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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
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REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00039N

In Re SRBA

Twin Falls County Civil Case No. 39576

Sub-Case No. 36-00039N

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources

Karl J. Dreher, Director

David B. Shaw, Adjudication Bureau Chief

David R. Tuthill Jr., Acting Adjudication Bureau Chief

July 1, 1996

COPY

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00039N

The Director of the Idaho Department of Water Resources (IDWR) submits this report regarding claim to water right no. 36-00039N in response to the request of Special Master Haemmerle, pursuant to Idaho Code §42-1412(4) and the court's Order Re: Contested Claims for Amounts Claimed in Excess of .02 CFS. This report was prepared under the supervision of Karl J. Dreher, Director, David B. Shaw, Adjudication Bureau Chief, and David R. Tuthill J., Acting Adjudication Bureau Chief for IDWR. The following persons assisted in the preparation of the following portions of this report:

David B. Shaw, Adjudication Bureau Chief, reviewed and verified this Report Regarding Claim to Water Right No. 36-00039N. The Affidavit of David B. Shaw describes Mr. Shaw's education and work experience, and is incorporated by reference herein. Mr. Shaw also reviewed IDWR's Report Regarding Evaluation of Irrigation Diversion Rates, described below.

David R. Tuthill Jr., Acting Adjudication Bureau Chief, reviewed this Report Regarding Claim To Water Right No. 36-00039N. The Affidavit of David R. Tuthill Jr. describes Mr. Tuthill's education and work experience, and is incorporated by reference herein.

Steven C. Clelland, Senior Water Resource Agent, investigated and prepared the preliminary recommendation for claim no. 36-00039N. The Affidavit of Steven C. Clelland describes Mr. Clelland's education and work experience, and is incorporated by reference herein. The affidavit also includes a general description of his investigation of claims in the Hagerman area. The affidavit of Steven C. Clelland Regarding Claim No. 36-00039N describes Mr. Clelland's investigation of the quantity and place of use of this claim, and is attached hereto and incorporated herein by reference.

Helen L. Harrington-Thornton, formerly Senior Water Resource Agent and currently Hydrogeologist, participated in the field examination for claim no. 36-00039N. The Affidavit of Helen L. Harrington-Thornton describes Ms. Thornton's education and work experience, and is incorporated by reference herein. The Affidavit of Helen L. Harrington-Thornton Regarding Claim No. 36-00039N describes her investigation of the this claim, and is attached hereto and incorporated by reference herein.

I. INVESTIGATION AND RECOMMENDATION OF CLAIMS GENERALLY

IDWR's general methodology for the investigation and recommendation of claims is described in Appendix A, which is incorporated herein by reference.

II. WATER RIGHT NO. 36-00039N

A. Basis of Claim

Claim no. 36-00039N was filed with IDWR by Philip T. and Patsy A. Kinnison Dick J. And Sigrid E. Veenendaal on March 12, 1991.¹ The claim is to a portion of one of two rights decreed to E.W. Dilatush and others in the *New International Mortgage* decree, entered in 1932.² The water rights decreed to Dilatush are numbered in IDWR's files as water right nos. 36-00039 and 36-00040. Right no. 36-00039 is to water from Billingsley Creek; right no. 36-00040 is to water from an unnamed spring. Both were decreed for use on the same lands, and both were decreed for "irrigation, domestic, power and other purposes." Portions of right no. 36-00039 were claimed by and recommended to various claimants.³

B. Splits of Water Right No. 36-00039

As noted above, various portions of right no. 36-00039 were claimed by and recommended to various claimants. The splits are listed below. The first column shows the quantity claimed; the second column shows the quantity recommended in the director's report. Water rights listed with an asterisk are contested.

¹ The original notice of claim is currently located in the files of the SRBA District Court, attached to IDWR's response to the claimant's objection.

² New International Mortgage Bank v. Idaho Power Co., et al., Equity No. 1602 (D.S.Id. 1932), at pp. 3-4.

³ A portion of right no. 36-00040 was claimed as 36-00040A; claim no. 36-00040A was recommended for disallowal and no objection was filed to that recommendation. No claims were filed to the remainder of right no. 36-00040.

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00039N

<u>Right no.</u>	<u>Claim</u>	<u>Report</u>	
36-00039B	0.12	0.03	
36-00039C*	0.28	0.06	This right is part of the group for which 706 reports are due 07/01/96.
36-00039D*	0.26	0.06	This right is not part of the group for which 706 reports are currently scheduled.
36-00039E*	0.04	0.03	This right is part of the group for which 706 reports are due 07/01/1996.
36-00039F*	0.12	0.03	This right is part of the group for which 706 reports are due 09/01/1996.
36-00039G	0.10	0.04	
36-00039H	0.28	0.04	
36-00039J*	0.28	0.04	This right is part of the group for which 706 reports are due 07/01/1996.
36-00039K	0.20	0.20	
36-00039L	0.12	0.03	
36-00039M*	0.12	0.04	This right is part of the group for which 706 reports are due 09/01/1996.
36-00039N*	0.12	0.04	
36-00039P*	0.12	0.04	This right is part of the group for which 706 reports are due 09/01/1996.
Total	2.16	0.68	

The quantity decreed for right no. 36-00039 in the *New International Mortgage* decree is 2.4 cfs. The total quantity of water claimed in all claims based on the decree is 2.16 cfs, which does not exceed the decreed amount.

The decreed place of use of this right contains approximately 24 acres. Using the decreed rate of diversion and the decreed place of use, the per acre rate of diversion is approximately 0.10 cfs per acre. The claimant's lands as described in the deed attached to the motion for summary judgment contain 1 acre, which is within the decreed place of use. Based on the description of the claimant's lands in the deed, the claimant's proportionate share of water right no. 36-00039 is approximately 0.10 cfs.⁴

In this instance, the deed purports to convey "six shares of water from the Buckeye Ditch Company" from a predecessor of the claimant to the claimant. IDWR does not have information indicating to what this language refers. IDWR does not have information indicating whether or how any amount greater than the claimant's

⁴ IDWR relied on the following in reaching its conclusion: *Koon v. Empey*, 40 Idaho 6, 231 P. 1097 (1924) (a conveyance of land conveys the appurtenant right absent express provision to the contrary); *Crow v. Carlson*, 107 Idaho 461, 690 P.2d 916 (1984) (division of tract of land to which water is appurtenant works a division of the water right in the same proportion as the land is divided, absent express provision to the contrary.)

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proportionate share of right no. 36-00039 came to be appurtenant to the claimant's lands. IDWR did not previously request this information from the claimants of the portions of right no. 36-00039 because the total amount IDWR found to be beneficially used under all the claimed portions of right no. 36-00039 did not exceed the decreed 2.4 cfs.⁵

B. Recommendation of Disallowal

The director's report recommends this claim for 0.04 cfs for domestic use. The claim and the objection seek 0.12 cfs for 1 acre of irrigation, stockwater and aesthetics. Based on a further review of its files, IDWR concluded that its original recommendation was in error. IDWR Senior Water Agents Steve Clelland and Helen Thornton investigation confirms the nonuse of water pursuant to water right no. 36-00039N for the period from 1980 through 1991. IDWR therefore recommends disallowal of claim no. 36-00039N. The investigation of this claim is described in the Affidavit of Steven C. Clelland Regarding Claim No. 36-00039N and the Affidavit of Helen L. Harrington-Thornton Regarding Claim No. 36-00039N.

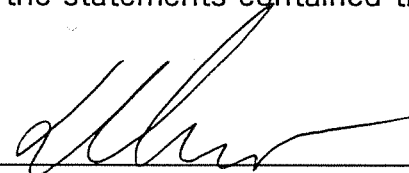
⁵ IDWR does not require all claimants to submit information showing a "chain of title" demonstrating ownership of all or part of a previously decreed or licensed right in its investigation of the claims. Generally, IDWR requires information as to ownership as part of the investigation of claims only where there are competing claims to the same water right.

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State of Idaho)
) ss.
County of Ada)

David B. Shaw, being first duly sworn, upon oath, deposes and says:

That I am the Adjudication Bureau Chief for IDWR, that I have read the foregoing report, know its contents, and that the statements contained therein are true to the best of my knowledge and belief.



David B. Shaw

Subscribed and sworn to before me this 1st day of July, 1996.

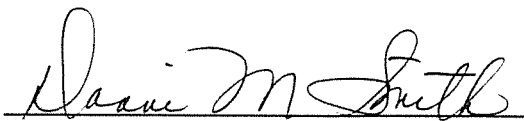


Notary Public for Idaho
Residing at: Kuna Id
My commission expires: 3-21-2000

Certificate of Service

I certify that on the 1st day of July, 1996, I hand-delivered copies of the foregoing document, including all attachments, with sufficient first class postage, to the following:

Patrick D. Brown
133 Shoshone St North
Twin Falls, ID 83303



Person mailing document(s)

APPENDIX A

A. INVESTIGATION AND RECOMMENDATION OF CLAIMS GENERALLY

To promote the accuracy and consistency of water right decrees, and to minimize the burden on the court and the claimants in a water right adjudication, the state has made the specialized expertise of IDWR available through IDWR's investigation and reporting function.¹

The resources the state has made available for this function, however, are limited. IDWR has the duty to conduct a reasonable investigation within the spending authority granted by legislative appropriation. Those resources are not sufficient for IDWR to exhaustively investigate each and every potentially relevant fact regarding each and every claim and to make a conclusive determination of the water right. Rather, IDWR reviews the claim and the information already available to IDWR, and conducts such further investigation as is reasonable to determine whether there is sufficient information to support recommendation of the water right to be decreed.

To make the most efficient use of the available resources, IDWR must make determinations as to what is a reasonable level of investigation for various classes of claims prior to making a recommendation to the court regarding any particular claim. IDWR has employed two primary mechanisms to identify a reasonable level of investigation. First, the statutes set criteria and IDWR has developed standards for various types of uses, requiring less information to support a claim to water within those standards and more information to support a claim outside those standards. Second, IDWR has adopted a "tier" approach, identifying classes of claims which for various reasons merit further investigation.

Generally, with claims based on beneficial use², IDWR conducts a "licensing type" field exam, which includes confirmation of the source, point(s) of diversion, purpose(s) of use, place(s) of use, and an examination of the water delivery system and the quantity of water beneficially used. IDWR also contacts the claimant to obtain information supporting the priority date claimed. This level of examination is conducted because there has been no prior administrative or judicial

¹ Idaho Code §§ 42-1410 and 42-1411.

² Water rights based on beneficial use are sometimes referred to as constitutional rights or grandfather rights.

confirmation of the existence and extent of a water right based on beneficial use.³

Generally, for water rights that have been previously confirmed by license or decree, IDWR begins its examination by comparing the claim to information already available to IDWR. Other information includes, for example, IDWR's decree files; license, permit and transfer files; remotely sensed data, including Landsat imagery of irrigated acres and aerial photography; watermaster reports; applicable laws and IDWR's interpretation of those laws in light of the water resource policies of the state; etc. If there are discrepancies between the claim and information already available to IDWR, IDWR conducts further investigation to resolve the discrepancy, which generally includes a field exam and/or contacting the claimant for further information. Thus, where there has been a prior judicial or administrative confirmation of the existence and extent of a water right, IDWR uses information already available to IDWR to limit its review to issues identified by its discrepancy analysis.

Finally, IDWR uses both the court-ordered notice of error process⁴ and the statutory objection process to identify claims which merit further review. If this further review yields new information that supports a different description of the water right, then IDWR will revise its recommendation (in the case of a notice of error) or submit a supplemental director's report or offer a standard form 5 (in the case of an objection), consistent with the new information.⁵

Further information as to IDWR's standards and procedures for the investigation and recommendation is set forth in IDWR's Claim Investigation Manual, Field Examiner's Handbook, Administrative Memorandums, and

³ IDWR conducts a more summary investigation of beneficial use claims limited to domestic and/or stockwater use up to 0.24 cfs.

⁴ The notice of error process, as originally conceived and implemented, was limited to disagreements between the claimant and IDWR as to fairly straight-forward "errors", such as clerical errors or other readily verifiable matters. Based on its experience in the test basins, IDWR has subsequently recommended that the notice of error process be expanded to address any type of perceived error, as well as to address disagreements between claimants.

⁵ This "tiered" approach to determining a reasonable level of investigation is embodied in the statutory framework for water right adjudications. See §42-1410 (which provides for the discretion of the director in determining the level of IDWR's investigation, and allows but does not require the agency to conduct hearings), and §42-1412 (which authorizes IDWR to submit supplemental reports, and authorizes the court or the parties to request further investigation by IDWR in contested subcases). The tiered approach embodied in the statutory framework promotes efficiency and minimizes the burden on the court and the claimants by providing a report/objection process to identify disputed matters, and reserving the highest level of investigation for disputed matters.

B. METHODOLOGY TO DETERMINE IRRIGATED ACREAGE

The area of irrigated acreage can be determined by information obtained from scaled and non-scaled photographs of the place of use supplied by one of several U.S. government agencies. The use of aerial photography by the U.S. government dates back to 1937, when the U.S. Department of Agriculture, Agricultural Stabilization and Conservation Service (ASCS, now known as the Farm Service Agency, or FSA) began photographing selected counties of the United States on a repetitive basis. This coverage continues today and aerial photos are used by the ASCS (FSA) to figure acreage planted on farms for purposes of managing farm programs. Photos used by IDWR typically include: ASCS photos and 35 mm color slides⁷; NAPP photos⁸; ortho-photoquads⁹; and U2

⁶ These documents set forth general standards and procedures and do not address all possible exceptions to the general standards and procedures. In addition, as a result of its experience in the test basins, statutory changes, judicial decisions, etc., IDWR has identified refinements and revisions to its standards and procedures for the investigation and recommendation of claims that have not yet been included in these documents.

⁷ Both the photos and slides are high oblique and vertical aerial photography. The ASCS photos are scaled and have selected features, such as roads, section lines, ditches, and field acreage superimposed on them by the ASCS. The color slides are simply color slides frequently taken with hand-held 35mm equipment. IDWR staff typically obtain copies (which are not scaled) of maps for lands claimed as the place of use during the investigation of the claims, either from the claimant or from the local ASCS office. Color slides may also be checked-out from the local ASCS office as needed; IDWR sometimes obtains the color slides as they are discarded by the local ASCS office.

⁸ NAPP (National Aerial Photography Program) photos are all color-infrared aerial photography. IDWR obtained coverage for most of the Snake River Basin, including all of the test basins; the photos are primarily from flights during 1987 and 1988, though some are from 1986 or 1989. The date of the flight is shown on the photo. NAPP photography is available from the U.S. Geological Survey Earth Resources Observation Systems (EROS) data center in Sioux Falls, South Dakota.

⁹ The full name for an ortho-photoquad is "orthographic photograph quadrangle." These are black and white photoimages prepared from aerial photographs that have been rectified to eliminate image displacement due to terrain relief that cover a systematically subdivided area of latitude and longitude. IDWR obtained coverage for most of the Snake River Basin, including all the test basins; the photos are primarily from flights during the 1970's. The date of the flight is shown on the quad sheet. Most of the orthophotos were obtained from the U.S. Geological Survey National Cartographic Information Center (NCIC) in Menlo Park, California. In some areas, maps were not available from U.S.G.S. but were available from other agencies, such as the United States Department of Agriculture, Forest Service.

aerial photos¹⁰.

A photographic "scale," like a map scale, is an expression that states that one unit of distance on a photograph represents a specific number of units of actual ground distance.

$$S = \text{Photo scale} = \frac{\text{Photo distance}}{\text{Ground distance}} = \frac{d}{D}$$

The scale may be expressed as unit equivalents, representative fractions, or ratios. For example, if 1 mm on a photo represents 25 m on the ground, the scale of the photo can be expressed as 1 mm = 25 m (unit equivalents), or 1/25,000 (representative fraction), or 1:25,000 (ratio).

The photo(s) used by IDWR personnel have varying scales. The ASCS photographs have map features drawn in by the ASCS. These photos are stated to be "not to scale," but do include the field acreage as determined by ASCS written on the places of use. NAPP photography is at a nominal scale of 1:40,000; U2 aerial photography is at a nominal scale of 1:120,000; and ortho-photoquads have a scale of 1:24,000.

To determine the area used, IDWR staff employed various transparent overlays, known as grid templates. These templates are available at most blueprint supply stores. One type consists of lines forming rectangles or squares of known area in the same scale that is utilized in the scaled photograph. The grid is placed over a scaled photograph and the area of a ground unit is estimated by counting grid units that fall within the unit to be measured.

Another commonly used grid is the dot grid, which is composed of uniformly spaced dots on a transparent overlay. The grid is placed over the photograph and the dots falling within the region to be measured are counted. The value assigned to each dot is dependent on the scale of the photograph. First, the number of acres per centimeter (or other measuring unit) is computed. This figure is then divided by the number of dots per measuring unit on the grid to obtain the acreage represented by each dot. For instance, a square 3.4 cm on each side containing 640 dots will cover 160 acres on a photo with a nominal

¹⁰ These photos are color-infrared aerial photography obtained by the National Aeronautics and Space Administration (NASA) Airborne Instrumentation Research Project, and available from EROS. IDWR obtained coverage of most of the southern portion of the Snake River Basin, most of which was flown in 1977. In addition, because the State of Idaho was part of an ongoing project with NASA to photograph selected areas, photography from various areas in various years is also available. The date of the flight is shown on the photo.

scale of 1:24000; 640 dots divided by 160 acres equals 4 dots to the acre, thus 1 dot equals 0.25 acres.

Because of its simplicity, the grid system is a practical method to determine the size of irrigated areas; it nonetheless requires some training and experience to be used effectively.

For non-scaled photos, such as the ASCS 35 mm photos, IDWR did not directly make acreage determinations. Instead, these photos were used to confirm whether the place of use and amount of irrigated acreage had changed for that year according to common landmarks visible in the photographs.

ALAN G. LANCE

Attorney General

State of Idaho

CLIVE J. STRONG

Deputy Attorney General

Chief, Natural Resources Division

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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 No. 36-00039N

)

Case No. 39576

)

AFFIDAVIT OF STEVE CLELLAND

)

REGARDING CLAIM NO. 36-00039N

)

STATE OF IDAHO

)

) ss.

County of Twin Falls

)

I, STEVE CLELLAND, being first duly sworn on oath, depose and state as follows:

1. I am a Senior Water Resource Agent with the Idaho Department of Water Resources (IDWR).

2. My work address is Idaho Department of Water Resources (IDWR), Southern Regional Office, 222 Shoshone St. East, Twin Falls, ID 83301-6105. I reside in Twin Falls, Idaho.

3. My educational background and work history both outside and within IDWR are detailed in my Affidavit of Steve Clelland as to the Investigation of Claims in the Hagerman Area.

4. As part of my duties as a senior water agent, I investigated claim no. 36-00039N. The pertinent details of that investigation are as follows:

A. On July 24, 1990, IDWR water agent Helen Thornton and I conducted a field examination to verify certain aspects of claim no. 36-00039N.

B. During that field examination, I observed no irrigation or any other use on the claimed place of use.

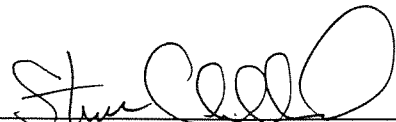
C. During that field examination, I observed that no delivery system existed to apply water out of the Buckeye ditch to the claimed place of use.

D. On February 13, 1991, I again visited the claimed place of use pursuant to claim no. 36-00039N. At that time, I observed no irrigation or any other use on the claimed place of use, nor did I observe any delivery system or ditch by which water out of the Buckeye ditch could be applied to the claimed place of use. During that visit, I took the photographs present in the split right analysis file for claim no. 36-00039A, copies of which are in the claim file for claim no. 36-00039N. Those photographs are consistent with my observations and show no irrigation or any other use on the claimed place of use, nor any delivery system or ditch by which water out of the Buckeye ditch could be applied to the claimed place of use.

5. During my final review of the claim file on February 6, 1992, I observed that

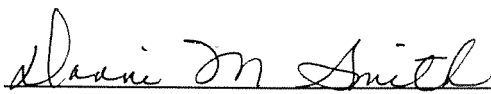
the pertinent ASCS color slide from June, 1980 showed no irrigation in any portion of the Willowbrook subdivision. I also observed that the pertinent NAPP photograph showed no irrigation in any portion of the Willowbrook subdivision.

DATED this 1st day of July, 1996.



STEVE CLELLAND

SUBSCRIBED AND SWORN to before me this 1st day of July, 1996.



Notary Public for the State of Idaho
Residing at: BOISE
My commission expires: 12-5-2000

CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

BRENT KING
CHARLES L. HONSINGER
Deputy Attorneys General
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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 No. 36-00039N
	)	
Case No. 39576	)	AFFIDAVIT OF HELEN THORNTON
	)	REGARDING CLAIM NO. 36-00039N
	)	
STATE OF IDAHO	)	
	) ss.	
County of Ada	)	

I, HELEN THORNTON, being first duly sworn on oath, depose and state as follows:

1. I am currently a Hydrogeologist with the Idaho Department of Water Resources (IDWR). At the relevant time for purposes of this affidavit, I was employed as a Senior Water Resource Agent with IDWR.

2. My work address is Idaho Department of Water Resources (IDWR), 1301 N. Orchard, Boise, ID 83706. I reside in Boise, Idaho.

3. My educational background and work history both outside and within IDWR are detailed in my Affidavit of Helen Thornton as to the Investigation of Claims in the

Hagerman Area.

4. As part of my duties as a senior water agent, I investigated claim no. 36-00039N. The pertinent details of that investigation are as follows:

A. On July 24, 1990, IDWR water agent Steve Clelland and I conducted a field examination to verify certain aspects of claim no. A36-00039N.

B. During that field examination, I observed no irrigation or any other use on the claimed place of use.

C. During that field examination, I observed that no delivery system existed to apply water out of the Buckeye ditch to the claimed place of use.

DATED this 1st day of July, 1996.

Helen L. Harrington-Thornton
HELEN L. HARRINGTON-THORNTON

SUBSCRIBED AND SWORN to before me this 1st day of July, 1996.

Dennis M. Smith
Notary Public for the State of Idaho
Residing at: Boise ID
My commission expires: 12-5-2000