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Department of Water Resources
Adjudication Bureau

Claimants:

Claimants listed in Exhibit A

Attorney Name and Address:

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

)

Case No. 39576

)

) CLAIMANTS' REPLY BRIEF
) ON SUMMARY JUDGMENT
)

I. THE COURT SHOULD NOT REQUIRE THE CLAIMANTS
TO RELITIGATE THEIR DECREED RIGHTS.

Claimants in these 24 subcases submit this reply to the State of Idaho's argument in opposition to summary judgment. The primary question is whether summary judgment should be granted on the previously decreed elements of the claimants' rights, given the admission of that decree along with an affidavit from each claimant pertaining to his or her right. Each affidavit establishes that the claimant is a successor in interest to the decreed right, has used the right and has not forfeited or abandoned the right.

1 The State opposes the motion, apparently based on nothing more than a
2 generalized misunderstanding of law which confuses the establishment of a right and,
3 therefore, the right to use as much water as is needed at any point in time up to the limit
4 of the right, with the notion that the right itself changes. More accurately put, the essence
5 of the State's position is that the extent of a water right may be irreversibly decreased (but
6 does not increase) because IDWR thinks the rightholder may be able to survive with less
7 water than confirmed to be a beneficial use by the New International Mortgage Bank ("NI")
8 Decree.

9 The claimants, on the other hand, maintain that their decreed rights fix the
10 maximum limits of beneficial use, and entitle them to use so much of that amount as
11 immediate needs require. United States v. American Ditch Ass'n., 2 F.Sup. 867 (D.Ct. Id.
12 1933). They further maintain that, while their rights may be lost through forfeiture,
13 abandonment or the like, they may not be diminished merely because IDWR thinks a lesser
14 amount is more reasonable. They adamantly oppose being required to relitigate their rights,
15 given the NI Decree, the absence of controversy with any party to the SRBA concerning
16 their rights, and the absence of specific facts creating a material issue.

17 Their concerns have been recognized by courts and addressed by treating prior
18 decrees as conclusive proof of rights, by application of principles of fairness, judicial
19 economy, finality and repose, and by application of res judicata in the proper circumstances.
20 For example, in Arizona v. California, 460 U.S. 605, 1035 Ct. 1382 (1983), the court
21 considered whether to reopen a 1964 decree in order to allow further litigation over the
22 number of "practicably irrigable acres" attendant to certain water rights. The court declined
23

1 to reopen the issue based on principles of finality and repose, even though neither res
2 judicata nor law of the case technically applied. It reasoned as follows:

3 "[A] fundamental precept of common-law adjudication
4 is that an issue once determined by a competent court is
5 conclusive. 'To preclude parties from contesting matters that
6 they have had a full and fair opportunity to litigate protects their
adversaries from the expense and vexation attending multiple
lawsuits, conserves judicial resources, and fosters reliance on
judicial action by minimizing the possibility of **1392
inconsistent decisions.'

7
8 In no context is this more true than with respect to rights
9 in real property. Abraham Lincoln once described with scorn
10 those who sat in the basements of courthouses combing
11 property records to upset established titles. Our reports are
12 replete with reaffirmations that questions affecting titles to land,
13 once decided, should no longer be considered open. Certainty
14 of rights is particularly important with respect to water rights in
the Western United States. The development of that area of the
United States would not have been possible without adequate
water supplies in an otherwise water-scarce part of the country.
The doctrine of prior appropriation, the prevailing law in the
western states, is itself largely a product of the compelling need
for certainty in the holding and use of water rights." [FN11]

15 FN11. Prior appropriation law serves western
16 interests by encouraging the diversion of water
17 for irrigating otherwise barren lands and for other
18 productive uses, and by insuring developers that
19 they will continue to enjoy use of the water.
"Appropriation law, developed in the arid West,
is usually thought of as a system of water-short
areas. Where there is not enough for everyone,
the rule of priority insures that those who obtain
rights will not have their water taken by others
who start later." F. Trelease, Cases and Materials
on Water Law 11 (1979).

21 Id. 460 U.S. at 619-620, 103 S.Ct. at 1391-1392. (citations omitted).

1 With the same concern for certainty and repose, the Idaho Supreme Court has
2 confirmed the validity of a prior decree, holding that the decree was

3 "[C]onclusive proof of diversion of the water, and of
4 application of the water to beneficial use, i.e., the decree is res
5 judicata as to the water rights at issue herein. Our holding of
6 the presumption of accuracy of the decree is in keeping with
7 the judicial policy of deterring the reopening of judgments long
8 after cases are decided and the files are closed."

9 * * * * *

10 "It would be unwise and unjust to overturn a decree
11 imposed 74 years ago which awarded water rights with a
12 priority of nearly 100 years ago. To the extent that the trial
13 court's ruling is inconsistent therewith, it is reversed.

14 Accepting the validity of the Rexburg decree, the water
15 right in question here is in some proportion appurtenant to the
16 Section 26 Gordon land, unless that right has at some time
17 been transferred to other property, abandoned, or negated in
18 some other way. We find no evidence in the record indicating
19 that the right to use the water on the Section 26 Gordon
20 property has been lost, under the facts as found by the trial
21 judge. The trial judge found that Byrne never conveyed either
22 the land in Section 26 or any water right appurtenant thereto.
23 Therefore, for plaintiff Crow to prevail, Byrne or his successors
must have lost the Section 26 right in some other way, such as
through adverse possession, prescriptive use, forfeiture, or
abandonment."

17 Crow v. Carlson, 107 Idaho 461, 465-466 (1984) (citations omitted); See, W.S. Ranch
18 Company v. Kaiser Steel Corp., 79 N.M. 65, 439 P.2d 714 (1968) (in a transfer proceeding,
19 a decree is proof of the nature and extent of a right, which the state engineer must accept
20 thus avoiding constitutional concerns about the engineer revising decrees, and preventing
21 future controversy concerning the extent of the right.)

1 The result in Crow and Arizona v. California is the result which should be
2 reached by summary judgment in these one-party subcases.

3 Here, the State's approach is unlike the principled analysis applied and the fair
4 result achieved in those cases. The State approaches the issue from such an intellectual
5 distance, and with such cursory legal analysis, it is unable to distinguish three very different
6 concepts, namely: (1) what must be done to establish a right; (2) once a right is established,
7 how much water a user is entitled to use at any point in time; and (3) what must occur in
8 order for the right to be lost, either by forfeiture or abandonment, or otherwise.

9 It is crucial to differentiate between these concepts in order to effectuate the
10 judicial role of preserving the certainty and finality demanded by the prior appropriation
11 doctrine and to protect property rights in water. It is crucial to distinguish a judicial
12 determination of rights which perpetually delimits the use from regulatory policing and
13 criminal law, which by definition do not diminish the rights, but instead regulate their
14 exercise to some lesser amount given the needs at any particular point in time. That
15 administrative function is not, as this court has ruled, a function for the judiciary in this
16 lawsuit.

17 It is also of paramount importance to not confuse the administrative function
18 which focuses on a reasonable exercise of a right given the immediate requirements of a
19 user, from the concept of losing the property right by forfeiture or abandonment. The law
20 is not so rigid, demanding, or blind to the equities that it would indulge the taking of an
21 established right of one who follows the law by diverting only so much of a right as is
22 needed from day-to-day, yet allow others to preserve greater rights by remaining less
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1 efficient. For tomorrow, both may have the same needs to the greater amount,
2 notwithstanding that one has enjoyed the ability to be more efficient for some interim
3 period.

4 The first legal concept, how a property right in water is established, was
5 addressed in the claimants' opening brief. There, numerous cases were cited which hold
6 that property rights vest to the extent of the original appropriation when water is diverted
7 and applied to beneficial use.

8 The State has cited no authority which contravenes those cases. It does not
9 argue that more is required to establish a right. Instead, it contends numerous cases hold
10 that rights are limited to reasonable beneficial use in terms of both their established amount
11 and in their subsequent exercise. But the State was able to cite only one case: Jenkins v.
12 Dept. of Water Resources, 103 Idaho 384 (1982).

13 Jenkins does not stand for the proposition that an established right shrinks to
14 a lesser quantum by the subsequent exercise of the right. The issue in Jenkins was whether
15 IDWR had authority to preliminarily determine if a right had been lost under recognized law
16 of forfeiture or abandonment, when a party to a transfer proceeding affirmatively asserted
17 that injury would result to its rights because it had acquired a right in the forfeited water.
18 Id. 103 Idaho at 387-388. The court held that IDWR could, at least preliminarily, determine
19 the abandonment and forfeiture issues. Id. 103 Idaho at 387. It was the third legal concept,
20 the loss of a right, not creation or exercise of it, which the Jenkins court addressed.
21 Compare, Application of Boyer, 73 Idaho 152, 160 (1952) (use of part of a right on some
22 lands sustains a holding of no forfeiture or abandonment). It did so only because a third-
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1 party asserted injury, and with the recognition that diminishment of priority imposes an
2 "undeniable injury" to a rightholder. Id. at 388.

3 The instant subcases are unlike Jenkins. IDWR's recommendations in these
4 subcases were made in 1992. The claimants objected to the recommended diminishment
5 of their rights in May of 1993. And now, more than three years later, not a one of the
6 thousands of parties to the SRBA has stepped forward to assert that their own rights would
7 be injured by confirmation of the prior decree of these rights.

8 The Jenkins court merely recognized that proof of abandonment, based on
9 intent and actual relinquishment, or forfeiture under I.C. § 42-222(2) based on complete
10 nonuse for 18 years resulted in a loss of right. It did not hold, or even suggest, that
11 established rights could be diminished because IDWR thought that contemporaneous
12 conditions make use of some portion of the right "nonbeneficial." Accordingly, Jenkins does
13 not support the State's position. Nor may one fairly conclude that support for its position
14 may be found in those other, undisclosed cases it purports to rely on.

15 In sum, rights are created under the prior appropriation doctrine when the
16 rights are first diverted and applied. Once that priority and the amount of beneficial use is
17 established, it is not the role of a court in a statutory adjudication to go beyond that function
18 and attempt to constrain the right to some notion of how it should be exercised. McGinness
19 v. Stanfield, 6 Idaho 372, 374 (1898). Nor is it necessary for the rightholder to use any
20 more of his right than, in his judgment, his immediate needs require in order to maintain
21 the right. E.g. United States v. Haga, 276 F. 41, 44 (D.Ct. ID 1921) (so long as an
22 appropriator is willing and able to beneficially use his right and does not forfeit or abandon
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1 it, it is not necessary that he maintain actual possession of the water in order to preserve the
2 right to it); C.f. Reynolds Irrig. Dist. v. Sproat, 70 Idaho 217 (1950) (destruction of a means
3 of conveyance does not destroy an established right); Mountain Home Irrig. Dist. v. Duffy,
4 79 Idaho 435 (1957) (in order to effectuate the policy of the State to secure the maximum
5 use and benefit of water, the Legislature has made it a misdemeanor to waste water (I.C. §
6 18-4302), which places a duty on the prior appropriator to allow water he has a right to use
7 to flow to junior rights whenever he has no immediate need therefor.) To hold otherwise,
8 that is, to diminish the right because it has not been exercised continuously to its fullest
9 extent, would do nothing less than encourage excess use and waste in order to maintain a
10 property right. Mountain Home Irrig. Dist., 79 Idaho at 443.

11 The point is that rights are acquired by appropriation of water to beneficial
12 use, which is a concept distinctively different than the concept of how the right must be
13 exercised, once established. The latter concept has been legislatively prescribed. The
14 legislative scheme, rightly or wrongly, elects to achieve maximum use of the resource by
15 imposing a duty on the rightholder to use only as much of his right as his immediate needs
16 require. See I.C. § 18-4302 and Mountain Home Irrig. Dist., supra. The Legislature has
17 equipped IDWR with the regulatory power necessary to effectuate that day-to-day function
18 of administering the resource, E.g. I.C. § 42-601 et. seq.

19 That legislative policy of restricting the use of water, even when a right entitles
20 the user to more, is simply inconsistent with the State's position that a user must exercise
21 the right to the fullest extent of its maximum, beneficial use in order to preserve the right.
22 The legislative scheme, notwithstanding the State's argument, recognizes that an established
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1 right is an entitlement to use a fixed, maximum amount which may not be needed or used
2 at any given point in time, depending on the circumstances.

3 The State, it seems, proposes that the right itself varies in quantum according
4 to the beneficial use made through its "subsequent exercise." Accepting that approach
5 would infuse the law with unnecessary and undesirable uncertainty, as every right would
6 become subject to readjudication the day after being decreed. Injecting uncertainty in the
7 law, though, would not make more water available than would exist under a properly
8 administered system.

9 The SRBA would serve little purpose if the inventory it produces may not be
10 relied on to manage the resource due to changing rights. But a water right is not so fragile
11 or perishable that it disintegrates because a user complies with the law, uses only as much
12 as is immediately needed, and furthers the goal of maximizing use of the resource as his
13 circumstances allow. This second concept, the extent to which an established right may be
14 exercised at any point in time, is truly a question of administration. It should not be
15 confused with the existence of a right, nor the loss of a right, which are questions for this
16 court to answer.

17 That brings us to the third legal concept, how may a right be lost. The State
18 incorrectly posits that loss may result from nothing more than a failure to exercise the full
19 extent of the right in a beneficial manner for some unspecified period. Notwithstanding the
20 irreconcilability of that premise with the legislative scheme of administration, the premise
21 is not to be found in any statement of Idaho law this counsel has been able to find.
22 Something more, something which is not found in these subcases, is required to deprive a
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1 claimant of his property right.

2 Idaho law recognizes only four ways by which a rightholder may lose his or
3 her right: (1) Through statutory forfeiture, which is not applicable to these subcases as IDWR
4 admits by its recommendations there has not been continuous nonuse of the entire right;
5 (2) through abandonment, which has not been asserted here and which is affirmatively
6 disproved by the affidavits of the respective claimants; (3) by estoppel, although no party
7 has made such a claim here; and (4) by adverse possession, which also has not been
8 claimed here; E.g. IDAHO LAW OF WATER RIGHTS, Hutchins, Wells A., Idaho Law
9 Review, Vol. 5, p. 73-85 (Fall 1968). Under each of the above theories, the entity asserting
10 that the property right has been lost must show that the rightholder was not using water at
11 a time when the rightholder needed it. E.g., Mountain Home Irrig. Dist. v. Duffy, 79 Idaho
12 435 (1957) (adverse possession may not be based on use when the rightholder had no
13 immediate need for water under the right, and estoppel must be based on adverse use or
14 relinquishment of the right by the failure of the rightholder to assert the right); Hodges v.
15 Trail Creek Irrig. Co., 78 Idaho 10 (1956) (all intendements against forfeiture or
16 abandonment must be indulged and a rightholder does not forfeit or abandon his right when
17 he does not exercise his right due to circumstances over which he has no control.)

18 In every Idaho case found on the subject, including Jenkins, the issue of loss
19 has come before a court and been prosecuted only on a claim of a third-party, i.e. someone
20 other than the claimant or IDWR. The absence of adverse parties here, combined with the
21 legislative removal of IDWR's party status should lead the court to conclude that judicial
22 resources may be better invested somewhere else, where a concrete dispute beckons for
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1 judicial resolution. Consider this: in Application of Boyer, 73 Idaho 152, 160 (1952), the
2 court held that forfeiture is not effective if a use is resumed, even in part, before a third-party
3 claims the water. Under that case, how is it this court will declare a forfeiture absent some
4 finding that the water is claimed by a third-party. Similarly, by definition, loss by adverse
5 possession or estoppel may only arise where a third-party asserts and proves those theories.

6 How then, is a loss of right to be achieved in these subcases, where not a
7 single party to the SRBA has even plead that loss has occurred?

8 Accordingly, the real issue before the court is whether rights confirmed by an
9 unchallenged decree may be relitigated and reduced solely because IDWR does not agree
10 with the amount decreed. The claimants maintain the rights may not be diminished, nor
11 may the issue even be considered, absent a justiciable controversy wherein some party to
12 the subcase asserts a loss by forfeiture or abandonment. Moreover, the court may not avoid
13 granting summary judgment confirming the decreed right where there has been no plea of
14 abandonment or forfeiture, where no party has presented evidence which could be
15 construed as clear and convincing evidence of abandonment or forfeiture. And where no
16 party to the SRBA has even attempted to file an Objection or Response in order to frame
17 such a dispute even though IDWR was removed as a party to this case almost a year ago
18 and every party was then given the opportunity to seek to participate. In sum, the record
19 reflects that the only potential barrier to summary judgment is the State's unsupported legal
20 assertion, not of forfeiture or abandonment, but of the notion that rights are limited by
21 "reasonable beneficial use" not only in their establishment, but in the subsequent exercise
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23

1 thereof.¹ Under the cases cited above, the court should decline the State's invitation to
2 speculate about what may or may not be beneficial and differ to the determinations made
3 in the NI case.

4 **II. THE EXISTENCE OF A DIRECTOR'S REPORT DOES NOT**
5 **CREATE GENUINE ISSUES OF FACT WHICH PREVENT SUMMARY JUDGMENT.**

6 The State asserts the court must deny summary judgment, hold an evidentiary
7 hearing to entertain the presentation of some undisclosed facts or factual basis for the
8 Director's Report, and then weigh that "evidence." The reason, the State asserts, is because
9 the Director's Report constitutes prima facie evidence under I.C. § 42-1411(4) and (5).
10 However, the State incorrectly assumes that prima facie status forestalls summary judgment.

11 I.C. § 42-1411(5) specifically recognizes that all proceedings shall be governed
12 by the Idaho Rules of Evidence and Procedure, one of which is Rule 56.

13 I.R.C.P. 56(c) expressly dictates that the summary judgment sought "shall be
14 rendered forthwith if the pleadings, depositions, and admissions on file, together with the
15 affidavits, if any, show that there is no genuine issue as to any material fact" 56(e)
16 plainly states that an adverse party may not "rest upon the mere allegations or denials of that
17 party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule,
18 must set forth specific facts showing that there is a genuine issue for trial." (emphasis
19 added). That rule specifically requires affidavits (1) based on personal knowledge, (2) setting

20
21 ¹ It should be noted that the State has not asserted that any claimant forfeited or
22 abandoned a right. During oral argument on the State's motion to participate, its counsel
23 admitted it does not know what the factual basis for the claims or the recommendations are.
Instead, it asserted it would have to conduct discovery to learn the facts.

1 forth admissible facts, (3) affirmatively establishing the affiant's competency to testify, and
2 (4) setting forth specific facts. See, Golay v. Loomis, 118 Idaho 389, 391 (1990).

3 The Director's Report meets none of those criteria. It is not a pleading, under
4 the I.R.C.P. or the present version of I.C. § 42-1412(3). The court must presume the
5 Legislature did not intend it to be a pleading, since the above provision changes the
6 character of the Report from its prior status as a "pleading," under I.C. § 42-1412(4) [1987].
7 Hopson v. North American Ins. Co., 71 Idaho 461 (1951). Nor is it a deposition, an
8 admission, or an affidavit. Moreover, it is not based on personal knowledge, it does not
9 establish some affiant's competency to testify about the matter contained therein, nor set
10 forth specific facts.

11 Rather, the Report is, at best, a conclusory statement devoid of specific,
12 admissible facts. The legislative designation of prima facie status does nothing to satisfy the
13 specificity required by Rule 56. Nor does declaring it evidence make it admissible evidence
14 under the Idaho Rules of Evidence which irrefutably apply to the proceeding. Under those
15 Rules, if the Report is a statement of fact, at all, it is inadmissible hearsay. It does not fall
16 within a hearsay exception because it is a "factual findings resulting from special
17 investigation of a particular complaint, case or incident." I.R.E. 803(8)(D).

18 As a result, the Director's Report is not the type of evidence which gives rise
19 to a genuine issue of fact. Its mere existence does not preclude summary judgment in favor
20 of the claimants.
21
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1 **III. THE STATE, IDAHO FISH & GAME AND IDWR ARE**
2 **EACH BOUND BY THE NEW INTERNATIONAL MORTGAGE DECREE.**

3 The State frivolously asserts that it is not in privity with a party to the NI
4 Decree, and is therefore not bound by res judicata. That assertion is not well taken, since
5 there is no way to construe the statutory provision allowing subdivisions of the State to
6 appear separately as an extinguishment of res judicata or of privity. The State's claims to
7 water, and the standards for adjudicating them are in no way different from the claims made
8 and standards applied to private citizens. In Re SRBA Case No. 39576, 912 P.2d 614, 629
9 (Idaho 1995). I.C. § 36-104(7) specifically authorizes IDF&G to acquire rights in water, not
10 for that agency, but only "for and on behalf of the state of Idaho."

11 Hence, if the court were to believe that IDF&G acquired the rights decreed
12 to the Bedals, it must not ignore that the acquisition could have occurred only as an agent
13 authorized to act for and acting on behalf of the State under I.C. § 36-104(7). More
14 interesting and telling, though, than the State's attempt to disassociate itself from those rights
15 and the NI Decree, are the deeds of record in Gooding County. The decreed rights were
16 acquired not by IDF&G, but the State. Exhibit B.

17 The State's acquisition of those rights by purchase put it in direct privity with
18 the Bedals as a successor in interest to the very property rights adjudicated by the NI
19 Decree. The court should therefore conclude the State and IDF&G are barred from
20 relitigating the rights therein decreed on the basis of res judicata. Estoppel also applies
21 because, whether through its agent or itself, the State claims the benefits of the Decree in
22 order to establish the State's water rights, and, therefore, may not at the same time attack
23

1 it.

2 **IV. IDWR IS BOUND BY THE NEW INTERNATIONAL MORTGAGE DECREE.**

3 The State contends the court may not hold IDWR to positions it has previously
4 taken in the SRBA because I.C. § 42-1401B(1) compels IDWR to make its recommendations
5 "as to the extent of beneficial use." Consequently, the State reasons, that is what IDWR did
6 in these subcases. It is curious, if not downright amazing, to think that IDWR could finalize
7 and file its recommendations in these subcases in November of 1992, based on a statute
8 that was not even enacted until April of 1994.

9 Leaving such curiosities aside, though, the court is left with the task of
10 deciding how to deal with IDWR's past conduct. The undisputed facts are these: In the
11 spring of 1993 when IDWR was a party to this case, through formal discovery HWRO
12 sought to learn what, in fact, was IDWR's basis for its recommendations of these water
13 rights. To obtain that information, HWRO had to move to compel discovery. Then IDWR
14 responded by stating first, as its investigation manual states, that it accepted these rights as
15 adjudicated by prior decree and that the decree conclusively determined all facts through
16 the time it was entered. Next, it explained that IDWR analyzed those decreed rights to
17 determine if a partial forfeiture had occurred, and if so, it reduced the rights accordingly.
18 From the spring of 1993 on, these claimants have paid counsel to litigate, successfully to
19 this point in time, the question of whether a right may be partially forfeited. This court
20 recently decided that rights may not be partially forfeited, and asked IDWR if it had made
21 its recommendation based on partial forfeiture. IDWR, through both Mr. Shaw and Ms.
22 Krogh, stated to the court as a matter of fact that recommendations were not based on
23

1 partial forfeiture, but on beneficial use.

2 Those are not representations of law, but of the facts of what IDWR did in
3 these subcases. There is no merit to the State's contention that equitable estoppel does not
4 apply because IDWR made representations of law.

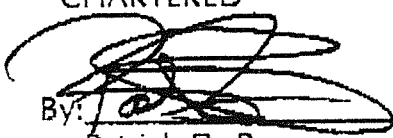
5 The same meritlessness attaches to the contention that IDWR's misinformation
6 was not detrimental to the claimants, claimants who have spent thousands of dollars
7 litigating partial forfeiture because they could not have read a nonexistent statute to learn
8 what IDWR did in their particular case, but instead reasonably relied on IDWR's
9 representations. Equitable Estoppel applies to prevent IDWR from disavowing its stated
10 position in the subcases after three years of litigation and a ruling adverse to its position.
11 Notions of fairness and fair play demand no less.

12 **V. CONCLUSION.**

13 For the reasons stated above and in the claimants' opening brief, the claimants
14 respectfully request the entry of summary judgment on each element of their water rights.

15 Dated this 3 day of July, 1996.

16 HEPWORTH, LEZAMIZ & HOHNHORST,
17 CHARTERED

18 By: 

19 Patrick D. Brown
20 Attorneys for Claimants
21
22
23

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 5 day of July, 1996, 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)

Director of IDWR
P. O. Box 83720
Boise, ID 83720-0098

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

U.S. Dept. of Justice
Environment & Natural
Resources Division
550 West Fort St, MSC 033
Boise, ID 83724

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



Patrick D. Brown

(WATER\REPLY.BRF)\lm

EXHIBIT "A"

DEED RECORD No. 31

No. 77568

This Indenture, Made this 14th day of May in the year of our Lord one

thousand nine hundred and forty (1940), between

Richard S. Tucker & Frances W. Tucker, Husband & wife (since prior to 1936)

of Hagerman County of Gooding State of Idaho

the parties of the first part, and

The State of Idaho

of Boise County of Ada State of Idaho

the party of the second part.

WITNESSETH, That said parties of the first part, for and in consideration of the sum of

Eighteen Thousand & No/100 (\$18,000.00)

DOLLARS.

lawful money of the United States of America, in them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, he do hereby grant, bargain and sell, and by these presents do grant, bargain, sell, confirm and confirm, unto the said party of the first part, and to their successors heirs and assigns, forever, all the following described real estate situated in Gooding County, State of Idaho, to-wit:

West Half of the Southeast Quarter (SW 1/2), Southeast Quarter of the Southeast Quarter (SE 1/4 SE 1/4) and East Half of the Southwest Quarter (EA SW 1/4) all in Sec. 36, Twp. Seven (7) South, Range Thirteen (13) E. B. M.; Lots One (1), Two (2), Six (6) and Seven (7) and Southeast Quarter of the Northeast Quarter (SE 1/4 NE 1/4), all in Sec. 1 Twp. Eight (8) South, Range Thirteen (13) E. B. M.; Lots Four (4), Five (5) and Six (6), all in Sec. 6, Twp. Eight (8) South, Range Fourteen (14) E. B. M.

Including, but not limited to, the following water rights decreed to said land (then in the name of Kate C. Badal and James Badal) in the case of New International Mortgage Bank, a corporation, vs. Idaho Power Company, et al., in the District Court for Gooding County, Idaho, case #1790, the decree appearing in book 2, pp. 31, et seq., of the records of judgments of said Gooding County, to-wit:

Amount	Source	Priority	Diversion Point
3 sec. ft.	Lon Lewis Spring	Sept. 1, 1889	Brailford-Owens Ditch;
2 sec. ft.	unnamed spring	May 26, 1891	Bickel Spring;
4.1 sec. ft.	Riley Creek	May 1, 1884	Badal Ditch.

(\$18.00 INTERNAL REVENUE STAMPS, ATTACHED)

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, the restrictions and reservations, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property as well in law as in equity, of the said party of the first part.

TO HAVE AND TO HOLD, All and singular, the above mentioned and described premises, together with the appurtenances, unto the party of the second part, and to its successors heirs and assigns forever. And the said party of the first part, and their heirs, the said premises in the quiet and peaceable possession of the said party of the second part, its successors heirs and assigns, against the said party of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and well WARRANT and by these presents forever DEFEND, except as to taxes for 1940.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands and seals, the day and year first above written.

Richard S. Tucker (SEAL)
Frances W. Tucker (SEAL)
(husband and wife—since prior to 1936) (SEAL)

STATE OF IDAHO.

County of Gooding On this 14th day of May in the year 1940, before me, Branch Bird, a Notary Public in and for said County, personally appeared Richard S. Tucker & Frances W. Tucker, husband & wife (since prior to 1936) known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

STATE OF IDAHO
(NOTARY SEAL)
COUNTY OF GOODING

I hereby certify that the foregoing is a true copy of the original instrument on file in my office.

Branch Bird, Notary Public in and for the State of Idaho, residing at Gooding, Idaho. My commission expires 1943.

Dated 7-2-1940
HELEN F. EDWARDS
District Court Clerk

By Penny Watson
Deputy Clerk

Recorded at the request of State of Idaho
on 9:15 o'clock A. M., this 7 day of June A. D. 1940
Fee, \$ 1.20

Bert Bowler
County Recorder.

By Valden J. Sullivan Deputy.

EXHIBIT "A"**List of Subcases**

Lynn J. Babington and Karen L. Babington	36-00003C
Walter J. Bonning, II and Judy L. Bonning	36-00108B
Dale E. Boyer and Elaine Boyer	36-00079
William E. Norris, David L. and Linda C. Cropper,	
Blaine Richard and Vivian Cropper, Dave and	
Nancy Anderson	36-00047
Mildred Culbertson	36-10409
Frank C. Erwin and Peggy Erwin	36-00092
Michael J. Fleming	36-00064B
Keith L. Fuell and Jolene Fuell	36-00086C
Frank L. Glauner and Jean Glauner	36-00039E
Mattie P. Grigg	36-10283B
George J. Korbis and Nellie W. Korbis	36-00039N
Marilyn J. Miller	36-00085A
Howard L. Morris and Rhonda K. Morris	36-00061
Howard L. Morris and Rhonda K. Morris	36-00062
Howard L. Morris and Rhonda K. Morris	36-00063
Mark Potter and Susan Potter	36-00039J
Edna M. Rea	36-00003A
Roger Shaffer	36-00034B
Doyt H. Simcoe and Roxie Simcoe	36-00003F
Richard D. Simon	36-00035J
Dick J. Veenendaal and Sigrid E. Veenendaal	36-00039C
Edith L. Vernon	36-00003E
Paul E. Watkins and Inez S. Watkins	36-00106
Basil Lester Zink and Myrle Hyde Zink	36-00103F

EXHIBIT "B"

WARRANTY DEED No. 02202

WARRANTY DEED No. 02202

This Indenture, Made this 18th day of June in the year of our Lord one thousand nine hundred and thirty six, between

James I. Bedal, a widower (former husband of Katie O. Bedal, Deceased)
 of Hagerman County of Gooding State of Idaho
 the party of the first part, and

Richard S. Tucker
 of Hagerman County of Gooding State of Idaho
 the party of the second part.

WITNESSETH, That said party of the first part, for and in consideration of the sum of Five thousand and 00/100 DOLLARS, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, he has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and confirm, unto the said party of the second part, and to his heirs and assigns, forever, all the following described real estate situated in Gooding County, State of Idaho, to-wit:

An undivided Half interest in the West half of Southeast quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$), East Half of Southwest quarter (E $\frac{1}{2}$ SW $\frac{1}{4}$) and the Southeast quarter of the Southeast quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) Section Thirty Six (36), Township Seven (7) South, Range Thirteen (13) E. S. M.
 Lots One (1), Two (2), Six (6) and Seven (7) and the Southeast quarter of the Northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section One (1), Township Eight (8) South, Range Thirteen (13), East Boise Meridian, Lots Four (4) Five (5) and Six (6) of Section Six (6), Township Eight (8) South, Range Fourteen (14) East of Boise Meridian, known as the Riley Ranch, together with all ditches, Canals, water and water rights appurtenant to or used in connection therewith, all situated in Gooding County, State of Idaho.

(45.00 INTERNAL REVENUE STAMP, ATTACHED AND CANCELLED).

TOGETHER with all and singular the tenements, hereditaments and appurtenances therewith belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all estate, right, title and interest in and to the said property as well in law as in equity, of the said party of the first part:

TO HAVE AND TO HOLD. All and singular, the above mentioned and described premises, together with the appurtenances, unto the party of the second part, and to his heirs and assigns forever. And the said party of the first part, and his heirs, the said premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said party of the first part, and his heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same shall and will WARRANT out by these presents forever DEFEND.

IN WITNESS WHEREOF, The said party of the first part has hereunto set his hand and seal, the day and year first above written

Signed, Sealed and Delivered in the Presence of

H. O. Frazier

James I. Bedal

(SEAL)

(SEAL)

(SEAL)

(SEAL)

STATE OF IDAHO,

County of Gooding ss. On this 18th day of June in the year 1936,
 before me, H. O. Frazier, a Notary Public in and for said County,
 personally appeared James I. Bedal, a widower,
 known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(NOTARY PUBLIC)
 COUNTY OF GOODING ss.

I hereby certify that the foregoing is a true copy
 of the original instrument on file in my office.

H. O. Frazier, Notary Public in and
 for the State of Idaho,
 Residing at Hagerman, Idaho.

Dated 7-2-1936
 HELEN P. EDWARDS
 District Court Clerk

By

Penny Lightson

Deputy Clerk

Recorded in the presence of
 at 3:05 o'clock P.M., this 24 day of September A.D. 1936
 Fee, \$1.20

By Vera J. Wright Deputy.

Bert Bowler
 County Recorder.