirements spelled out in the *Order*.

Because the moving parties have failed to shoulder the burden imposed by the *Order*, their motions should be denied.

Dated this 21st day of November, 1995.

HEPWORTH, LEZAMIZ & HOHNHORST,
CHARTERED

By: 
Patrick D. Brown
Attorneys for Claimants

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, with offices at 133 Shoshone St. North, P.O. Box 389, Twin Falls, Idaho 83303, and one of the attorneys for the claimants in this matter, certifies that on the 21st day of November, 1995, he served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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

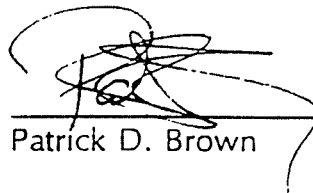
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