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DISTRICT COURT-SRBA
TWIN FALLS CO., IDAHO
FILED

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00061

In Re SRBA

Twin Falls County Civil Case No. 39576
Sub-Case No. 36-00061

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. 36-00061

The Director of the Idaho Department of Water Resources (IDWR) submits this report regarding claim to water right no. 36-00061 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 Jr., 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. 36-00061. Mr. Shaw reviewed and verified IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights, which is incorporated by reference herein. 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.

Jeff Peppersack, Adjudication Engineer, prepared and verified IDWR's Report Regarding Evaluation of Irrigation Diversion Rates, which is incorporated by reference herein. The Affidavit of Jeff Peppersack describes Mr. Peppersack's education and work experience, and is incorporated by reference herein. Mr. Peppersack also reviewed IDWR's Report Regarding Consumptive Use for Irrigation in the Hagerman Area, described below.

David R. Tuthill Jr., Acting Adjudication Bureau Chief, prepared IDWR's Report Regarding Consumptive Use for Irrigation in the Hagerman Area, which is incorporated by reference herein. Mr. Tuthill also reviewed this Report Regarding Claim To Water Right No. 36-00061. 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. 36-00061. 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 Nos. 36-00061, 36-00062 and 36-00063 describes Mr. Clelland's investigation of the quantity and place of use of this water right; it is attached hereto and incorporated by reference herein.

Helen L. Harrington-Thornton, formerly Senior Water Agent and currently Hydrogeologist, participated in the field examination for claim no. 36-00061. 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 Nos. 36-00061, 36-00062, and 36-00063 describes her investigation of the quantity and place of use of this water right, 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. 36-00061

A. Basis of Claim

Claim no. 36-00061 was filed with IDWR by Howard L. and Rhonda K. Morris on August 26, 1988.¹ The claim is to a one of three rights decreed to Mr. and Mrs. L.W. Hoffman in the *New International Mortgage* decree, entered in 1932.² The water rights decreed to the Hoffmans are numbered in IDWR's files as water right nos. 36-00061, 36-00062, and 36-00063. All three were decreed for use on the same lands; all three were decreed, along with numerous others, for "irrigation, domestic, power and other purposes." The claimants also claimed right nos. 36-00062 and 36-00063, filed objections to the director's recommendations as to these claims, and filed motions for summary judgment in the subcases as to these claims. IDWR's Report Regarding Claim to Water Right No. 36-00062 and IDWR's Report Regarding Claim to Water Right No. 36-00063 are incorporated by reference herein.

B. Name and Address of Claimant

The name and address of the claimant set forth in the claimant's motion for summary judgment is the same as recommended in the director's report.

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.

C. Source of Water

The source of water is described in the director's report as Hoagland Tunnel, tributary to Billingsley Creek. The claimant's objection does not contest the source. The claimant's motion for summary judgment describes the source as Weatherby Springs.

Hoagland Tunnel is a source distinct from the source known as Weatherby Springs. The two sources are hydrologically related, in that they are both part of an area known as the Weatherby Springs Complex, and are in close proximity to each other (both in the same 10 acre tract). They are nonetheless distinguishable in that each has a distinct location, in that the flow of each is diverted by different systems and delivered pursuant to different water rights, and in that the tunnel was created and/or augmented through the construction of a concrete-lined tunnel, while the source known as Weatherby Springs is not so constructed. Hoagland Tunnel tributary to Billingsley Creek is therefore the more accurate description of the source of this right, and description of the source in this manner helps to distinguish the various rights diverted from the Weatherby Springs Complex.³

D. Date of Priority

The priority date set forth in the claimant's motion for summary judgment is the same as recommended in the director's report.

E. Point of Diversion

The point of diversion set forth in the claimant's motion for summary judgment is the same as recommended in the director's report.

F. Purpose of Use

The purposes of use stated on the notice of claim were irrigation, stockwater and domestic. The purposes of use recommended in the director's report include all three claimed purposes of use. The objection did not contest the purpose of use.

³ The director's report includes the body of water to which the source of the right is tributary for each water right in the director's report, except for rights to ground water. IDWR adopted this standard for the description of the source of water rights because there are so many instances, sometimes in the same administrative basin, where different surface water sources bear the same name. IDWR relied upon the following in reaching its conclusion: Idaho Code §42-1411(2) (which provides that the director shall determine the source of the right to the extent the director deems appropriate and proper to define and administer water rights acquired under state law).

The claimant's motion for summary judgment now seeks to add wildlife, recreation, aesthetics, and "diversion system maintenance."⁴

The description of the purposes of use of this right in the decree is ambiguous in that it describes the purposes of use for the three Hoffman rights and others in the same list collectively as irrigation, domestic, power and other purposes," rather than specifically identifying each purpose of use for each right.⁵ IDWR's investigation confirmed the use of water for irrigation, stockwater and domestic purposes, as further described below in the sections addressing quantity and place of use. Neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for the other purposes listed in the motion, either pursuant to the right as originally appropriated or as currently used.⁶ Such information is necessary not only to confirm the use but to quantify the amount of water beneficially used for that purpose.

G. Quantity of Water Used

The notice of claim states a quantity of 2.22 cfs for irrigation, 0.07 cfs for stockwater, 0.04 cfs for domestic, and a total quantity of 2.22 cfs. The quantity recommended in the director's report is the same as claimed. The objection contests quantity, but does not state an amount. The claimant's motion for summary judgment states a total quantity of 2.22 cfs, but does not state a quantity for each

⁴ The filing fee for claims other than small domestic and stockwater claims consists of a flat \$50.00 fee, plus a variable fee of \$1.00 per acre for any claimed irrigation use, plus a per cfs variable fee for other claimed purposes of use. The filing fee for small domestic and stockwater claims is \$25.00; no filing fee is required for portions of rights for small domestic and stockwater uses. The filing fee paid for this claim was limited to the purposes of use claimed in the notice of claim, and no filing fee was paid for the domestic and stockwater portion.

⁵ IDWR relied upon the following in reaching its conclusion: *Morgan v. Udy*, 58 Idaho 670, 79 P.2d 295 (1938) (a water right decree that omitted the description of the point of diversion necessarily determined the point of diversion but was ambiguous as to its location).

⁶ IDWR relies upon the following in reaching this conclusion: Idaho Code §42-1427 (which allows an ambiguity in a prior decree or license to be resolved based on current beneficial use); the statement of the Presiding Judge that this section "cannot change or exceed the previously decreed or recorded element of the decreed or licensed right" nor "be used to claim an expansion of use beyond the beneficial use existing at the time the right was originally memorialized in a decree or license," Revised Memorandum Decision and Order on Basin-Wide Issue 4, dated May 17, 1995, at page 9; and the statement of the Presiding Judge that, "the purpose of use is defined by the intentional application of water to an intended beneficial use of water," Memorandum Decision and Order Re: Basin-Wide Issue 5, dated April 26, 1996, at page 8.

purpose of use. The quantity decreed for right no. 36-00061 in the *New International Mortgage* decree is 2.22 cfs.

1. Necessity for quantity for each purpose of use

The director's report includes a quantity for each purpose of use in addition to the total quantity. This information is necessary to indicate whether and to what extent the total quantity or any portion of the total quantity is used for multiple purposes, or whether and to what extent the total quantity is allocated among the listed purposes of use. For example, if a claimant diverted one cfs through a hydropower facility and then used that same water for irrigation, the amount for each purpose of use would be 1 cfs, with a total diversion rate of 1 cfs. If a claimant diverted one cfs, but used one-half in a hydropower facility and the other half for irrigation, the amount for each purpose of use would be 0.5 cfs, with a total diversion rate of 1 cfs.

Omission of a quantity for each purpose of use would result in ambiguities in the definition of the right that could result in enlargements in use that would result in expansion of the right and injury to other water users. In the example above, assume the claimant who used one-half of a 1 cfs right in a hydropower facility and the other half for irrigation decided to start using the full cfs in a hydropower facility, followed by use of the full cfs for irrigation. If the hydropower use were a year-round use, then the use of the irrigation half outside the irrigation season for hydropower use would result in injury to junior water users outside the irrigation season who were previously subject to a prior use of one-half cfs who are now subject to a prior use of 1 cfs. In addition, if the half cfs formerly used only for hydropower were also used for irrigation, junior water users during the irrigation season would be injured by the use of this half cfs for a more consumptive purpose.⁷

2. Quantity for irrigation

As noted above, the claimant claimed a quantity of 2.22 cfs for irrigation and IDWR recommended 2.22 cfs for irrigation. 2.22 cfs is also the quantity decreed in the *New International Mortgage* decree. Any further information as to the basis for IDWR's recommendation as to quantity for irrigation therefore appears to be unnecessary.

⁷ This further quantification is provided pursuant to Idaho Code §42-1411(2) (which provides for IDWR to determine the quantity of water used to the extent the director deems appropriate to define and administer the water right).

3. Quantity for stockwater

As noted above, IDWR recommended a quantity of 0.07 cfs for stockwater. In addition, the recommendation includes a further description of non-irrigation uses, which states: STOCKWATER, 300 RANGE [CATTLE].

This right was claimed for 0.07 cfs for stockwater for 300 head of cattle. IDWR recommended 0.07 cfs based on the claim and its guidelines for quantity for stockwater use. The 0.07 cfs is the standard for 300 head of range cattle. The guidelines for quantity for stockwater use are described in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights. Neither the claimant nor IDWR's investigation has yielded information which would confirm the beneficial use of a greater quantity for stockwater.

As noted above, the director's report includes a further description of non-irrigation uses by number and type of head which is not included in the claimant's motion for summary judgment. The further description of non-irrigation uses is based in part on the notice of claim. Additional information as to the basis for the further description of non-irrigation uses is set forth in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights. As part of Basin Wide Issue 12, however, IDWR has proposed that the further description of non-irrigation use be rephrased as: THE QUANTITY FOR NON-IRRIGATION USE IS LIMITED TO THE AMOUNT OF WATER BENEFICIALLY USED FOR: STOCKWATER, 300 RANGE CATTLE. The basis for this rephrasing is also described in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights.⁸

4. Quantity for domestic purposes

As noted above, IDWR recommended a quantity of 0.04 cfs for domestic. In addition, the recommendation includes a further description of non-irrigation uses, which states: DOMESTIC, 1 HOME.

This right was claimed for 0.04 cfs for domestic use for one home. IDWR recommended 0.04 cfs based on the claim and its guidelines for quantity for domestic use. The 0.04 cfs is the standard for one home. The guidelines for quantity for domestic use are described in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights. Neither the claimant nor IDWR's investigation has

⁸ Special Master Haemmerle has issued his recommendation regarding Basin Wide Issue 12; a motion by the United States for reconsideration is pending.

yielded information which would confirm the beneficial use of a greater quantity for domestic use.

As noted above, the director's report includes a further description of non-irrigation uses by number of households. The further description of non-irrigation uses is based in part on the notice of claim. Additional information as to the basis for the further description of non-irrigation uses is set forth in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights. As part of Basin Wide Issue 12, however, IDWR has proposed that the further description of non-irrigation use be rephrased as: THE QUANTITY FOR NON-IRRIGATION USE IS LIMITED TO THE AMOUNT OF WATER BENEFICIALLY USED FOR: DOMESTIC, 1 HOME. The basis for this rephrasing is also described in IDWR's Report Regarding Quantification of Small Domestic and Stockwater Rights.

5. Quantity for other purposes

As to the quantity for other purposes of use stated in the claimant's motion for summary judgment, neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for other purposes, as noted in section F above. Therefore, IDWR does not have information that would confirm the quantity used for the other purposes.

H. Period of Year Water is Used for Each Purpose of Use

1. Irrigation

Both the notice of claim and director's report state a period of use of 3/15 to 11/15 for irrigation. The claimant's objection states a period of use of 1/1 to 12/31. The claimant's motion for summary judgment states the period of use as "the irrigation season." The *New International Mortgage* decree does not state a period of use for irrigation.

The recommended season of use is consistent with season of use standards for irrigation developed by IDWR for various climatic regions throughout the state, which are based on a 75% chance of a 24 degree Fahrenheit frost. In addition, the director's report included general provision 12b, which allowed use of water for irrigation outside the season of use stated in the description of the individual right subject to certain conditions. In the Memorandum Decision and Order Re: Basin-Wide Issue 5, the Presiding Judge concluded that general provision 12 is not necessary and would not be decreed. This decision further provided that "all decrees for irrigation in the SRBA shall set the period of use as the "irrigation season." Order, pp.

15-16. The district court denied a subsequent motion for permission to appeal the decision. Pending any further proceedings on the decision, any further statement of the basis for IDWR's recommendation as to the season of use for irrigation appears to be unnecessary.

2. Stockwater and domestic purposes

The period of use claimed on the notice of claim and recommended in the director's report is 1/1 to 12/31 for stockwater and domestic. The claimant's motion for summary judgment states the period of use as year-round, which is for all intents and purposes the same as recommended in the director's report.

3. Other purposes

As to the season of use for other purposes of use stated in the claimant's motion for summary judgment, neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for other purposes, as noted in section F above. Therefore, IDWR does not have information that would confirm the season of use for the other purposes.

I. Legal Description of the Place of Use

1. Place of use for each purpose of use

The director's report includes a place of use for each purpose of use. This information is appropriate and necessary both to define and to administer water rights, as illustrated by the following example. Assume an appropriator has a water right to irrigate lands in each of four quarter-quarter sections (40-acre tracts) in a quarter-section (160-acre tract), and for domestic use for one home in the NE quarter-quarter section. The appropriator then sells the SW quarter-quarter, with appurtenant water rights, and the buyer files a notice of change in ownership with IDWR (which splits the water right). Absent the identification of the place of use for the domestic use in the NE quarter, IDWR would not know, without further investigation and determination of the water right, whether the domestic use remained with the purchaser or was conveyed to the buyer. To take the example one-step further, if the new owner were then to build a home and start using the water right for domestic purposes, IDWR would not know, without further investigation and determination of the water right, whether it was the buyer or the seller who was using water for domestic purposes without a valid right for that purpose.

2. Irrigation

The legal description of the place of use for irrigation recommended in the director's report is the same as the notice of claim, except that the director's report recommends 4 irrigated acres less than claimed in one quarter-quarter section. The objection contests the recommended place of use only as to the difference in the number of irrigated acres. The legal description of the place of use for irrigation in the claimant's motion for summary judgment nonetheless differs from the description in the director's report in the following respect, in that the two tracts in section 31 are described in the claimant's motion for summary judgment as the NWNW and the SWNW. These tracts are described in the director's report as Lot 1 (NWNW) and Lot 2 (SWNW). The legal description of these tracts as shown by U.S. government plat maps of the public land survey system are the government lot numbers. (The description of the claimant's lands in the deed attached to the motion for summary judgment also describe the claimant's lands as portions of these two government lots.) The quarter-quarter descriptions in the parentheses are not the actual legal descriptions; these designations are provided for the convenience of those who do not have ready access to U.S. government plat maps.

As to the difference in the number of irrigated acres, the claimant's lands as described in the deed include those portions of Lot 1 and Lot 2 "south of the North Bank of John Curran Irrigation Ditch." The claimant's lands thus include the ditch. The irrigated acres recommended in the director's report include all of the lands in Lots 1 and 2 south of the Curran ditch. The recommended irrigated acres thus exclude the ditch. The recommendation and the claimant's motion for summary judgment both state 30 acres for Lot 2; the difference is between the 5 acres claimed and the 1 acre recommended in Lot 1. One acre is IDWR's best estimation of the size of the lands south of Curran ditch in Lot 1. IDWR Senior Water Resource Agents Steve Clelland and Helen Thornton confirmed the irrigation of lands south of Curran ditch by personal observation and aerial photography. The examination of the place of use for this claim is described in the Affidavit of Steven C. Clelland Regarding Claim Nos. 36-00061, 36-00062 and 36-00063, and the Affidavit of Helen L. Harrington-Thornton Regarding Claim Nos. 36-00061, 36-00062, and 36-00063.

3. Stockwater

The legal description of the place of use for stockwater recommended in the director's report is one of the quarter-quarter sections in which irrigated acres are recommended (the SENE S36). The stockwater use consists of corrals located in this quarter-quarter section, which was confirmed by IDWR Senior Water Agents Steve Clelland and Helen Thornton through personal observation and aerial photography.

Stockwater use is not recommended in each quarter-quarter section in which irrigated acres are recommended, as claimed in this case and as IDWR has recommended for other water rights; in this instance the irrigation system is a closed system wherein water is delivered through pipes and sprinklers, rather than open ditches from which stock might water.

IDWR's recommendation of the place of use is contested only with respect to the number of irrigated acres. In the claimant's motion for summary judgment, the claimant asserts that the place of use for stockwater is the same quarter section where there are irrigated acres. Neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for stockwater purposes pursuant to this right within quarter-quarter sections other than the one recommended.

4. Domestic

The legal description of the place of use for domestic recommended in the director's report is one of the quarter-quarter sections in which irrigated acres are recommended (NENE S36). This is the same place of use for domestic described on the notice of claim, and was confirmed by IDWR Senior Water Agents Steve Clelland and Helen Thornton through personal observation and aerial photography. As noted above, IDWR's recommendation as to the place of use is contested only with respect to the number of irrigated acres. In the claimant's motion for summary judgment, the claimant asserts that the place of use for domestic is the same quarter sections where there are irrigated acres. Neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for domestic purposes pursuant to this right within quarter-quarter sections other than the one claimed and recommended.

5. Other purposes

As to the legal description of the place of use for other purposes of use stated in the claimant's motion for summary judgment, neither the claimant nor IDWR's investigation has yielded information that would confirm the beneficial use of water for other purposes, as noted in section F above. Therefore, IDWR does not have information that would confirm the place of use for the other purposes.

J. Annual Volume of Consumptive Use

The notice of claim states an annual volume of consumptive use of 375 AFY, or 3.0 AFY per irrigated acre. The annual volume of consumptive use recommended

in the director's report is 363 AFY, or 3.0 AFY per acre. The claimant's objection contests the recommended consumptive use, but does not state an amount. The claimant's motion for summary judgment states an amount of 562.5 AFY, or 4.5 AFY per acre. The Affidavit of Charles E. Brockway, submitted by the claimant in support of the motion for summary judgment, states "that 3.75 acre feet per acre per annum is the amount of consumptive use that is reasonable [in the Hagerman area] based upon a yield of ten tons [of alfalfa] per acre." Applying this standard, the total annual consumptive use volume would be 453.75 AFY for the 121 recommended acres, or 468.75 AFY for the 125 claimed acres.

IDWR developed standards for annual volume of consumptive use for the various climatic areas throughout the state. The standard for the area in which the claimant's place of use is located is 3.0 AFY. IDWR's recommendation is based on this standard. The development of IDWR's standards for annual volume of consumptive use is described in IDWR's Report Regarding Evaluation of Irrigation Diversion Rates. IDWR has conducted further analysis of the annual volume of consumptive use based on further information IDWR received subsequent to its original analysis. The further analysis is described in IDWR's Report Regarding Consumptive Use for Irrigation in the Hagerman Area. Based on this further analysis, IDWR recommends an annual volume of consumptive use of 3.5 AFY per acre, for a total of 423.5 AFY for the 121 recommended acres. (This is the total annual consumptive use volume for this right and right no. 36-00062, as further described in section K below.)

In response to the request of the Presiding Judge, the director filed an Amended Director's Report for Reporting Area 3 (Basin 36), which substantially reduced the number of general provisions in the director's report. Attachment 2 to the amended report explains the changes made to the general provisions, and further explains the changes to the list of recommended rights necessitated by the changes to the general provisions. The amended report deleted General Provision 14, which established that the recommended consumptive use is for the irrigation portion of the right only. As a result, the description of the annual volume of consumptive use for this right should contain the following language:

THE CONSUMPTIVE USE VOLUME IS ONLY FOR THE IRRIGATION PORTION OF THIS RIGHT.⁹

⁹ IDWR relied upon the following in reaching its conclusion: Idaho Code §42-1401A (Supp. 1996) (which provides that the determination of the annual volume of consumptive use for all uses of water other than irrigation need not be decreed unless reported in the director's report).

K. Conditions on the Exercise of the Right and Other Necessary Matters

The recommendation of this right in the director's report includes the following remarks:

THE APPROPRIATOR IS ENTITLED TO THE AMOUNT OF WATER DESCRIBED HEREIN FOR STOCKWATER PURPOSES AT A POINT OF MEASUREMENT WHERE THE DELIVERY DITCH ENTERS THE PLACE OF USE DESCRIBED HEREIN.

THE PORTION OF THIS RIGHT FOR STOCKWATER PURPOSES MAY BE DIVERTED SO LONG AS THE AMOUNT OF WATER DIVERTED AT THE POINT OF DIVERSION FOR STOCKWATER DOES NOT CONSTITUTE UNREASONABLE WASTE AND DOES NOT CONFLICT WITH THE PUBLIC INTEREST, AS DETERMINED BY THE DIRECTOR. WATER IS DELIVERED THROUGH THE HOAGLAND DITCH.

USE OF THIS RIGHT WITH RIGHT NO. 36-00062 IS LIMITED TO A TOTAL ANNUAL CONSUMPTIVE USE VOLUME OF 363 AF, AND TO THE IRRIGATION OF A COMBINED TOTAL OF 121 ACRES IN A SINGLE IRRIGATION SEASON.

The claimant's objection seeks deletion of remarks except the remark identifying the common name of the ditch. The claimant's motion for summary judgment seeks deletion of all the remarks.

1. Ditch name (third sentence)

In response to the request of the Presiding Judge, IDWR submitted IDWR's Report for September 19, 1995 Status Conference. In this report, IDWR indicated that it had reviewed its use of remarks in the description of the individual water right, both to address concerns identified by the court, and to separate explanatory material from material the Director recommends be included in the decree of water rights pursuant to the 1994 amendments to the adjudication statute.¹⁰ The remark identifying the common name of the ditch through which the water right is delivered is explanatory material.

2. Stockwater (first and second sentences)

The first two remarks were erroneously included in the recommendation of this right as the result of a coding error. These remarks are sometimes included to quantify stockwater use outside the irrigation season where an irrigation ditch with substantial conveyance losses that carries a relatively large amount of water for

¹⁰ See Idaho Code §42-1411 (which addresses the form and content of director's reports).

irrigation pursuant to numerous water rights during the irrigation season is used to deliver a relatively small amount of water for a number of stockwater rights outside the irrigation season. In this instance, the diversion system from the Hoagland Tunnel is used to deliver a number of water rights, but the diversion system consists of a concrete-lined ditch and pipeline, in which the conveyance losses are not significant. The first two remarks should therefore be deleted from the recommendation of this right.

3. Combined use (fourth sentence)

As noted above, IDWR submitted IDWR's Report for September 19, 1995 Status Conference, in which IDWR indicated that it had reviewed its use of remarks in the description of the individual water right to address concerns identified by the court. One of the concerns identified by the court was the need to move remarks under the description of the individual elements of the water right to the extent possible. As also noted above, IDWR filed an Amended Director's Report for Reporting Area 3 (Basin 36), which substantially reduced the number of general provisions. Attachment 2 to the amended report explains the changes made to the general provisions, and further explains changes to the list of recommended rights necessitated by the changes to the general provisions. Attachment 3 to the amended report included samples of uncontested water rights, which were amended as explained in Attachment 2. One of the changes illustrated in these samples was the rephrasing and relocation of combined use remarks. The combined use remark listed above should similarly be rephrased and relocated as follows:

The following language should be included under the description of the place of use:

USE OF THIS RIGHT WITH RIGHT NO. 36-00062 IS LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 121 ACRES IN A SINGLE IRRIGATION SEASON.

The following language should be included under the description of annual volume of consumptive use:

USE OF THIS RIGHT WITH RIGHT NO. 36-00062 IS LIMITED TO A TOTAL ANNUAL CONSUMPTIVE USE VOLUME OF 423.5 AF. (The number of acre feet is higher than stated in the director's report, as described in section J above.)

Both remarks are appropriate and necessary to define and administer water rights, as further described below.¹¹

a. Irrigated acres

The description of the place of use of each right (nos. 36-00061 and 36-00062) describes the irrigated acres for that right as 121 acres. Inclusion of the additional language noted above in the description of the place of use for each right establishes that the two rights are used for the irrigation of the *same* 121 acres. Recommendation of the right in this manner accurately reflects actual use. More importantly, it avoids the possible misconception that the appropriator is entitled to use water on the sum of the irrigated acres pursuant to the two rights (121 plus 121, for a total of 242), which would be double the actual beneficial use, and would constitute an enlargement and would presumptively cause injury to other rights by increasing the total consumptive use under the two rights.¹²

b. Consumptive Use

With multiple rights for irrigation of the same parcel, IDWR does not state the annual volume of consumptive use for each right. Rather, IDWR includes a remark in each right stating the total annual volume of consumptive use under both rights. IDWR does not state a consumptive use for each right individually because the portion of the total annual volume of consumptive use that is actually consumed under each water right cannot reasonably be determined. The consumptive use volume provided by each right will vary from year to year depending on the portion of the total water supply provided under each water right in any given year. But because the rights are used in combination, the essential limit is the total annual consumptive use volume from both rights.

¹¹ IDWR relies upon the following in reaching its conclusion: Idaho Code §42-1411(2), which provides that the director shall determine the place of use and the annual volume of consumptive use to the extent the director deems *appropriate and proper* to define and administer water rights acquired under state law, and Idaho Code §42-1412(6), which provides that the decree shall contain or incorporate a statement of each element of a water right as stated in section 42-1411, as contrasted with language later in section 42-1412 providing for the inclusion of general provisions to the extent *necessary* to define and administer water rights.

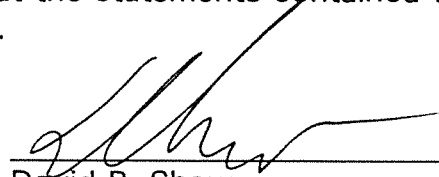
¹² IDWR relied upon the following in reaching its conclusion: *Hall v. Blackmun*, 22 Idaho 556, 126 P. 1047 (1912); Idaho Code §42-222 (prohibiting injury or enlargement from changes in use).

REPORT REGARDING CLAIM TO WATER RIGHT NO. 36-00061

State of Idaho)
) ss.
County of Ada)

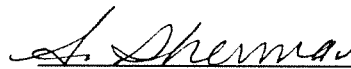
David B. Shaw, being first duly sworn, upon oath, deposes and says:

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: Boise ID
My commission expires: 11-14-1998

Certificate of Service

I certify that on the 1st day of July, 1996, I hand-delivered copies of the foregoing document, including all attachments, 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.

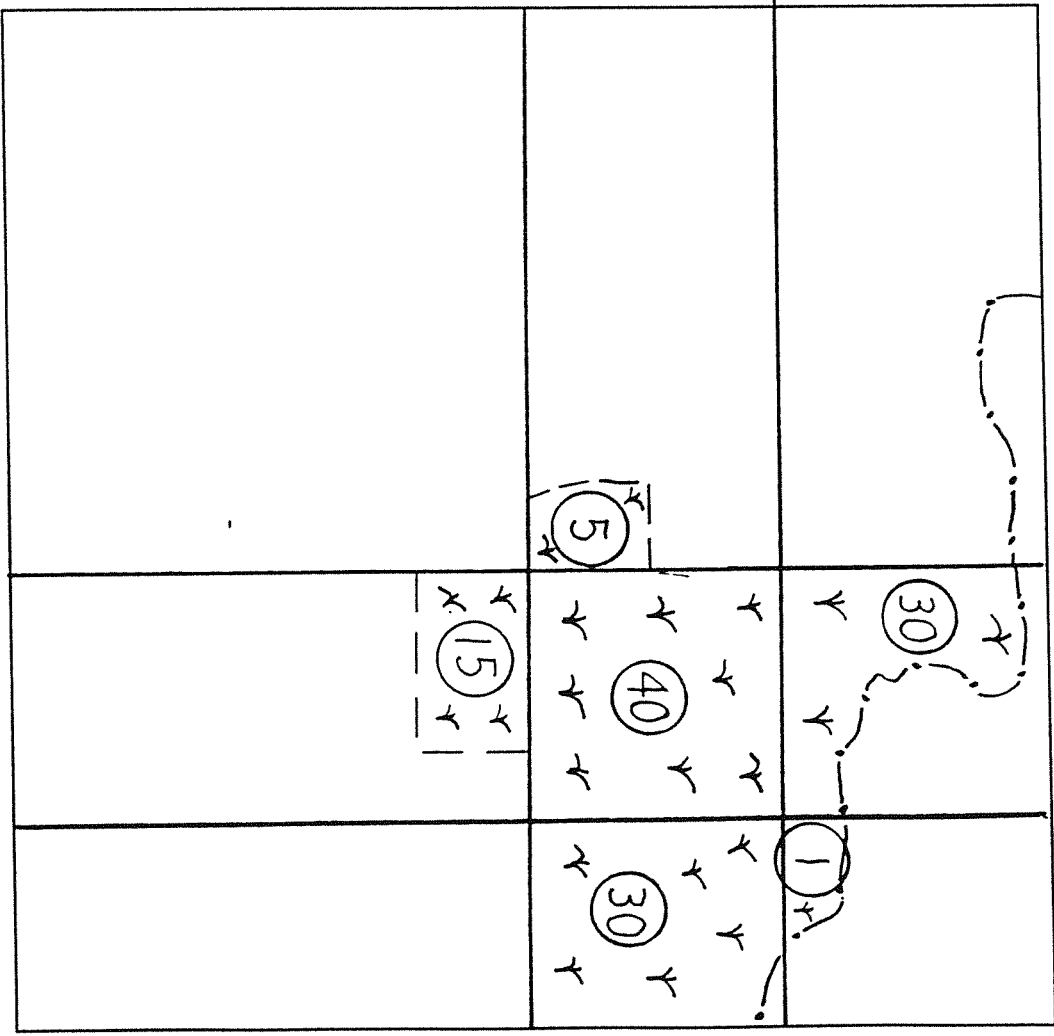
For non-scaled photos, such as the ASCS 35 mm photos, IDWR did not directly make acreage determinations. Instead, these photos were used to confirm whether the place of use and amount of irrigated acreage had changed for that year according to common landmarks visible in the photographs.

FIGURE 1

T. 7 S., R. 13 E.
NENE, SWNE, SENE, NESE
Section 36
T. 7 S., R. 14 E.
NWNW, SWNW
Section 31
Gooding County

Legend

—, — Curren ditch
—○ irrigated land



IDWR QUAD AA-69

Water Right No. 36-00061/62/63

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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. 36-00061, 36-00062, 36-00063
	)	
Case No. 39576	)	AFFIDAVIT OF STEVE CLELLAND
	)	REGARDING CLAIM NO. 36-00061,
_____	)	36-00062, 36-00063

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 rights agent, I investigated the acreage claimed as irrigated pursuant to claim nos. 36-00061, 36-00062 and 36-00063. The pertinent details of that investigation are as follows:

A. On August 21, 1990, IDWR water agent Helen Thornton and I conducted a field examination to verify the irrigated acreage claimed in claim nos. 36-00061, 36-00062 and 36-00063.

B. I observed that the water delivered pursuant to these claims had as its source the Hoagland tunnel. I observed that water delivered from the Hoagland tunnel was applied to acreage claimed as irrigated by the claimant.

C. I observed the existence of one home on the property. Using aerial photography, I confirmed the location of that home as being in the NENE quarter-quarter of Section 36.

D. I observed that stockwater was used only at the corrals. Using aerial photography, I confirmed the location of those corrals as being in the SENE quarter-quarter of Section 36.

E. Upon my return to the office, I used an orthophoto quad from 1974 with the grid system described in Appendix A to IDWR's Report Regarding Claim to Water

Right No. 36-00061 to measure the irrigated area and determined that acreage irrigated with water pursuant to these claims totaled 121 acres. My best estimate of the irrigated acreage south of the Curran ditch in Lot 1 was one acre. I also observed the pertinent NAPP photograph that showed as irrigated those areas I had observed were actually irrigated.

4. As part of my duties as a senior water agent, I also investigated the quantity of water delivered pursuant to claim nos. 36-00061, 36-00062, and 36-00063. The pertinent details of that investigation are as follows:

A. I observed that water pursuant to these claims was delivered from the source to the claimed place of use through a concrete lined ditch and a pipeline and pumped directly into a sprinkler system. Because of my observations, I concluded that conveyance losses to deliver water pursuant to this claim were insignificant due to the impermeable nature of the delivery system.

DATED this 1st day of July, 1996.

Steve Clelland
STEVE CLELLAND

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

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

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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 Nos. 36-00061, 36-00062, 36-00063
	)	
Case No. 39576	)	AFFIDAVIT OF HELEN THORNTON
	)	REGARDING CLAIM NOS. 36-00061,
	)	36-00062, 36-00063
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 rights agent, I investigated the acreage claimed as irrigated pursuant to claim nos. A36-00061, A36-00062 and A36-00063. The pertinent details of that investigation are as follows:

A. On August 21, 1990, IDWR water agent Steve Clelland and I conducted a field examination to verify the irrigated acreage claimed in claim nos. A36-00061, A36-00062 and A36-00063.

B. I observed that the water delivered pursuant to these claims had as its source the Hoagland tunnel. I observed that water delivered from the Hoagland tunnel was applied to acreage claimed as irrigated by the claimant.

C. I observed the existence of one home on the property.

D. I observed that stockwater was used only at the corrals.

5. As part of my duties as a senior water agent, I also investigated the quantity of water delivered pursuant to claim nos. A36-00061, A36-00062, and A36-00063. The pertinent details of that investigation are as follows:

A. I observed that water pursuant to these claims was delivered to the claimed place of use through a concrete lined ditch and a pipeline. Conveyance losses pursuant to these claims were calculated as insignificant. Through my observations, I concluded that the insignificant conveyance losses were due to the impermeable nature of the delivery system.

DATED this 14 day of July, 1996.

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

SUBSCRIBED AND SWORN to before me this 15th day of July, 1996.

L. Sherman
Notary Public for the State of Idaho
Residing at: Boise ID
My commission expires: 11-14-1998