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AUG 19 2016

DEPARTMENT OF
WATER RESOURCES

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

Subcase Nos.: 91-7102; 91-7173

SECOND MIHARA AFFIDAVIT IN
SUPPORT OF TRIBE'S MOTIONS FOR
SUMMARY JUDGMNET

Claimant(s),

Coeur d'Alene Tribe, a federally-recognized Indian Tribe,

Objector.

COMES NOW, the Coeur d'Alene Tribe, Objector, by and through its attorneys of record and hereby offers this affidavit of counsel in support of its motions for summary judgment.

SECOND MIHARA AFFIDAVIT IN SUPPORT OF
TRIBE'S MOTIONS FOR SUMMARY JUDGMENT - 1

State of Idaho)
) ss.
County of Kootenai)

COMES NOW, Kinzo H. Mihara, after being duly sworn before an officer authorized to administer oaths, swears and declares as follows:

- (1) My name is Kinzo H. Mihara. I am an attorney duly authorized to practice law in the State of Idaho. I am one of the attorneys who represent Objection in the above-noted subcases. I am over the age of 18 and am competent to testify to matters herein.
- (2) The exhibits attached hereto are numbered consecutively in accordance with the numbering of my prior affidavit in support of the Tribe's motion for summary judgment in order to avoid any confusion.
- (3) Attached hereto as Exhibit 12 is a true, accurate, and correct copy of the first page of the deposition of Steve Hawks taken on May 2, 2016, and pages 17, 18, 19, 20 to 29, 31, 32, 36, 39, 40, 41, 53 to 57, and 121.
- (4) Attached hereto as Exhibit 13 is a true, accurate, and correct copy of bates CDAT OBJ-7102 0131 and the back of said page which was marked as Exhibit 2 to the deposition of Steve Hawks taken on May 2, 2016.
- (5) Attached hereto as Exhibit 14 is a true, accurate, and correct copy of Exhibit 3 to the deposition of Steve Hawks taken on May 2, 2016.
- (6) Attached hereto as Exhibit 15 is a true, accurate, and correct copy of Exhibit 4 to the deposition of Steve Hawks taken on May 2, 2016.
- (7) Attached hereto as Exhibit 16 is a true, accurate, and correct copy of Exhibit 6 to the deposition of Steve Hawks taken on May 2, 2016.

- (8) Attached hereto as Exhibit 17 is a true, accurate, and correct copy of Exhibit 7 to the deposition of Steve Hawks taken on May 2, 2016.
- (9) Attached hereto as Exhibit 18 is a true, accurate, and correct copy of Exhibit 8 to the deposition of Steve Hawks taken on May 2, 2016.
- (10) Attached hereto as Exhibit 19 is a true, accurate, and correct copy of bates CDAT OBJ-7102 0040. This document is identical to Exhibit 3 of the deposition of Steve Hawks taken on May 2, 2016, without Mr. Hawks' handwriting.
- (11) Attached hereto as Exhibit 20 is a true, accurate, and correct copy of bates CDAT OBJ-7102 0038. This document is identical to Exhibit 4 of the deposition of Steve Hawks taken on May 2, 2016, without Mr. Hawks' handwriting.
- (12) Attached hereto as Exhibit 21 are true, accurate, and correct copies of portions of IDWR's "Beneficial Use Field Report," and "Beneficial Use Field Report Supplement," bates CDAT OBJ-9102 0023 and 0008, respectively. These documents were obtained from IDWR's on-line repository.
- (13) Attached hereto as Exhibit 22 is a true, accurate, and correct copy of Exhibit 12 of the deposition of Steve Hawks taken on May 2, 2016.
- (14) Attached hereto as Exhibit 23 is a true accurate, and correct copy of *Claimants' Answers and Responses to Objector's Second Requests for Discovery*, cover page, and page 14 (Interrog. 20).
- (15) Attached hereto as Exhibit 24 is a true, accurate, and correct copy of Exhibit 23 of the deposition of Steve Hawks taken on May 2, 2016.

- (16) Attached hereto as Exhibit 25 is a true, accurate, and correct copy of an encroachment permit my office obtained from Idaho Department of Lands issued to Cyril C. Chase.
- (17) Attached hereto as Exhibit 26 is a true, accurate, and correct copy of the Avista's Federal Energy Regulatory Commission license for its operations of the Post Falls Dam, issued June 18, 2009, cover page and p. 10. As noted on the Exhibit, legal citation to the entire document (over 160 pages) can be found at 127 FERC ¶ 61,265.
- (18) Attached hereto as Exhibit 27 is a true, accurate, and correct copy of a report entitled, "Contributions to the Hydrology of the United States, 1921, Nathan C. Grover, Chief Hydrolic Engineer, [U.S. Department of the Interior], Coeur d'Alene Lake, Idaho, and the Overflow Lands," authored by R.W. Davenport, Department of the Interior Water-Supply Paper 500-A, bates Hawks 2928 to 2961, received in discovery from the Claimants.
- (19) Attached hereto as Exhibit 28 is a true, accurate, and correct copy of the State's Trial Memorandum in the district court proceedings in the Erickson case. My office received the foregoing document from the State of Idaho through discovery in these proceedings.

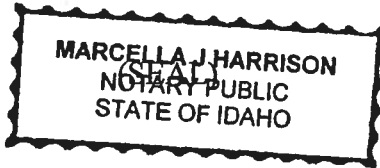
Further your affiant sayeth naught.

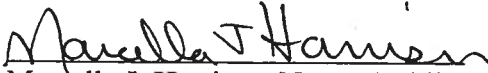
Respectfully submitted this 17th day of August, 2016.


Kinzo H. Mihara

NOTARIAL ATTESTATION

That on the 17th day of August, 2016, and after being duly sworn, Kinzo H. Mihara, personally known to me and upon showing sufficient identification, appeared before me and executed this document.




Marcella J. Harrison, Notary Public
Residing at Coeur d'Alene, ID
My Commission Expires 4-14-20

Certificate of Service

I hereby certify that on the 17th day of August, 2016, a copy of the foregoing document was served on the following counsel of record and other entities via the method indicated below:

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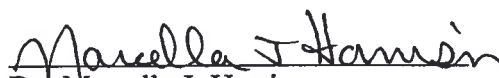

By: Marcella J. Harrison

EXHIBIT 12



COURT REPORTING

LEGAL VIDEOGRAPHY

VIDEOCONFERENCING

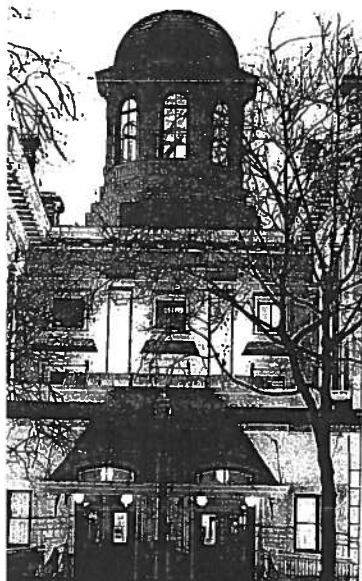
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**DISTRICT COURT, FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In re CSRBA

Case No. 49576



STEVE AND DEANNE
HAWKS,

Claimants, SUBCASE NOS. 91-7102; 91-7173

vs.
COEUR D'ALENE TRIBE,
a federally recognized
Indian Tribe,

Objector.

DEPOSITION OF

STEVE HAWKS

**TAKEN ON
MONDAY, MAY 2, 2016
1:17 P.M.**

**MORRIS AND WOLFF, P.A.
722 MAIN AVENUE
SAINT MARIES, IDAHO 83861**

1 A. Yeah. Do you want me to read it?

2 Q. Please.

3 A. "The lands above described are subject to
4 all rights under an application by the Washington
5 Water Power Company, approved February 2, 1909,
6 under the Act of February 15, 1901 -- 31 Stat. 790 -
7 - being an application for a permit for the
8 construction of a reservoir for water power
9 purposes."

10 MR. MIHARA: Thank you.

11 (WHEREUPON, a tract map was marked as
12 Exhibit 2 for identification.)

13 MR. MIHARA: Please let the record reflect
14 I'm handing Mr. Hawks's counsel and counsel for the
15 state what's been marked as Exhibit 2.

16 BY MR. MIHARA:

17 Q. Mr. Hawks, handing you what's been marked
18 as Exhibit 2, have you seen that document before?

19 A. Yes.

20 Q. Can you -- have you seen both pages of
21 that document before?

22 A. I don't think I've seen this (indicating),
23 the second page.

24 Q. When you say you haven't "seen this, the
25 second page," can you tell me, below in the right-

1 hand corner, what the numbers and letters noted in
2 the bottom corner are?

3 A. It's CDAT OBJ-7102 0132.

4 Q. Okay. But the first page of Exhibit 2 you
5 have seen before?

6 A. Yes.

7 Q. Can you tell me where you've seen that
8 document before?

9 A. I think we have a copy, bigger, at home.

10 Q. Okay. When you say you have a copy at
11 home, would this be in the same filing system that
12 your wife noted earlier in her deposition?

13 A. Probably.

14 Q. Okay. Now, there's a ballpoint pen and a
15 Sharpie marker there. Could you please take the
16 Sharpie marker and draw a box around the properties
17 that you're claiming to own.

18 A. (Witness complied.) I think it's lot six,
19 but I'm not sure, that we talk about the -- the pump
20 being on? I'll try it.

21 Q. Okay. Mr. Hawks, can you -- inside of the
22 boxes you just drew, can you mark an X inside the
23 boxes that you just drew?

24 A. (Witness complied.)

25 Q. Okay. Are you familiar with the term

1 "point of diversion"?

2 A. Uh-huh.

3 Q. Okay. And, now, when I ask you this
4 question, I'm referring to the point of diversion
5 for water right claims 91-7102 and 91-7173.

6 Can you please mark with a Y where those
7 points of diversion are on that map?

8 A. Okay. I'm not sure if lot six is the one
9 we're talking about, but it would be right about
10 there (indicating), right about there (indicating).

11 Q. Okay.

12 MR. MIHARA: Would you please mark this as
13 Exhibit 3.

14 (WHEREUPON, a record of survey was marked
15 as Exhibit 3 for identification.)

16 MR. MIHARA: Let the record reflect that
17 I'm handing what's been marked as Exhibit 3 to
18 counsel for Mr. Hawks as well as counsel for the
19 state.

20 BY MR. MIHARA:

21 Q. Mr. Hawks, I'm handing you what's been
22 marked as Exhibit 3. Are you familiar with this
23 document?

24 A. Or something similar, yes, but not this
25 exact one, no.

1 Q. Okay. Can you take a look at the second
2 page and let me know if you've ever seen the second
3 page of that exhibit?

4 A. (Witness complied.) No.

5 Q. Okay. Do you recognize what that exhibit
6 purports to depict?

7 A. Sylvia's Haven.

8 Q. Like Exhibit 2, can you take the Sharpie
9 marker and on the properties that are noted on it,
10 can you draw a box around the properties that you
11 claim to own?

12 A. (Witness complied.) An X?

13 Q. Yeah.

14 A. (Indicating.)

15 Q. Okay. And like Exhibit 2, can you put a Y
16 where your points of diversion are?

17 A. (Witness complied.)

18 Q. Okay. I'll refer you to Exhibit 2. Can
19 you read what's marked at the very bottom of that
20 exhibit?

21 A. "Mean summer level" -- or "Mean summer
22 water."

23 Q. Are you aware of what the term "mean
24 summer water level" is?

25 A. Just what the level of the lake is in the

1 summer that's regulated by the dam.

2 Q. And the dam would be --

3 A. Post Falls.

4 Q. -- the dam -- just so we're making a
5 written record, when I'm asking a question, before
6 you answer or if -- I apologize if I interrupted
7 you. So let's try to, if I'm speaking, to let me
8 finish and if you're speaking, I will try my hardest
9 to let you --

10 A. Okay.

11 Q. -- finish. It's for the benefit of the
12 court reporter.

13 A. Okay.

14 Q. So the dam is located in Post Falls,
15 correct?

16 A. Right.

17 Q. And that regulates the water level at your
18 properties --

19 A. Yes.

20 Q. -- correct?

21 Now, is there a difference of water level
22 between lot six and lot 13, meaning is the water
23 adjacent to lot 13 any different level?

24 A. No.

25 Q. So it's the same level at the same time?

1 A. Yes.

2 Q. So if the water goes up on lot six, the
3 water goes up on lot 13?

4 A. Yes.

5 Q. And if the water goes down on lot six, the
6 water goes down on lot 13?

7 A. Yes.

8 Q. Okay. Now, I notice on Exhibit 2 and
9 Exhibit 3 you marked your Y's inside the boxes
10 (indicating), (indicating). And that's correct?

11 A. (Witness nods head.) Yeah.

12 Q. Okay. Now, for those diversions, do those
13 diversions have piping?

14 A. Yes.

15 Q. And so would you say that the ends of
16 those pipes are where you drew the Y?

17 A. No -- well, yeah, that one is
18 (indicating). Yeah, it's pretty close.

19 Q. Okay. And when you say "that one," you're
20 referring to lot six on Exhibit 3?

21 A. Yes.

22 Q. Okay. And that's the same for Exhibit --
23 lot six on Exhibit 2?

24 A. Yes.

25 Q. So is it different on lot 13?

1 A. Yes. It goes out -- out to the piling.

2 Q. Okay. Could you mark with the Sharpie
3 with a Y on where the end of those pipes would be on
4 both Exhibit 3 and Exhibit 2?

5 A. Well, depending on how far the pilings go.
6 I'm just going to guess (indicating), (indicating).

7 Q. And would you circle both of the Y's that
8 you just drew on those exhibits so we know -- we can
9 differentiate?

10 A. (Witness complied.) Okay.

11 Q. Okay. Thank you. Now, you say that the
12 point of diversion for lot six is approximately
13 where you drew the Y's on both Exhibit 3 and Exhibit
14 2, correct?

15 A. Yes.

16 Q. Okay. Do you see any of -- it's kind of
17 hard to see, but do you see any of the circles --

18 A. Yes.

19 Q. -- noted --

20 A. Yes.

21 Q. -- here (indicating)?

22 A. Uh-huh.

23 Q. Could you please circle with the Sharpie
24 marker those circles that you observe on those
25 documents?

1 A. (Witness complied.)

2 Q. Okay.

3 A. This one (indicating), too?

4 Q. Yes, please. When you say, "This one,
5 too," you're referring to --

6 A. Yes.

7 Q. -- Exhibit 3?

8 A. Sorry. (Witness complied.)

9 Q. And if you don't see them, don't mark
10 them.

11 A. I see one (indicating).

12 Q. Okay. Have you ever seen any survey pins
13 on your property?

14 A. Yes.

15 Q. Have you seen any survey pins on lot six
16 approximately at the locations where you've marked
17 circles?

18 A. There's one by the highway, probably this
19 one (indicating).

20 Q. And by "this one" you mean the north --

21 A. I'm sorry.

22 Q. -- the northern two circles?

23 A. Yes.

24 Q. That's what you just indicated on Exhibit
25 3?

1 A. Yes.

2 Q. Okay. Have you seen where the southern
3 two pins are --

4 A. No.

5 Q. -- on lot six?

6 A. No.

7 Q. Okay. But the line you drew around lot
8 six approximate where those pins are located --

9 A. Yes.

10 Q. -- is that correct?

11 A. Yes.

12 Q. Okay.

13 MR. MIHARA: Please mark this document as
14 Exhibit 4.

15 (WHEREUPON, a copy of an aerial photograph
16 was marked as Exhibit 4 for identification.)

17 MR. MIHARA: Let the record reflect I'm
18 handing counsel for Mr. Hawks, counsel for the
19 state, what's been marked as Exhibit 4.

20 BY MR. MIHARA:

21 Q. Mr. Hawks -- oh, before -- before we get
22 into Exhibit 4, let me follow up a little bit on
23 Exhibit 3.

24 Have you ever observed anybody else
25 surveying Sylvia's Haven in the general vicinity of

1 blocks two or three?

2 A. No.

3 Q. Okay. When you were involved in the
4 access litigation with your neighbor on lot 12 of
5 block two, was there ever a surveyor hired in
6 relation to that lawsuit?

7 A. I don't remember.

8 Q. Okay. Have you ever seen anybody move any
9 of the pins that you've marked with a circle on any
10 of these --

11 A. No.

12 Q. Would you have any reason to believe
13 anybody ever has moved any of those pins?

14 A. No.

15 Q. Okay. I'm handing you what's been marked
16 as Exhibit 4. Like you've done with Exhibits 2 and
17 3, can you please diagram the properties which you
18 claim an ownership in with the Sharpie marker?

19 A. (Witness complied.) X?

20 Q. And place an X where you've marked the
21 properties?

22 A. (Witness complied.)

23 Q. Okay. I'm going to go back to what's been
24 marked as Exhibit 3 and I'm going to ask you a
25 question.

1 I note that on Exhibit 2 and Exhibit 4
2 that you've highlighted the area surrounding parcel
3 six, but on Exhibit 3 --

4 A. Oh.

5 Q. -- you circled and X'd and Y'd what's
6 marked on that document as parcel five --

7 A. Yep.

8 Q. -- is that correct?

9 A. I -- to tell you the truth, I don't know
10 which one is which, but I can tell with this
11 picture. I really can't tell. I think it must be
12 this one (indicating), then, because I can see the
13 pump business there.

14 Q. Okay. So I just wanted to make sure --

15 A. Yeah, I --

16 Q. -- on this one, were you incorrect on
17 Exhibit 3 when you marked --

18 A. I think --

19 Q. -- lot five?

20 A. I think so.

21 Q. I believe from this morning, if I recall
22 correctly, your wife marked lots four, five and six.

23 A. Huh.

24 Q. Do you know if you own any interest in
25 lots four and five as well as lot six?

1 A. Yeah, I think we do.

2 Q. Okay.

3 A. But I thought we were just talking about
4 where the pump was is why I'm --

5 Q. Okay. Well, I -- just to clarify my
6 question, if you could highlight -- circle or
7 diagram on those -- on that photo, Exhibit 4, all
8 the property you own that's depicted on that and
9 mark with an X inside of it.

10 A. (Witness complied.)

11 Q. And then for water right claim No. 7102,
12 if you could mark the point of diversion with a Y.

13 A. (Witness complied.)

14 Q. And could you mark water diversion for
15 7173 with a Y?

16 A. (Witness complied.)

17 Q. Okay. Now, when we were talking earlier,
18 we talked about having pipes --

19 A. Uh-huh.

20 Q. -- and there was pipes out in the water,
21 and you drew this Y (indicating) and circled it on
22 Exhibit 3.

23 A. Uh-huh.

24 Q. Could you do the same on Exhibit 4 if you
25 can tell approximately where the end of your pipe

1 for water right claim 91-7173 comes out into the
2 water?

3 A. If I could see the pilings -- it goes out
4 to the second piling. I'm just going to guess at it
5 here (indicating). Put a Y?

6 Q. Put a Y and then circle it, if you --

7 A. (Witness complied.)

8 Q. Okay. Thank you.

9 MR. MIHARA: Would you please mark this as
10 Exhibit 5.

11 (WHEREUPON, a deed of distribution subject
12 to a life estate was marked as Exhibit 5 for
13 identification.)

14 MR. MIHARA: Let the record reflect I'm
15 showing counsel for Mr. Hawks and counsel for the
16 state what's been marked as Exhibit 5.

17 BY MR. MIHARA:

18 Q. Mr. Hawks, I'm handing you what's been
19 marked as Exhibit 5. Do you recognize what that
20 document depicts?

21 A. Yeah.

22 Q. Are you familiar with that document?

23 A. No.

24 Q. Okay. Were you familiar with Mrs.
25 Perkins, Mrs. Jill Lorene Perkins?

1 A. No.

2 Q. You do not know?

3 A. She did not.

4 Q. She did not live there?

5 A. No.

6 Q. Do you know where she lived?

7 A. Pendleton, Oregon.

8 Q. Pendleton, Oregon?

9 A. Yes.

10 Q. Okay. Do you know who owned any of the
11 property depicted in Exhibits 2, 3 or 4 --

12 A. We --

13 Q. -- before 1978?

14 A. Cy Chase.

15 Q. Okay. But do you know if either you or
16 your wife had visited any of these properties?

17 A. No.

18 Q. Okay. No, you don't know whether you --

19 A. We did not.

20 Q. Okay. You did not visit -- neither you
21 nor your wife visited any of these properties --

22 A. No.

23 Q. -- before 1978?

24 A. Correct.

25 Q. Thank you. Do you know whether you or

1 your spouse pay property taxes to Benewah County for
2 any of the property depicted in this exhibit? And by
3 "this exhibit" I mean Exhibit 4.

4 A. Yes. Thirteen (indicating) and these
5 three (indicating) -- whatever numbers they are.

6 Q. Okay. And by "these three" are you
7 referencing lots four, five, and six?

8 A. I believe so, yes.

9 Q. Okay. So do you or your wife pay any
10 property taxes to either Benewah County or the State
11 of Idaho for any of the area depicting water
12 (indicating) in Exhibit 4?

13 A. I don't believe so.

14 Q. Okay. Do you know for a fact yes or no?

15 A. No.

16 Q. Have you ever sold -- you and your wife
17 ever sold any property which is --

18 A. No.

19 Q. Okay. Now, I believe earlier when we were
20 in your wife's deposition, in approximately -- and
21 forgive me -- it may have been 1990, but you
22 acquired the full interest in lot 13; is that
23 correct?

24 A. That's correct.

25 Q. At the time you acquired your property on

1 A. (Witness complied.)

2 Q. Okay. And that is on Exhibit 4, correct?

3 A. Correct.

4 Q. Okay. Thank you. Do you know what the
5 tax parcel identification numbers are for lots four,
6 five, and six or lot 13?

7 A. No.

8 Q. Okay. Are you aware of the Supreme Court
9 case we talked about earlier in your wife's
10 deposition where the Supreme Court of the United
11 States had quieted title in favor of the Coeur
12 d'Alene Tribe to the bed and banks below navigable
13 waters within the Coeur D'Alene Reservation?

14 A. Yes.

15 Q. And how are you aware of that Supreme
16 Court case?

17 A. It was in the paper. And I kind of
18 researched it, and I thought it was the bed and
19 banks back in 1906 before the dam was put in. I
20 thought that's what it was talking about --

21 Q. Okay.

22 A. -- for bed and banks.

23 Q. And where did you research that case, sir?

24 A. Probably on the web.

25 Q. Okay. Would you say that tribal ownership

1 signature there, sir?

2 A. Yes.

3 Q. Okay. Flipping to the pages in front of
4 your signature, can you tell me whose handwriting is
5 there in block letters?

6 A. My wife's, Deanne.

7 Q. Okay. Can you tell me -- may I see the
8 exhibit, sir?

9 A. Sure (indicating).

10 Q. Have you ever seen the last page of what's
11 been marked as Exhibit 7?

12 A. I don't know. I don't think so.

13 Q. Okay. Can you read for me what -- under -
14 - what's marked as 1.e. under "Action of the
15 Director, Department of Water Resources"?

16 Can you read for me what that says?

17 A. It says: "Other: The issuance of this
18 permit in no way grants any right-of-way or easement
19 across the land of another."

20 Q. And what does that language mean to you?

21 A. I can't go across anybody's land.

22 Q. And by -- when you say it means you can't
23 go across anybody's land, would you include the
24 Coeur d'Alene Tribe within that statement?

25 A. Yeah, if they were anywhere there

1 (indicating).

2 Q. And when you say "if they were anyone
3 [sic] there," you were referring to the statement
4 under 1.e. --

5 A. Yes.

6 Q. -- under "Action of the Director,
7 Department of Water Resources"?

8 A. Yes. There's no Indian land involved.

9 Q. Okay. Can you tell me what you mean by
10 what you just said, that there's no Indian land
11 involved?

12 A. Well, did you ask me if that was -- it
13 included Indian land?

14 Q. My question, sir --

15 A. Say it again.

16 Q. Okay. I'll ask the question again, sir.

17 When -- under item 1.e. when it says:
18 "The issuance of this permit in no way grants any
19 right-of-way or easement across the land of another"
20 --

21 A. Uh-huh.

22 Q. -- would you understand that statement to
23 mean that that would also include the lands of the
24 Coeur d'Alene Tribe?

25 A. Yes.

1 Q. Okay. Thank you.

2 MR. MIHARA: Please mark this as Exhibit

3 8.

4 (WHEREUPON, an affidavit of publication
5 was marked as Exhibit 8 for identification.)

6 MR. MIHARA: Please let the record reflect
7 I'm handing counsel for Mr. Hawks, counsel for the
8 state, what's been marked as Exhibit 8.

9 BY MR. MIHARA:

10 Q. Mr. Hawks, I'm going to hand you what's
11 been marked as Exhibit 8. Are you familiar with
12 this document or any portion of it?

13 A. Oh, yeah (indicating). This is our
14 advertisement for water right.

15 Q. Okay. And you're indicating on that
16 document, sir, and just for the record, is it
17 correct that you're indicating on the upper right-
18 hand portion of that -- what's been marked as
19 Exhibit 8 --

20 A. Correct.

21 Q. -- under what's noted "Application for
22 water right field by Hawks"?

23 A. "Filed by Hawks."

24 Q. "Filed by Hawks"?

25 A. Yes.

1 A. Summer level. Is that it?

2 Q. I'm asking you, Mr. Hawks -- sorry -- if

3 --

4 A. If it's summer level, that's what it means
5 to me.

6 Q. Okay. Would you equate ordinary high
7 water mark, ordinary summer level, to ordinary
8 summer pool?

9 A. I don't know for sure.

10 Q. Okay. Do you know what the elevation is
11 of the ordinary high water mark in relation to your
12 property?

13 A. No. But it's on -- I look on a website
14 that has a graph, and I can't think of the name of
15 it, and it's in the paper every day.

16 Q. In --

17 A. In The Spokesman.

18 Q. In The Spokesman Review every day?

19 A. Yeah.

20 Q. Do you know what website that you were
21 just referring to?

22 A. Nope.

23 Q. Okay.

24 A. I have it on the favorites.

25 Q. Okay. Are you familiar with the term

1 "navigable waters"?

2 A. Uh-huh.

3 Q. Is that a "Yes"?

4 A. Yes. I'm sorry.

5 Q. Okay. I -- just for the benefit of the
6 court reporter.

7 Would you consider the waters depicted on
8 Exhibit 4 to be navigable?

9 A. At certain times of the year.

10 Q. When the water is at its ordinary high
11 water mark or ordinary summer pool, would you
12 consider the waters depicted in Exhibit 4 to be
13 navigable?

14 A. Yes.

15 Q. Any waters that are depicted on Exhibit 4
16 would you consider to be not navigable at the
17 ordinary high water mark or ordinary summer pool?

18 A. No.

19 Q. Okay. Forgive me. I'm just trying to
20 maintain organization here.

21 MR. MIHARA: Would you please mark this
22 (indicating) Exhibit 12 and this (indicating)
23 Exhibit 13, please.

24 (WHEREUPON, a State of Idaho Department of
25 Water Resources Beneficial Use Field Report

1 Supplement was marked as Exhibit 12 and a photocopy
2 of photographs was marked as Exhibit 13 for
3 identification.)

4 MR. MIHARA: Please let the record reflect
5 I'm handing counsel for Mr. Hawks what's been marked
6 as Exhibit 12 and 13.

7 BY MR. MIHARA:

8 Q. Mr. Hawks, I'm handing you what have been
9 marked as Exhibits 12 and 13.

10 A. Uh-huh.

11 Q. Are you familiar with what those pictures
12 depict?

13 A. Yeah.

14 Q. And what do those pictures depict?

15 A. The lot (indicating) where we have our
16 diversion.

17 Q. Okay. And is that the same answer for
18 both Exhibit 12 and 13?

19 A. Yes.

20 Q. Okay. Focusing your attention on Exhibit
21 12 for a second, this morning in your wife's
22 deposition I believe we referred to that as the
23 orange thingy out in the water.

24 A. Yeah.

25 Q. Can you tell me what the orange thingy out

1 in the water is?

2 A. That's the foot valve that goes to my
3 pump.

4 Q. The foot valve that goes to your pump. Can
5 you circle that with the black Sharpie?

6 A. (Witness complied.)

7 Q. Now, does the end of your pipe end at that
8 foot valve or does it extend beyond the foot valve?

9 A. Goes down about 6 inches into the water.

10 Q. So directly down --

11 A. Yes.

12 Q. -- 6 inches?

13 Is there a screen at the end of that?

14 A. Yes.

15 Q. Do you know at what time of the year that
16 photo was taken?

17 A. The date here says August 8, '89.

18 Q. Okay. Is the water level depicted in that
19 picture approximately the normal water level at
20 August?

21 A. Yes.

22 Q. Okay. And is there a boat located in that
23 photo, Mr. Hawks?

24 A. Yep.

25 Q. Is it a little boat or a big boat or --

1 A. Oh, that's an old lifeboat that belonged
2 to Bud Harvey.

3 Q. Okay. Was that a little boat or a big
4 boat?

5 A. That was about a 25-footer.

6 Q. That's a pretty big boat.

7 A. Lifeboat, yeah.

8 Q. Pretty big boat.

9 A. Yeah. Doesn't draw much though.

10 Q. And with the water level -- forgive my
11 memory, but we just said the water level was at the
12 ordinary high water mark?

13 A. Looks to be, yes.

14 Q. And that foot valve is out in the water at
15 that time, correct?

16 A. Yes.

17 Q. Okay. Turning your attention to the
18 handwriting next to the picture --

19 A. Uh-huh.

20 Q. -- can you tell me what that says?

21 A. "The PD."

22 Q. Do you know what that refers to?

23 A. I'm guessing pump diversion.

24 Q. Okay. Do you know who made -- do you know
25 whose handwriting that is?

1 A. Oh, no. No, no.

2 Q. So what happens when the water is let out
3 of the dam? What happens to the lagoon?

4 A. They go dry.

5 Q. How many years -- what percentage of the
6 years have you seen the lagoon go dry?

7 A. Every year.

8 Q. So can you navigate in the lagoon area
9 then?

10 A. No.

11 Q. So if the dam isn't holding water back,
12 there's no boating in the lagoon?

13 A. No.

14 Q. Just to be clear, several -- the multiple
15 times that Mr. Mihara asked you about an OHWM or an
16 ordinary high water mark --

17 A. Uh-huh.

18 Q. -- did you understand that to mean the
19 summer pool or the summer level?

20 A. Yes.

21 Q. Okay. And that's based on your own
22 recollection of what the summer pool is?

23 A. It's what we keep track of from the paper
24 and how it looks on our land --

25 Q. Okay.

EXHIBIT 13

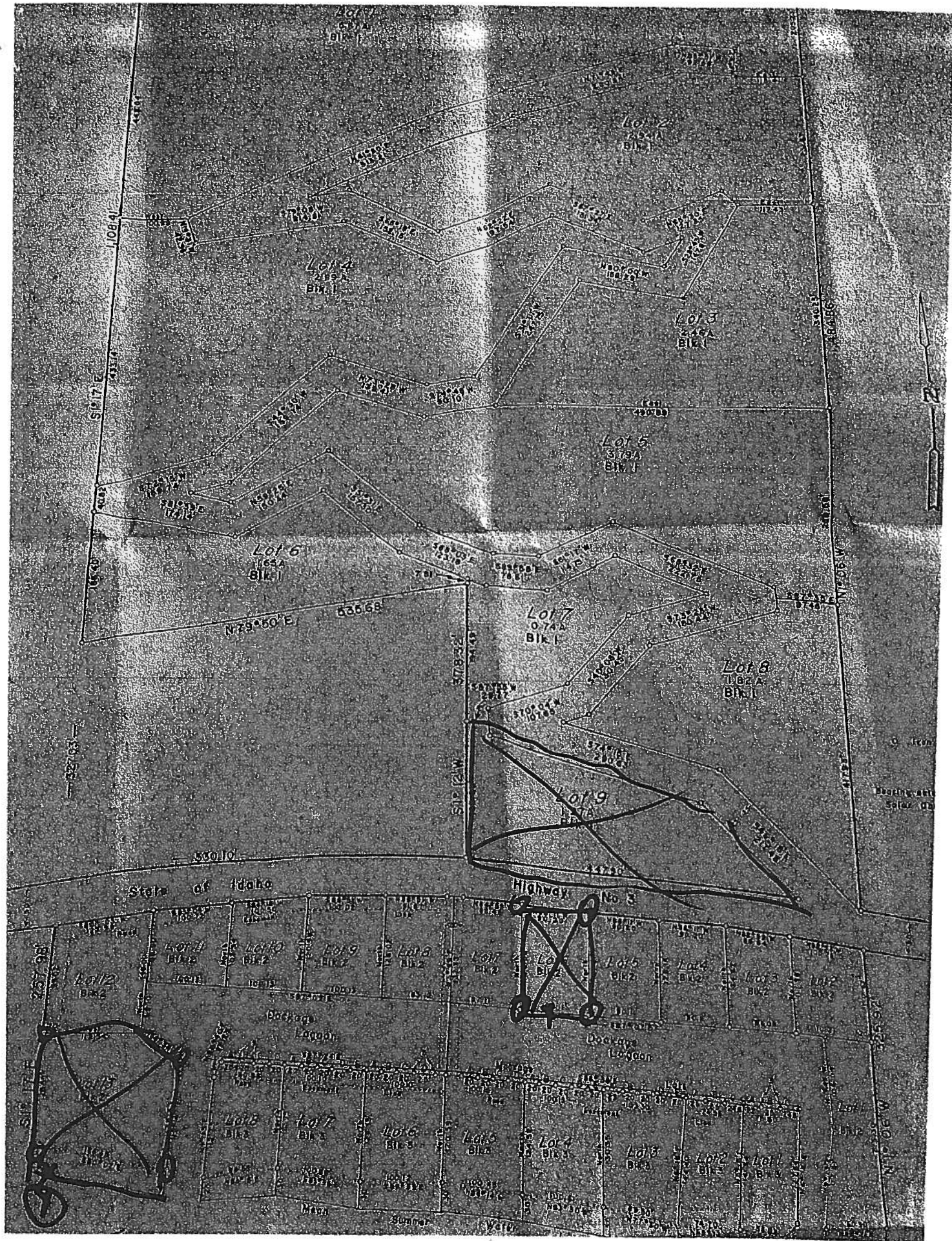


EXHIBIT	
2	
DEPONENT NAME:	DATE:
S. HAWKS	5/21/16

EXHIBIT 14

EXHIBIT 15

EXHIBIT 16

WATER AGREEMENT AND EASEMENT

THIS AGREEMENT made and entered into this 29th day of April, 1982, by and between DANIEL L. DAVENPORT and PATRICIA A. DAVENPORT, husband and wife, of P.O. Box 190, City of St. Maries, County of Benewah, State of Idaho, hereinafter referred to as Grantors, and DONALD J. HARVEY, JR. and SONJA G. HARVEY, husband and wife, of Route 2, Box 82, City of St. Maries, County of Benewah, State of Idaho, and C.C. CHASE and VERDIE CHASE, husband and wife, of 305 Lincoln Avenue, City of St. Maries, County of Benewah, State of Idaho, hereinafter referred to as Grantees.

WHEREAS, Grantors are the owners, or beneficial owners under escrow sale agreement, of a tract of land situated in Benewah County, State of Idaho, described as follows, to-wit:

A portion of Lot Eight (8), Block One (1), Sylvia's Haven, a record subdivision in Benewah County, Idaho; the boundary of said portion is described as follows:

Beginning at the Southeast corner of said Lot Eight (8), said corner also being the intersect of the northerly right-of-way boundary of Highway 951, the northeasterly edge of a dedicated roadway and the east boundary of Lot Eight (8), running thence North 1°06' West, along said east boundary of Lot Eight (8), a distance of 187.29 feet; thence West a distance of 98.95 feet; thence South 1°06' East and parallel to said east boundary, a distance of 98.76 feet; thence South 46°18' East along the northeasterly edge of said dedicated roadway, a distance of 128.12 feet to the point of beginning, enclosing an area of 0.30 acres;

WHEREAS, Grantees are the owners of the following tracts of land situated in Benewah County, State of Idaho, described as follows, to-wit:



HARVEYS' TRACT:

Lots One (1), Two (2), Three (3) and Four (4), Block Two (2), Sylvia's Haven, a record subdivision of Benewah County, Idaho.

CHASES' TRACT:

Lots Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11) and Twelve (12), Block Two (2), and Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7) and Eight (8), Block Three (3), Sylvia's Haven, a record subdivision of Benewah County, Idaho;

WHEREAS, there is on the above-described tract of Grantors a water well, together with a pump, casing, water lines and fittings, which were installed at the expense of Grantors and Grantees; and

WHEREAS, Grantors, their heirs and assigns, and Grantees, their heirs and assigns desire to use water from such well for domestic purposes on the said tract of Grantors and the above-described tracts of Grantees;

NOW, THEREFORE, in consideration of Ten and no/100 Dollars (\$10.00) and the mutual covenants herein contained, Grantors do hereby grant, bargain, sell and convey unto Grantees and their heirs and assigns forever, the right to use water from said well as Grantees shall reasonably require for domestic purposes for those residences, houses, mobile homes, cabins and outbuildings in existence on the said tracts of Grantees as of the date hereof, or replacements thereof; SUBJECT, HOWEVER, to the right of Grantors, their heirs and assigns to use so much water from such well as Grantors shall reasonably require for domestic purposes for those residences, houses, mobile homes, cabins and outbuildings in existence on the said tract of Grantors as of the date hereof, or replacements thereof. Neither Grantors nor

Grantees, as between Grantors and Grantees or as between themselves, shall have any prior or superior right to use the water from such well.

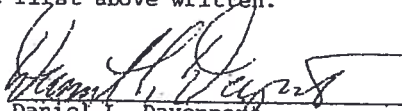
For the same consideration, Grantors do hereby grant, bargain, sell and convey unto Grantees and their heirs and assigns forever, a perpetual, non-exclusive easement for the purpose of conveyance of water, maintenance, repair and replacement of the said well, pump, casing, water lines and fittings, on, in, over and across the above-described tract of Grantors, said easement being ten (10) feet in width, the centerline of which is described as: Beginning at a point on the East line of said tract, from which point the Northeast corner bears N 01°06' W a distance of 10.00 feet; running thence N 84°35' W a distance of 57.15 feet to the center of said well. Said easement shall also include, to the extent not already included above, a radius of five (5) feet measured from the center of said well and running around the same.

Grantors hereby agree to pay for the cost of the electricity to operate the pump for said well; however, Grantees, Harveys and Chases, shall reimburse Grantors in the sum of Twenty-four and no/100 Dollars (\$24.00) and Twelve and no/100 Dollars (\$12.00) respectively each year therefor. Each party shall be responsible for maintenance, repair and replacement of their own lines running from said well, and each party agrees to perform such maintenance, repair and replacement of their lines as shall be reasonably necessary and in a good and workmanlike manner, with minimum interference with the water rights of the other party and minimum disturbance of the said tract of Grantors, returning the same as closely as reasonably possible to its condition immediately prior to such disturbance. The parties shall bear all other costs and expenses of maintenance, repair and replacement of said

well, pump, water lines and fittings pro rata according to the amount of water used by each up to the time of such maintenance, repair and replacement. Meters shall be utilized by each party for such purpose, which meters shall also be maintained, repaired and replaced as reasonably necessary with costs and expenses of such maintenance, repair and replacement to be borne by the parties pro rata according to their water usage.

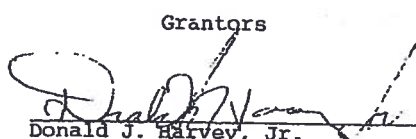
This agreement and the rights granted and conveyed hereunder shall run with and serve the Grantees' said tracts and shall bind and inure to the benefit of Grantors and Grantees and their respective heirs, personal representatives and assigns, forever.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the date first above written.


Daniel L. Davenport


Patricia A. Davenport

Grantors


Donald J. Harvey, Jr.


Sonja G. Harvey


C. C. Chase

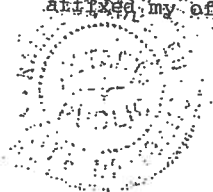
Verdie Chase
Verdie Chase

Grantees

STATE OF IDAHO)
County of Benewah) ss.

On this 26th day of April, 1942, before me,
the undersigned, a Notary Public in and for the said State,
personally appeared DANIEL L. DAVENPORT and PAULINE
DAVENPORT, husband and wife, known to me to be the persons
whose names are subscribed to the above and foregoing 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 date last above written.



Verdie Chase
Notary Public, State of Idaho
Residing at Benewah, Idaho
Commission Expires 1943

EXHIBIT 17

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
APPLICATION FOR PERMIT

Ident. No. 91-07102

To appropriate the public waters of the State of Idaho

APPROVED

1. Name of applicant Steve Hawks Phone 245-2403
Post office address Rt. 2 Box 86 St. maries, Id. 83861
2. Source of water supply ST JOE RIVER which is a tributary of CREEDDALE LAKE
3. Location of point of diversion is NE $\frac{1}{4}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$, Govt. Lot 1
Sec. 7 Township 46N Range 2W B.M. Benewah County; additional
points of diversion if any: _____

4. Water will be used for the following purposes:

- Amount 2.02 for ^{DOMESTIC} garden watering purposes from 1 MAR to 1 Dec (both dates inclusive)
(cfs or acre-feet per annum)
- Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
- Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)
- Amount _____ for _____ purposes from _____ to _____ (both dates inclusive)
(cfs or acre-feet per annum)

5. Total quantity to be appropriated is (a) 2.02 and/or (b) _____
cubic feet per second acre feet per annum

6. Proposed diverting works:

a. Description of ditches, flumes, pumps, headgates, etc. 1 1/4" pipe through
culvert to canal

b. Height of storage dam _____ feet; active reservoir capacity _____ acre-feet; total
reservoir capacity _____ acre-feet; period of year when water will be diverted to storage:
_____ to _____ inclusive.

c. Proposed well diameter is _____ inches; proposed depth of well is _____ feet.

d. Is ground water with a temperature of greater than 90°F being sought? _____

7. Time required for the completion of the works and application of the water to the proposed beneficial use is
1 years (minimum 1 year).

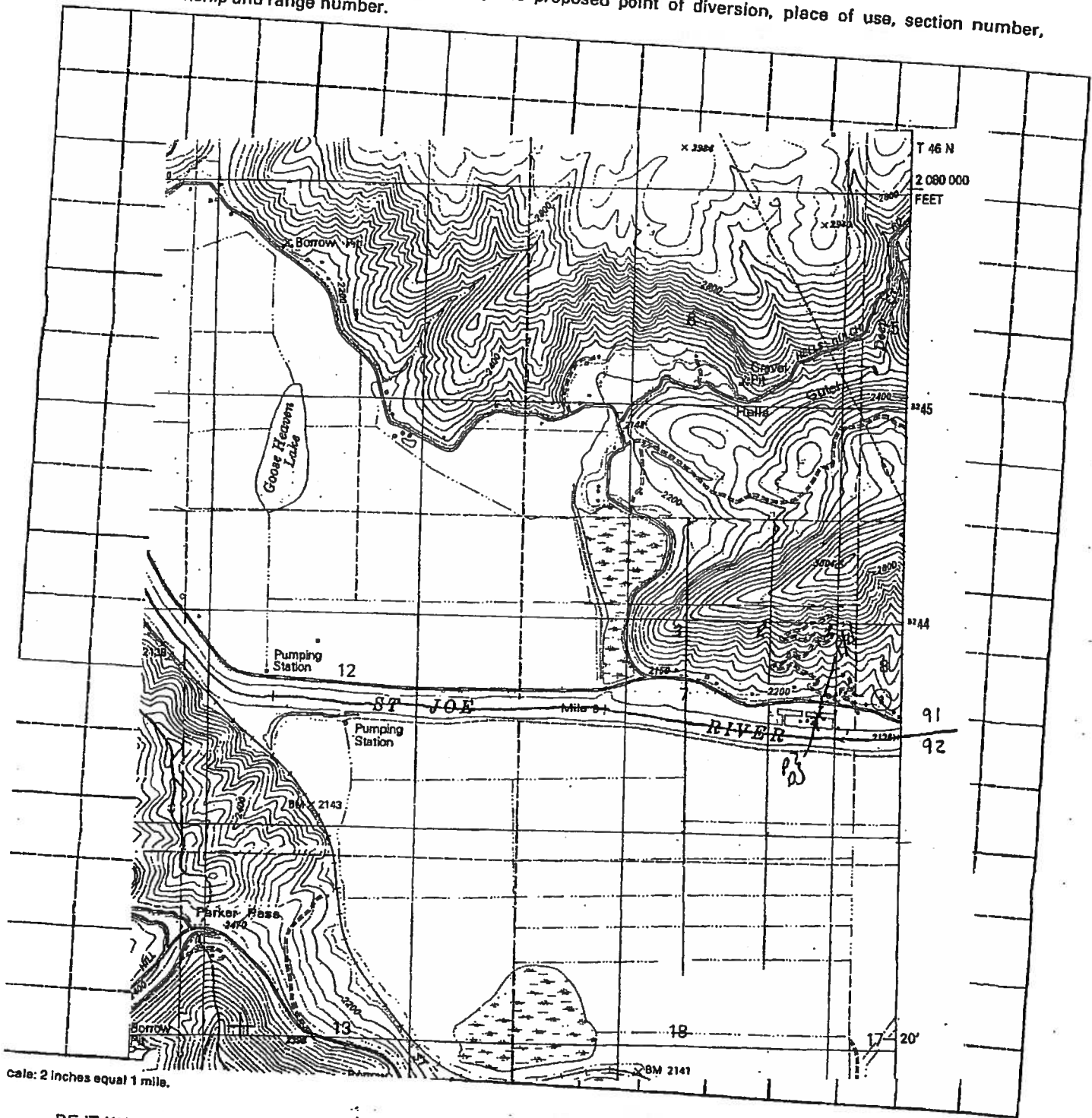
MICROFILMED

DEC 27 1988

EXHIBIT <u>7</u>	
DEPONENT NAME: <u>S. HAWKS</u>	DATE: <u>5/21/86</u>

- e. Other; describe fully. _____

13. Map of proposed project: show clearly the proposed point of diversion, place of use, section number, township and range number.



BE IT KNOWN that the undersigned, **MICHAEL MED**, do hereby certify that the application for permit to appropriate the public waters of the State of Idaho as herein set forth.

DEC 27 1988

Shirley Hawks
(Applicant)

CDAT OBJ-7102 0015

Received by KK Date 7/22/88 Time 1:00 PM Promoted Priority 7/22/88
Fee \$ 302 Receipted by JK # N 741 Preliminary check by JK
Publication prepared by [signature] Date 8/16/88 Published in Idaho Water Rights
Publication approved [signature] Date 8/24/88

ACTION OF THE DIRECTOR, DEPARTMENT OF WATER RESOURCES

This is to certify that I have examined Application for Permit to appropriate the public waters of the State of Idaho No. 91-7102, and said application is hereby APPROVED.

1. Approval of said application is subject to the following limitations and conditions:

- a. SUBJECT TO ALL PRIOR WATER RIGHTS.
- b. Proof of construction of works and application of water to beneficial use shall be submitted on or before November 1, 1989.
- c. The rate of diversion, if water is to be used for irrigation under this permit, when combined with all other water rights for the same land shall not exceed 0.02 cubic feet per second for each acre of land.
- d. The water right acquired under this permit if for hydropower purposes shall be junior and subordinate to all rights to the use of water, other than hydropower, within the State of Idaho that are initiated later in time than the priority of this permit and shall not give rise to any right or claim against any future rights to the use of water, other than hydropower, within the State of Idaho initiated later in time than the priority of this permit.
- e. Other: The issuance of this permit in no way grants any right-of-way or easement across the land of another.

Witness my hand this 6th day of October, 1988.

[signature]
for Director

MICROFILMED

DEC 27 1988

EXHIBIT 18

Affidavit of Publication

STATE OF IDAHO
County of Benewah, ss.

Cynthia Ann Hammes, being first duly sworn on oath, deposes and says that she is vice president of The Corporation, owner of the St. Maries Gazette Record, a weekly newspaper printed and published at St. Maries, Benewah County, State of Idaho; the St. Maries Gazette Record is a newspaper having general circulation in Benewah county, State of Idaho, and has been continuously and uninterruptedly published in Benewah County, State of Idaho, during a period of more than seventy-eight consecutive weeks prior to the first publication of the notice of advertisement hereon.

That the notice, of which the one hereto attached is a true copy, was published in said newspaper for a period of 2 issues, the first publication being on the 17th day of Aug, 19 88 and the last on the 24th day of Aug, 19 88.

That said newspaper was regularly distributed to its subscribers during the time of the same period; that said notice was published in the regular and entire issue of said paper.

Dated this 26th day of Aug, 19 88

Cynthia Ann Hammes

STATE OF IDAHO
COUNTY OF BENEWAH }

On this 26th day of Aug in the year 19 88
before me, a Notary Public, personally appeared Cynthia Ann Hammes known or identified to me to be the person whose name subscribed to the within instrument, and acknowledged to me that she executed the same.

Sharon D. Blackman

Notary Public
Residing at St. Maries, Idaho

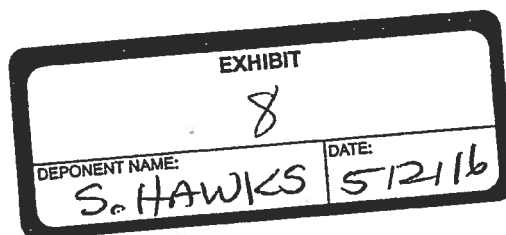
Application for water right filed by Hawks

NOTICE OF APPLICATION FOR WATER RIGHT

The Following application(s) have been filed to appropriate the public waters of the State of Idaho: 91-07102

Hawks, Steve
Rt 2 Box 88
St. Maries, ID 83861
Source: St. Joe River
Tributary: Coeur d'Alene Lake
Diversion Pt: Lot 1 (NENESE) Sec 7 T 46N R 02W
Use: Domestic (.020 CFS)
Date Filed: 7/22/1988
In: T46N R02W S07 Lot 1 (NESE)
The permit(s) will be subject to all prior water rights. Protests must be filed with the Director, Dept. of Water Resources, Northern Region, Government Way Suite 9, Coeur d'Alene, Idaho 83814 on or before September 6, 1988.
R. Keith Higginson, Director
No. 549 -- Aug. 17-24.

OK
8/29/88



CDAT OBJ-7102 0018

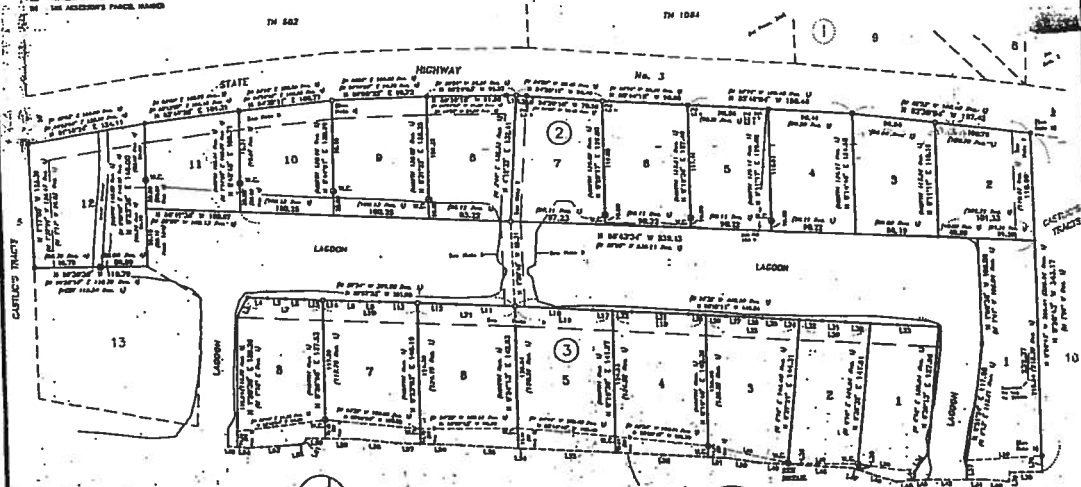
EXHIBIT 19

LOTS 1-12, BLOCK 2 AND LOTS 1-8,
BLOCK 3, SYLVIA'S HAVEN, IN THE
SE1/4, SEC. 7, T.48N., R.27W., B.M.,
BENEFASH COUNTY, IDAHO

BASIS OF BEARING

BASE OF BEARING - IS 60°10'00" E ALONG THE EAST-WEST CORNERLINE OF
SEC. 8, T48N, R20E, E4A, BETWEEN TRIMBLE MONUMENTS AT THE V1/4 SECTION
CORNER AND THE C7/8 SECTION CORNER, ACCORDING TO THE PLAN OF AMENDED
COLUMBIANA HILLS SUBDIVISION, RECORDED MAY 1961, BY R. HENWELL, PLS 100.

- FLA. AM BROWN BOSS, 5/8 IN. DIA. WITH AN ALUM. CAP.
3 1/2 DIA. BROWN, 1/2 IN. VERTICALS REMOVED - PLS 872
- FLA. 1/4 DIA. STEEL.
- FLA. AM BROWN BOSS, 1/2 IN. DIA. WITH A PLASTIC
CAP. 1/2 IN. DIA. PLS 874A
- FLA. AM BROWN BOSS, 1/2 IN. DIA. WITH A PLASTIC
CAP. 1/2 IN. DIA. PLS 873
- FLA. AM BROWN BOSS, 1/2 IN. DIA. NO CAP
- SET AM BROWN BOSS, 3/8 IN. DIA. 5/8 IN. DIA.
WITH A PLASTIC CAP. 1/2 IN. DIA. PLS 874B
- FLA. AM BROWN BOSS, 3/8 IN. DIA. 5/8 IN. DIA.
WITH AN ALUM. CAP. NO. 102. DIA. 1/2 IN. VERTICALS
REMOVED - PLS 874A
- MEASUREMENT POINT (Drawing 84)
- DRAWN FORCE (74C)
- VERTICALS REMOVED
- LMS ACCESSORIES FRAME, HANDED

[illegible][illegible]

2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2817 2818

LONG DATA
OF 1971

12. 9401 10 00



1. CHRISTOPHER & DONALD, PERFORMANCE LABS SURVEILLANCE, INC. ADVISED THAT THE SLURRY WAS MADE BY THE
SIDE OF 2040, SO HENRY CONFIRMS THAT THE SLURRY WAS MADE BY THE
WORKER BY SUPERVISOR IN COMPLIANCE WITH BOND CODE FOR ALL PERIODS
AND FOR THE PERIOD FROM 1998, L.L. AT THE RESIDE OF 200 HOLLAND.

PAGE 1 OF 2

1-12, 1-13, 1-14, 1-15, 1-16, 1-17, 1-18, 1-19, 1-20, 1-21, 1-22, 1-23, 1-24, 1-25, 1-26, 1-27, 1-28, 1-29, 1-30, 1-31, 1-32, 1-33, 1-34, 1-35, 1-36, 1-37, 1-38, 1-39, 1-40, 1-41, 1-42, 1-43, 1-44, 1-45, 1-46, 1-47, 1-48, 1-49, 1-50, 1-51, 1-52, 1-53, 1-54, 1-55, 1-56, 1-57, 1-58, 1-59, 1-60, 1-61, 1-62, 1-63, 1-64, 1-65, 1-66, 1-67, 1-68, 1-69, 1-70, 1-71, 1-72, 1-73, 1-74, 1-75, 1-76, 1-77, 1-78, 1-79, 1-80, 1-81, 1-82, 1-83, 1-84, 1-85, 1-86, 1-87, 1-88, 1-89, 1-90, 1-91, 1-92, 1-93, 1-94, 1-95, 1-96, 1-97, 1-98, 1-99, 1-100, 1-101, 1-102, 1-103, 1-104, 1-105, 1-106, 1-107, 1-108, 1-109, 1-110, 1-111, 1-112, 1-113, 1-114, 1-115, 1-116, 1-117, 1-118, 1-119, 1-120, 1-121, 1-122, 1-123, 1-124, 1-125, 1-126, 1-127, 1-128, 1-129, 1-130, 1-131, 1-132, 1-133, 1-134, 1-135, 1-136, 1-137, 1-138, 1-139, 1-140, 1-141, 1-142, 1-143, 1-144, 1-145, 1-146, 1-147, 1-148, 1-149, 1-150, 1-151, 1-152, 1-153, 1-154, 1-155, 1-156, 1-157, 1-158, 1-159, 1-160, 1-161, 1-162, 1-163, 1-164, 1-165, 1-166, 1-167, 1-168, 1-169, 1-170, 1-171, 1-172, 1-173, 1-174, 1-175, 1-176, 1-177, 1-178, 1-179, 1-180, 1-181, 1-182, 1-183, 1-184, 1-185, 1-186, 1-187, 1-188, 1-189, 1-190, 1-191, 1-192, 1-193, 1-194, 1-195, 1-196, 1-197, 1-198, 1-199, 1-200, 1-201, 1-202, 1-203, 1-204, 1-205, 1-206, 1-207, 1-208, 1-209, 1-210, 1-211, 1-212, 1-213, 1-214, 1-215, 1-216, 1-217, 1-218, 1-219, 1-220, 1-221, 1-222, 1-223, 1-224, 1-225, 1-226, 1-227, 1-228, 1-229, 1-230, 1-231, 1-232, 1-233, 1-234, 1-235, 1-236, 1-237, 1-238, 1-239, 1-240, 1-241, 1-242, 1-243, 1-244, 1-245, 1-246, 1-247, 1-248, 1-249, 1-250, 1-251, 1-252, 1-253, 1-254, 1-255, 1-256, 1-257, 1-258, 1-259, 1-260, 1-261, 1-262, 1-263, 1-264, 1-265, 1-266, 1-267, 1-268, 1-269, 1-270, 1-271, 1-272, 1-273, 1-274, 1-275, 1-276, 1-277, 1-278, 1-279, 1-280, 1-281, 1-282, 1-283, 1-284, 1-285, 1-286, 1-287, 1-288, 1-289, 1-290, 1-291, 1-292, 1-293, 1-294, 1-295, 1-296, 1-297, 1-298, 1-299, 1-300, 1-301, 1-302, 1-303, 1-304, 1-305, 1-306, 1-307, 1-308, 1-309, 1-310, 1-311, 1-312, 1-313, 1-314, 1-315, 1-316, 1-317, 1-318, 1-319, 1-320, 1-321, 1-322, 1-323, 1-324, 1-325, 1-326, 1-327, 1-328, 1-329, 1-330, 1-331, 1-332, 1-333, 1-334, 1-335, 1-336, 1-337, 1-338, 1-339, 1-340, 1-341, 1-342, 1-343, 1-344, 1-345, 1-346, 1-347, 1-348, 1-349, 1-350, 1-351, 1-352, 1-353, 1-354, 1-355, 1-356, 1-357, 1-358, 1-359, 1-360, 1-361, 1-362, 1-363, 1-364, 1-365, 1-366, 1-367, 1-368, 1-369, 1-370, 1-371, 1-372, 1-373, 1-374, 1-375, 1-376, 1-377, 1-378, 1-379, 1-380, 1-381, 1-382, 1-383, 1-384, 1-385, 1-386, 1-387, 1-388, 1-389, 1-390, 1-391, 1-392, 1-393, 1-394, 1-395, 1-396, 1-397, 1-398, 1-399, 1-400, 1-401, 1-402, 1-403, 1-404, 1-405, 1-406, 1-407, 1-408, 1-409, 1-410, 1-411, 1-412, 1-413, 1-414, 1-415, 1-416, 1-417, 1-418, 1-419, 1-420, 1-421, 1-422, 1-423, 1-424, 1-425, 1-426, 1-427, 1-428, 1-429, 1-430, 1-431, 1-432, 1-433, 1-434, 1-435, 1-436, 1-437, 1-438, 1-439, 1-440, 1-441, 1-442, 1-443, 1-444, 1-445, 1-446, 1-447, 1-448, 1-449, 1-450, 1-451, 1-452, 1-453, 1-454, 1-455, 1-456, 1-457, 1-458, 1-459, 1-460, 1-461, 1-462, 1-463, 1-464, 1-465, 1-466, 1-467, 1-468, 1-469, 1-470, 1-471, 1-472, 1-473, 1-474, 1-475, 1-476, 1-477, 1-478, 1-479, 1-480, 1-481, 1-482, 1-483, 1-484, 1-485, 1-486, 1-487, 1-488, 1-489, 1-490, 1-491, 1-492, 1-493, 1-494, 1-495, 1-496, 1-497, 1-498, 1-499, 1-500, 1-501, 1-502, 1-503, 1-504, 1-505, 1-506, 1-507, 1-508, 1-509, 1-510, 1-511, 1-512, 1-513, 1-514, 1-515, 1-516, 1-517, 1-518, 1-519, 1-520, 1-521, 1-522, 1-523, 1-524, 1-525, 1-526, 1-527, 1-528, 1-529, 1-530, 1-531, 1-532, 1-533, 1-534, 1-535, 1-536, 1-537, 1-538, 1-539, 1-540, 1-541, 1-542, 1-543, 1-544, 1-545, 1-546, 1-547, 1-548, 1-549, 1-550, 1-551, 1-552, 1-553, 1-554, 1-555, 1-556, 1-557, 1-558, 1-559, 1-560, 1-561, 1-562, 1-563, 1-564, 1-565, 1-566, 1-567, 1-568, 1-569, 1-570, 1-571, 1-572, 1-573, 1-574, 1-575, 1-576, 1-577, 1-578, 1-579, 1-580, 1-581, 1-582, 1-583, 1-584, 1-585, 1-586, 1-587, 1-588, 1-589, 1-590, 1-591, 1-592, 1-593, 1-594, 1-595, 1-596, 1-597, 1-598, 1-599, 1-600, 1-601, 1-602, 1-603, 1-604, 1-605, 1-606, 1-607, 1-608, 1-6

BOOK 5 Page 62

RENALDO LAND SURVEYING
SURVEYING AND PLANNING
711 CENTER AVE., ST. MAURICE, ILL. 61362 TEL. 248-5151

BOOK 5 Page 62

EXHIBIT 20

EXHIBIT 21

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
BENEFICIAL USE FIELD REPORT SUPPLEMENT
C O N T E N T S

() B/U Acknowledgment Letter Sent

This Examination Report Contains the Following Documents.

(☒) Field Report (☒) Quad Sheet (☒) Gov. Lot Plat (☒) Rules Check list
() Aerial Photo () Photo PD/PU () Well Log

Number of Diagrams Attached _____ Number of Calculation Sheets Attached _____

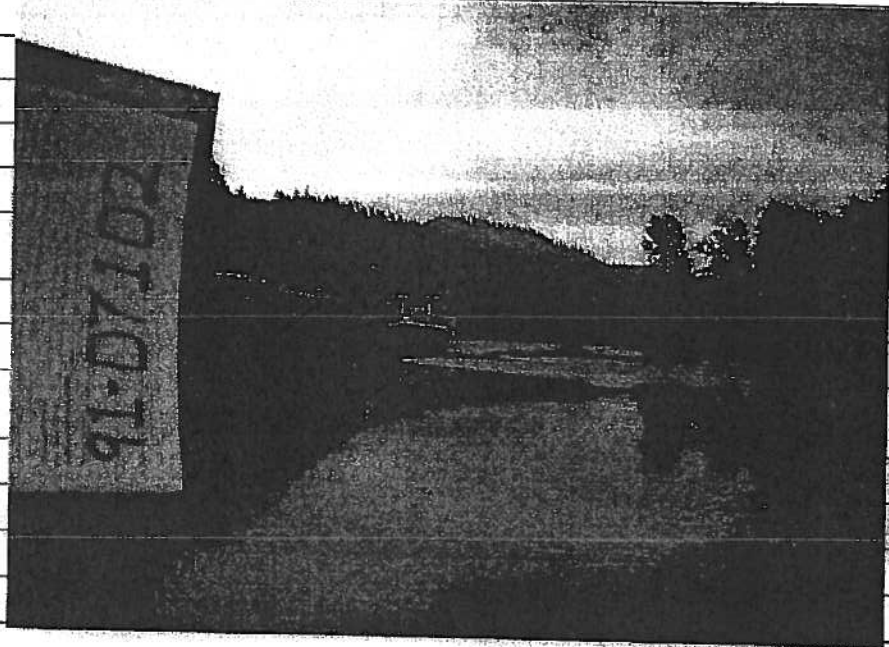
() Correspondence (Date) _____

() Other (List) _____

Contacts: _____

Remarks: _____

The PD



Exam Completed By *Louis M...*

Sr. Agent Review _____

Regional Manager Review _____

MICROFILMED

Date *8/8/89*

Date _____

Date _____

NOV 10 1990

PERMIT NUMBER

91-07102

RECEIVED
JUN 27 1990

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
BENEFICIAL USE FIELD REPORT

Department of Water Resources

A. GENERAL INFORMATION

Permit No. 91-7108

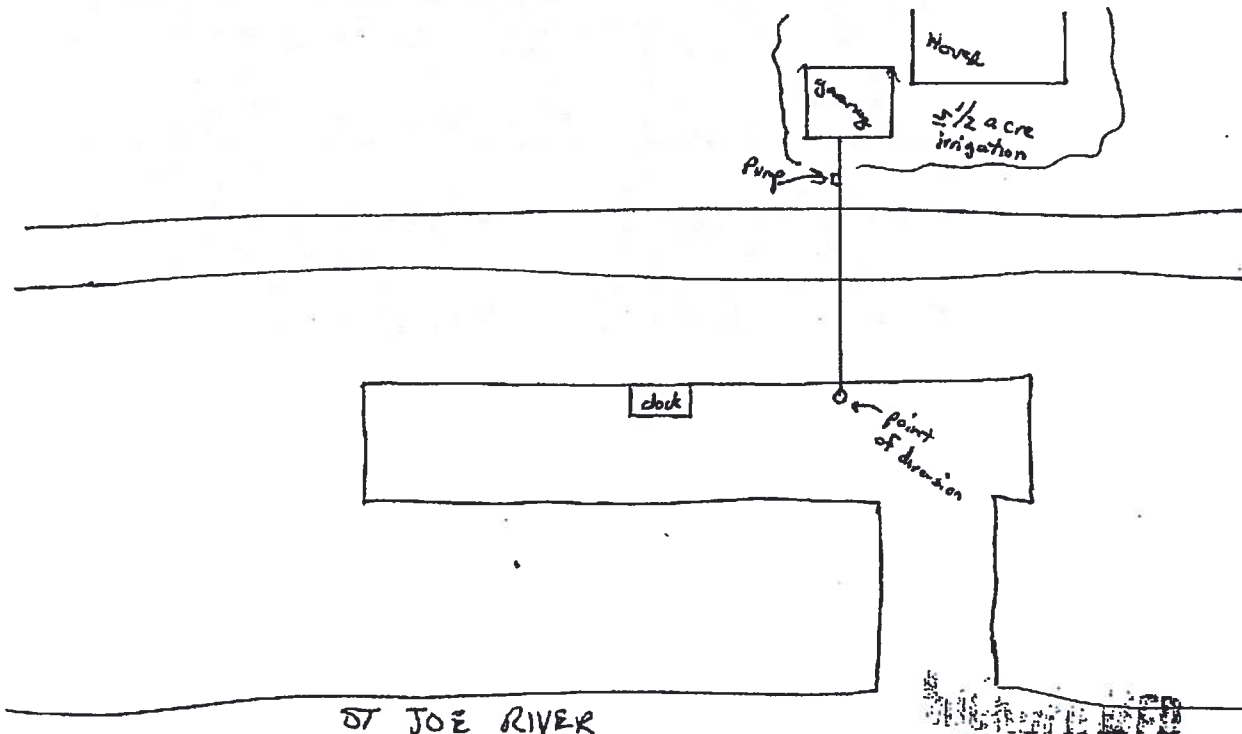
1. Owner: Steve Hawks Phone No. 245-2493
Current Address: Rt 2 Box 86 St. Maries, Id 83861
2. Accompanied by: Mrs. Hawks EXAM. DATE: 7/26/89
Address: Same Phone No. Same
Relationship to Permit Holder: wife
3. Source: St. Joe River tributary to Coeur d'Alene Lk.

B. OVERLAP REVIEW

1. Other water rights with same place of use: NONE ☐ Copies Attached
2. Other water rights with same point of diversion: NONE ☐ Copies Attached ☐ Copies of Field Exam's Attached

C. SYSTEM DESCRIPTION

1. **Diversion System Diagram:** Indicate all major components and distances between components. Indicate weir size/ditch size/pipe i.d. as applicable. ☐ Alternative diagram attached



Scale: 1" = NTS

2. ☐ Copy of U.S.G.S. Quadrangle Attached Showing location(s) of point(s) of diversion and place(s) of use (required). ☐ Aerial Photo Attached (required for irrigation of 10 acres or more).
☐ Photo of Diversion and System Attached (required for all but single household domestic groundwater, and stockwater).

EXHIBIT 22

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES
BENEFICIAL USE FIELD REPORT SUPPLEMENT
C O N T E N T S

() B/U Acknowledgment Letter Sent

This Examination Report Contains the Following Documents.

(☒) Field Report (☒) Quad Sheet (☒) Gov. Lot Plat (☒) Rules Check list
() Aerial Photo () Photo PD/PU () Well Log

Number of Diagrams Attached _____ Number of Calculation Sheets Attached _____

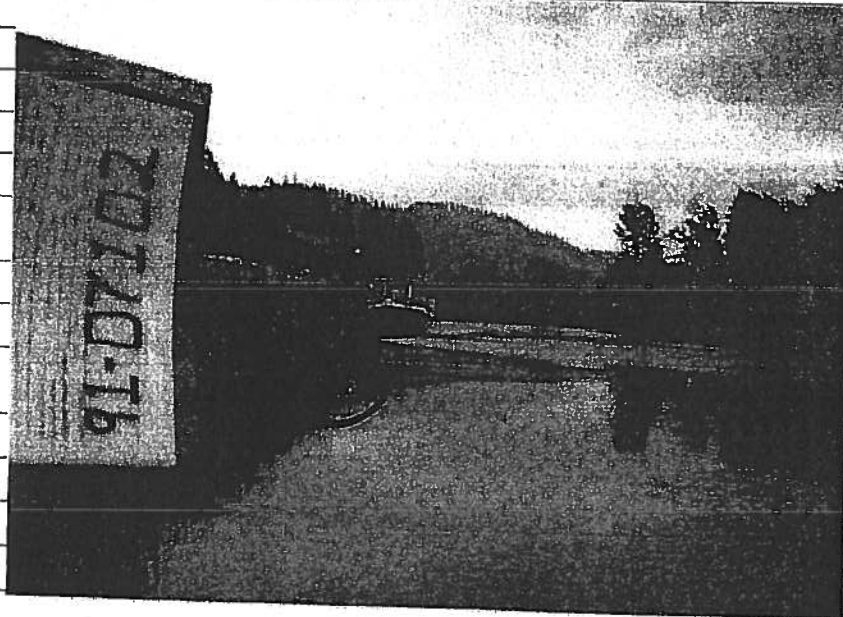
() Correspondence (Date) _____

() Other (List) _____

Contacts: _____

Remarks: _____

Tha PD



Exam Completed By *Joris*

Sr. Agent Review _____

Regional Manager Review _____

MICROFILMED

Date *8/8/89*

Date _____

Date _____

JUL 10 1990

PERMIT NUMBER

91-07102

EXHIBIT

12

DEPONENT NAME:

S. HAWKS

DATE:

5/21/86

CDAT OBJ-7102 0008

EXHIBIT 23

Norman M. Semanko, ISB No. 4761
Sarah A. McCormack, ISB No. 9683
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
nms@moffatt.com
sam@moffatt.com
26002.0001

Attorneys for Claimants Steve and Deanne Hawks

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

In re CSRBA

Case No. 49576

Subcase No. 91-7102

**CLAIMANTS' ANSWERS AND
RESPONSES TO OBJECTOR'S
SECOND REQUESTS FOR
DISCOVERY**

Steve and Deanne Hawks,

Claimant(s),

vs.

Coeur d'Alene Tribe, a federally-recognized
Indian tribe,

Objector.

**CLAIMANTS' ANSWERS AND RESPONSES TO OBJECTOR'S
SECOND REQUESTS FOR DISCOVERY - 1**

Client4123404.1

with knowledge regarding any such facts, and all documents relating in any way to your response.

ANSWER NO. 19: See Answer to Interrogatory No. 17. In addition, Claimants' point of diversion is not only higher than the elevation of the water above the submerged lands prior to Statehood, which precludes it from ownership by the United States, but the lagoon from which Claimants receive their water at their point of diversion was not even constructed until after the construction of the dams.

All individuals with knowledge regarding such facts are Claimants.

INTERROGATORY NO. 20: Please state the elevation, in feet above mean sea level, of the ordinary, historic or natural high water mark of the St. Joe River, as referenced in Claimants' answers to Requests for Admission Nos. 6 and 7, and the ordinary low water mark of the St. Joe River. Please identify all individuals with knowledge regarding any facts stated in your response, and all documents relating in any way to your response.

ANSWER NO. 20: Objection is made to Interrogatory No. 20 on the ground that the ordinary low water mark was not referenced in Claimants' Responses to Requests for Admission Nos. 6 and 7. Without waiving the objection, the ordinary low water mark of the lagoon is the level of the water when the lagoon is completely dry. The ordinary high water mark is 2120. See also Response to Request for Admission No. 17.

All individuals with knowledge regarding such facts are Claimants.

INTERROGATORY NO. 21: Please provide the basis or describe the basis for the answer to Interrogatory No. 20, as well as the basis for Claimants' denial in Responses to Request for Admission Nos. 6 and 7 that "the historic OHWM or the natural high water mark for Coeur d'Alene Lake and the St. Joe River is or has always been 2128 feet," and that "the point of

EXHIBIT 24

IDAHO DEPARTMENT OF LANDS

1910 NW Blvd., Suite 201
Coeur d'Alene, Idaho 83814-2615
Phone: (208) 769-1535 FAX (208) 769-1557

STANLEY F. HAMILTON - DIRECTOR

BOARD OF LAND
COMMISSIONERS

PHILIP E. BATT
Governor

PETE T. CENARRUSA
Secretary of State

ALAN G. LANCE
Attorney General

J.D. WILLIAMS
State Controller

ANNE C. FOX
Sup't of Public
Instruction

August 15, 1997

Steve Hawks
HCR 2 Box 86
St. Maries, ID 83861

Dear Mr. Hawks:

Re: Encroachment Permit L-95-S-4339

Enclosed is subject permit in accordance with the application you filed with this office. Please comply with all special terms and conditions.

You are required to record this original notarized permit with Benewah County. Encroachment permit number 4339 must be displayed upon the most waterward area of your encroachment with metal, plastic or vinyl numerals at least three inches in size.

Thank you for your cooperation.

Sincerely;

Carl Washburn

CARL WASHBURN
Navigable Waters Specialist

mc

enclosures

c: COE-CDA
Harrison Dock Builders

COPIES

EXHIBIT

23

DEPONENT NAME:

S. HAWKS

DATE:

5/21/16

KEEP IDAHO GREEN
PREVENT WILDFIRE

FOR OPPORTUNITY FOR STATE

CDAT OBJ-7173 0044

IDAHO DEPARTMENT OF LANDS

1910 NW Blvd., Suite 201
Coeur d'Alene, Idaho 83814-2615
Phone: (208) 769-1535 FAX (208) 769-1557

STANLEY F. HAMILTON - DIRECTOR

BOARD OF LAND
COMMISSIONERS

PHILIP E. BATT
Governor

PETE T. CENARRUSA
Secretary of State

ALAN G. LANCE
Attorney General

J.D. WILLIAMS
State Controller

ANNE C. FOX
Sup't of Public
Instruction

ENCROACHMENT PERMIT NO. L-95-S-4339

Permission is hereby granted to STEVE HAWKS
of HCR 2 Box 86 St. Maries, ID 83861 to install and maintain
2.5' x 20' ramp & 8' x 30' float dock w/ 4 piling
located: St. Joe River, Sylvia's Haven, Block 2, Lot 12, Section 7,
Township 46 North, Range 2 West, Boise Meridian, Benewah County,

1. All applicable provisions of the Rules for Regulation of Beds, Waters, and Airspace over Navigable Lakes and Streams in the State of Idaho are incorporated herein by reference and made a part hereof.
2. Construction will follow details and specifications shown on the approved drawings and data provided by the applicant. Should such information and data prove to be materially false, incomplete and/or inaccurate, this authorization may be modified, suspended, or revoked in accordance with the Administrative Procedures Act, Idaho Code title 67, chapter 52.
3. This permit does not convey the State's title to or jurisdiction or management of lands lying below the natural or ordinary high water mark.
4. Acceptance of this permit constitutes permission by the Permittee for representatives of the Department of Lands to come upon Permittee's lands at all reasonable times to inspect the encroachment authorized by this permit.
5. The Permittee assumes all liability for damages which may result from the exercise of this permit.
6. This permit does not relieve the Permittee from obtaining additional local or federal permits as required.
7. This permit is not valid until the identification number is displayed on the outermost area of the encroachment.
8. If the activity authorized herein is not completed on or before the 15th day of August, 2000 (three years from the date of issuance), this permit shall automatically expire unless it was previously revoked or otherwise extended.

KEEP IDAHO GREEN
PREVENT WILDFIRE

EQUAL OPPORTUNITY EMPLOYER

CDAT OBJ-7173 0045

9. White bead foam flotation shall be completely encased in a manner that will maintain the structural integrity of the foam. The encasement shall be resistant to the entry of rodents.
10. Removal of any pre-existing facilities is a condition of this permit.
11. This permit supersedes and voids any permit previously issued for this property unless otherwise noted.
12. Construction materials shall be natural or pressure treated utilizing only those preservative chemicals registered for the specific uses, such as CCA (Chromated Copper Arsenate), by the U.S. Environmental Protection Agency (EPA). All treated wood materials shall be produced in compliance with "Best Management Practices (BMPs) For the Use of Treated Wood in Aquatic Environments" issued by the Western Wood Preservers Institute (WWPI), July 1996. Treated materials not in contact with the water shall be completely dry before use near navigable waters. Contact Idaho Department of Health and Welfare, Division of Environmental Quality, at (208)769-1422 with questions regarding treated materials.
13. All construction material must be stockpiled landward of the ordinary high water mark.
14. Regardless of dock dimensions, the dock may only extend waterward to a water depth of six feet when measured at full pool (elevation 2,128 WWP datum).
15. This permit is issued subject to the established commercial navigational servitude. The permittee places this encroachment at his own peril and specifically waives any claim against commercial log tow operators who may accidentally damage this encroachment.
16. The permittee shall maintain the structure or work authorized herein in a good and safe condition and in accordance with the plans and drawings attached hereto.
17. All construction shall be completed in accordance with descriptions and methods provided unless otherwise specified. Any changes shall be approved in writing by the department prior to construction.

ENCROACHMENT PERMIT NO. L-95-S-4339
August 15, 1997
Page three

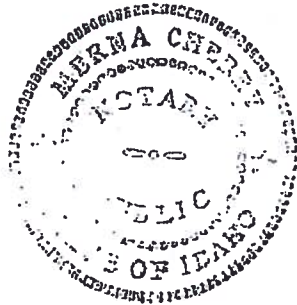
UPON TRANSFER OF THIS REAL PROPERTY, YOU ARE REQUIRED TO NOTIFY THIS
OFFICE OF THE SUBSEQUENT NAME CHANGE (SEE ENCLOSURE).

FOR THE DIRECTOR

By: Carl Washburn
CARL WASHBURN
Navigable Waters Specialist

STATE OF IDAHO)
) ss
COUNTY OF KOOTENAI)

Subscribed and sworn to before me this 15th day of
August, 1997.



Merina Cherry
Notary Public for Idaho
Residing at Post Falls, Idaho
Commission expires: 1/24/98

EXHIBIT 25

IDAHO DEPARTMENT OF LANDS

1910 NW Blvd., Ste. 201
Coeur d'Alene, Idaho 83814-2615
Phone (208) 769-1535 Fax (208) 769-1536

STANLEY F. HAMILTON - DIRECTOR

BOARD OF LAND
COMMISSIONERS

PHILIP E. BATT
Governor

PETE T. CENARRUSA
Secretary of State

ALAN G. LANCE
Attorney General

J.D. WILLIAMS
State Controller

ANNE C. FOX
Sup't of Public
Instruction

ENCROACHMENT PERMIT NO. L-95-S-4172

Permission is hereby granted to Cyril C. Chase
of 305 Lincoln Avenue St. Maries, ID 83861 to install and maintain
excavate and dredge approx. 4000 cubic yards material from existing
constructed side channel located: St. Joe River, Sylvia's Haven, SENE
Section 7, Township 46N, Range 2W, Boise Meridian, Benewah County.

1. All applicable provisions of the Rules for Regulation of Beds, Waters, and Airspace over Navigable Lakes and Streams in the State of Idaho are incorporated herein by reference and made a part hereof.
2. Construction will follow details and specifications shown on the approved drawings and data provided by the applicant. Should such information and data prove to be materially false, incomplete and/or inaccurate, this authorization may be modified, suspended, or revoked in accordance with the Administrative Procedures Act, Idaho Code title 67, chapter 52.
3. This permit does not convey the State's title to or jurisdiction or management of lands lying below the natural or ordinary high water mark.
4. Acceptance of this permit constitutes permission by the Permittee for representatives of the Department of Lands to come upon Permittee's lands at all reasonable times to inspect the encroachment authorized by this permit.
5. The Permittee assumes all liability for damages which may result from the exercise of this permit.
6. This permit does not relieve the Permittee from obtaining additional local or federal permits as required.
7. This permit is not valid until the identification number is displayed on the outermost area of the encroachment.
8. If the activity authorized herein is not completed on or before the 1st day of September, 1998 (three years from the date of issuance), this permit shall automatically expire unless it was previously revoked or otherwise extended.

KEEP IDAHO GREEN
PREVENT WILDFIRE

EQUAL OPPORTUNITY EMPLOYER

CDAT OBJ-7102 0081

September 1, 1995

Page two

9. Approximately 4000 cubic yards of material may be excavated below the ordinary high water mark.
10. Operation of excavation equipment will be held to a minimum below the ordinary high water mark. Equipment shall be operated only on dry ground above the 2121 WWP Datum. Construction machinery may not be operated in the water.
11. No material shall be placed within a wetland area.
12. All construction will be done according to the specifications detailed in the attached design plan.
13. The Department of Lands reserves the right to inspect the dredging operation and stop work if, in the state's opinion, unacceptable turbidity levels are produced.
14. Excavated material shall be removed to an area above the ordinary high water mark and in a position such that it will not reenter the lake.
15. All construction shall be completed in accordance with descriptions and methods provided unless otherwise specified. Any changes shall be approved in writing by the department prior to construction.
16. A silt curtain, fence, or straw bales shall be installed waterward of the project site. It will remain in place and functional until the turbidity level inside the curtain or fence equals the turbidity outside the curtain or fence.
17. An adequate supply of petroleum-absorbing products shall be on site in the event of a spill.
18. State water quality standards will be maintained at all times during the life of the operation. Should a violation of water quality standards occur, operations on the site will cease immediately and corrective action will be taken, and the Department of Health and Welfare, Division of Environmental Quality, notified.
19. Project will be conducted during the low-water time of the year.
20. Upon transfer of this real property, you are required to inform this office of the subsequent name change.

FOR THE DIRECTOR

By: Jim Brady
JIM BRADY, Specialist
Navigable Waters/Minerals

STATE OF IDAHO)
) ss
COUNTY OF KOOTENAI)

Subscribed and sworn to before me this 1st day of
September, 1995.

Deanna Cherry
Notary Public for Idaho
Residing at Post Falls, Idaho
Commission expires: 1/24/98



EXHIBIT 26

127 FERC ¶ 61,265
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suede G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Avista Corporation

Project Nos. 2545-091
12606-000

ORDER ISSUING NEW LICENSE AND APPROVING ANNUAL CHARGES
FOR USE OF RESERVATION LANDS

(Issued June 18, 2009)

INTRODUCTION

1. On July 28, 2005, Avista Corporation (Avista) filed applications for new licenses, pursuant to sections 4(e) and 15 of the Federal Power Act (FPA),¹ for the continued operation and maintenance of five developments comprising the 137.67-megawatt (MW) Spokane River Hydroelectric Project (Spokane River Project). The project is located on the Spokane River in Spokane, Lincoln, and Stevens Counties, Washington, and in Kootenai and Benewah Counties, Idaho.² The Spokane River Project occupies about 6,460 acres of federal and tribal lands, including about 5,996 acres that are part of the Coeur d'Alene Reservation.³ On January 29, 2009, after a contested relicensing

¹ 16 U.S.C. §§ 797(e) and 808 (2006).

² The five developments comprising the Spokane River Project are operated in a coordinated manner as a single unit of development. Under FPA section 23(b)(1), 16 U.S.C. § 817(1) (2006), the Spokane River Project is required to be licensed because of its location on federal lands.

³ These reservation lands are owned by the United States and held in trust for the Coeur d'Alene Indian Tribe. The Coeur d'Alene Reservation includes the submerged lands of the Coeur d'Alene Lake that lie within the present-day boundaries of the reservation. *See Idaho v. United States*, 533 U.S. 262 (2001). In addition to the Coeur d'Alene Reservation lands, which are administered by the U.S. Department of the

(continued...)

acres for the Post Falls development,²⁰ 138 acres for the Upper Falls and Monroe Street developments, 414 acres for the Nine Mile development, and 5,613 acres for the Long Lake development.²¹

D. Existing Project Operation

30. The Post Falls development is the project's upstream-most development on the Spokane River. Avista uses its Post Falls development to regulate flows in the Spokane River at certain times and in accordance with minimum flow requirements, other lake level and downstream flow considerations, energy demands, flood control, and upstream recreational, residential, and commercial interests.

31. The Post Falls development typically controls water levels in the Spokane River and Coeur d'Alene Lake approximately six months a year starting in late June or July, after the spring runoff flows have peaked and largely subsided. Throughout the summer recreation season, Coeur d'Alene Lake is maintained at or near elevation 2,128 feet. Generally during the week after Labor Day, Avista begins to release stored water at the Post Falls development, resulting in a gradual drawdown in lake levels of one to two feet per month to a maximum drawdown of 7.5 feet. The timing of the drawdown varies annually based on flow conditions, weather forecasts, and energy demands.

32. From the natural Coeur d'Alene Lake outlet, water flows downstream to the three Post Falls development dams. Avista uses the North and South Channel dams to divert flow into the Middle Channel. Water in the Middle Channel flows through steel penstocks into the six-turbine powerhouse, integral to the Middle Channel dam. After flowing through the turbines, water exits the powerhouse through the tailrace and re-enters the Spokane River. Water not diverted for generation at the Middle Channel dam spills into the bypassed reaches of the North and South Channel dams, which are 4,000 feet long and 2,800 feet long, respectively.

²⁰ The project boundary for the Post Falls development primarily follows the 2,128-foot-elevation contour (Avista Datum), which is the full pool elevation of Lake Coeur d'Alene. The original acreages for the Post Falls development were generated using simple planimetric techniques many years ago. With the advent of GIS technology and verification using field data, in the 1990s Commission staff recalculated the new project boundary based on the 2,128-foot-elevation contour, which resulted in changes to the project boundary, as verified by Avista field data. Among other things, this resulted in an increase of 64 acres of BLM lands and 37 acres of Forest Service lands within the project boundary.

²¹ See final EIS at 3-396 through 3-399.

EXHIBIT 27

CONTRIBUTIONS TO THE HYDROLOGY OF THE UNITED STATES, 1921.

NATHAN C. GROVER, *Chief Hydraulic Engineer.*

COEUR D'ALENE LAKE, IDAHO, AND THE OVERFLOW LANDS.

By R. W. DAVENPORT.

INTRODUCTION.

A controversy regarding the use of Coeur d'Alene Lake, Idaho, as a storage reservoir has existed for several years between the Washington Water Power Co. and owners of overflow lands near the lake and its tributaries. The purpose of using Coeur d'Alene Lake for storage is to equalize the flow of low-water periods and to increase the mean flow during such periods by the release of flood water stored in the spring, thereby assuring a greater output of power from the Washington Water Power Co.'s hydroelectric plants on Spokane River. The use of the lake for storage, although it has not increased the maximum water level or the maximum area of lands that may occasionally be flooded, involves the maintenance of a higher water level during low-water periods than would naturally exist, and the consequent retarding of drainage is detrimental to the interests of the landowners. Although the Washington Water Power Co. has settled with the landowners, the natural conflict of interests in the process of settling as well as in the management of the storage reservoir has fostered a great deal of ill feeling.

Because of the functions of the Department of the Interior in the administration of public lands the controversy has been placed several times before the department for consideration. A recent request made of the Geological Survey for certain technical advice has necessitated a field investigation. The writer was detailed to make this investigation and thus had a favorable opportunity to become familiar with the existing physical conditions and with the main features of the controversy.

Because the situation is very complex and involves many factors, concerning which information is lacking or meager, it has seemed advisable to publish a brief report on the conditions and the conclusions reached in order to contribute to a better understanding of

the situation and to a proper solution of the many problems involved. It is the purpose of this report, therefore, to present such conclusions as are consistent with a proper understanding of these conditions and to make constructive suggestions as to further activities.

The field investigation was made during the period from May 19 to June 3, 1920, inclusive. About six days was spent with the settlers and their representatives in seeing and considering the features that they believed deserved special attention, and about the same length of time was spent in a similar way with representatives of the Washington Water Power Co. The remainder of the period was spent in independent investigation.

At the time of the visit the stage of water in the lake was at its highest for the season. Although this afforded a good opportunity to see the extent of lands flooded by the lake at that stage, it was not so favorable for observing the character of the soil of the low lands and other conditions that would appear at a lower stage. Two trips by boat were made—one up Coeur d'Alene River as far as Lane and the other up St. Joe River as far as St. Maries. From St. Maries automobile trips were made up St. Maries River for 5 or 6 miles and up St. Joe River as far as Falls Creek, a distance of about 20 miles. The drainage projects near St. Maries were examined, and numerous interviews were had with citizens representing not only the agricultural but various other interests of the region. The officers and representatives of the Washington Water Power Co. made full statements respecting the attitude of the company, and the city engineer of Spokane was interviewed regarding the effect of floods in Spokane.

All persons concerned showed a most helpful disposition in furnishing all information in their possession and in aiding the investigation in every way. The engineering staff of the Washington Water Power Co. has collected a large amount of data regarding the physical conditions and has made studies and investigations of the different features. The settlers have done much less work of this kind but have obtained considerable information concerning the cultivation and productivity of the lands.

The writer is most grateful to all who facilitated the examination. Special acknowledgment is due to Mr. Fred Herrick, Capt. John A. Nye, and Mr. M. S. Parker, among the settlers, and to the officials and employees of the Washington Water Power Co. Valuable information was obtained from a report on the situation entitled "Preliminary report on proposed drainage district No. 4, Benewah County, and drainage district No. 6, Kootenai County," prepared by L. T. Jessup, drainage engineer, under the direction of Samuel Fortier, chief of irrigation investigations, Bureau of Public Roads, United States Department of Agriculture.

GENERAL FEATURES.

TOPOGRAPHY.

Coeur d'Alene Lake is in northern Idaho, in the "panhandle." This lake, which lies a few miles from the west boundary of the State, in the same latitude as the city of Spokane, Wash., is 24 miles long and in most places from 1 to 2 miles wide. The chief tributaries are Coeur d'Alene and St. Joe rivers, which drain a wide mountainous area that extends eastward to the crest of the Bitterroot Mountains, part of the eastern boundary of Idaho. The outlet of the lake is Spokane River, which flows westward through Spokane and joins Columbia River. Plate I is a map of the Spokane River basin.

Coeur d'Alene Lake was formed by the drowning of a narrow, steep-sided valley by a dam of gravel that was deposited by a glacial stream at a time when a great glacier extended down from the north.¹ The lake originally extended several miles up the valleys of Coeur d'Alene and St. Joe rivers, but these valleys have been gradually filled with soil washed down from the mountains and deposited by the streams where the current slackens as the water joins the lake. This material has been deposited not only where the main current slackens but also along the margins of the main current where the water has spread outward and the current is not so strong. Because of this lateral deposition, the immediate river banks are the highest land between the river and the steep slopes of the hills that bound the valleys. Decayed vegetation has also contributed to the enrichment of the lands and in some measure to their formation. The lands slope gradually toward the lake, thus illustrating the different stages of the process by which they are being built up. As a further incident of the building process small lakes and swamps have been entirely or partly cut off from the lake at its lower levels.

The natural low-water elevation of the lake is 2,120 feet above the sea. The highest level that the lake has been known to reach was 2,137.6 feet, in the spring flood of 1894. Between these two levels lies about 30,000 acres, including the alluvial bottom lands and the lakes and swamps that at low-water elevation are not a part of the lake proper. This area includes about all the lands that owe their origin to the process described. Considerably more than two-thirds of this area is below an elevation of 2,130 feet and subject to overflow by high water in spring in more than half the years. The area of the lake at a level of 2,120 feet is about 27,000 acres. Its depths are generally great, and navigation is practicable for

¹ Calkins, F. C., A geological reconnaissance in northern Idaho and northwestern Montana: U. S. Geol. Survey Bull. 384, p. 32, 1909.

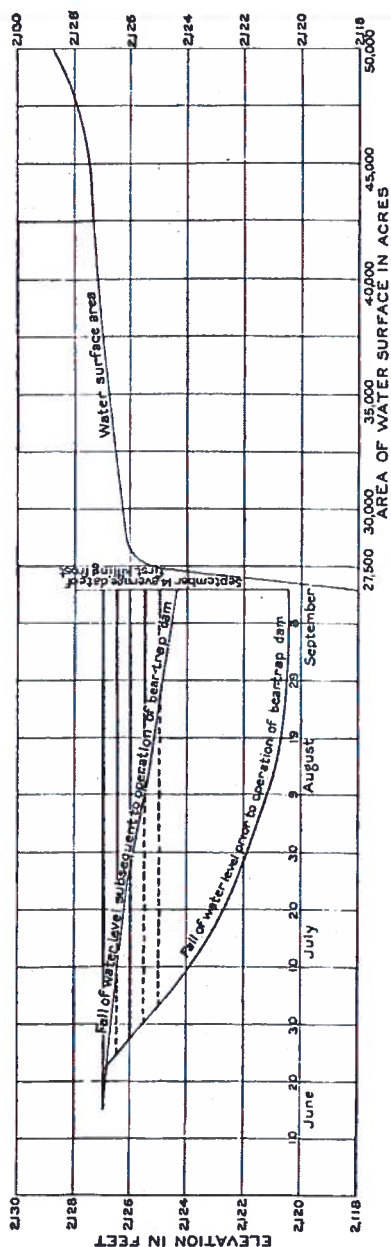


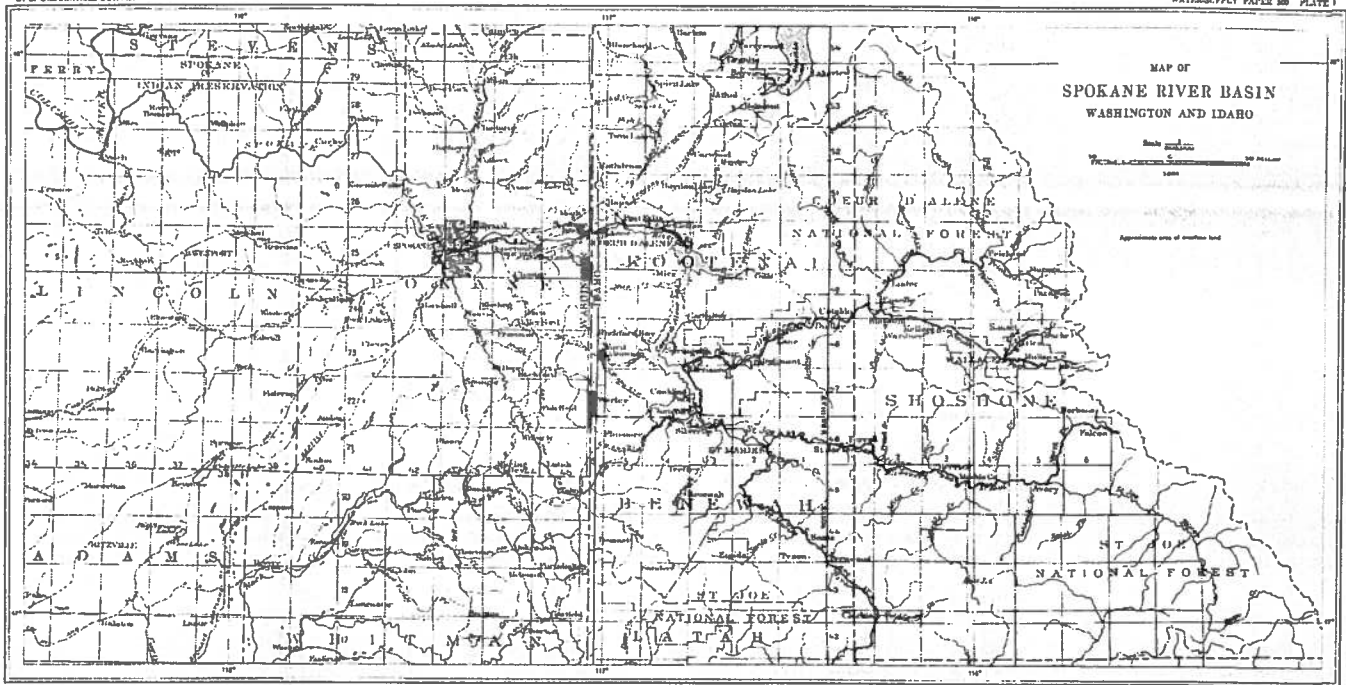
FIGURE 1.—Diagram showing fall of water level of Coeur d'Alene Lake, Idaho, during summer before and after operation of bear-trap dam, in relation to water-surface area.

several miles up its chief tributaries. Figure 1 represents the area of the lake at different levels and indicates also the elevation of the overflow lands.

Coeur d'Alene Lake and its tributaries, Coeur d'Alene and St. Joe rivers, are far famed for their beauty. Although many have described them, the description by Capt. John Mullan is perhaps the most interesting, because he saw the region before it had been scarred by the operations of lumbermen and by navigation. Capt. Mullan was on the Coeur d'Alene in 1854 to 1862, superintending the construction of the military road called by his name, extending from Fort Walla Walla to Fort Benton. In July, 1859, he first saw the lake in the vicinity of the mouth of St. Joe River, near the present log-sorting gap. The following extract* from his report of 1863 is of historical as well as descriptive interest:

The valley of the St. Joseph's is a beautiful gem, embedded in a noblerange of mountains. Viewed from an elevation on a summer's day the scenery and effect is grand and picturesque—the river winding from side to side in graceful curves, while copses of willow, cottonwood, and alder fringe its banks, and silvery lakes dot here

* Mullan, John, Report on the construction of a military road from Fort Walla Walla to Fort Benton, p. 16, Washington, Government Printing Office, 1863.



and there the green sward in which it is clothed. The spurs that form its either boundary, gently rising to an elevation of a thousand feet, are densely clad with one of the finest growths of fir and pine to be found in the mountains; and, enlivened, as it is, with here a camp of hunters and there the light bark canoe of the Indian, forms one of the most beautiful scenes it was our fortune to meet with in the Rocky Mountains. It was in this valley that, as early as 1842, the Jesuit fathers chose a site for the first of their Rocky Mountain missions. A small plateau, projecting into the valley from the north, where fine springs gushed from the slopes, on which the forest lay as yet untouched by the woodman and a rich virgin soil smiled in a beauty of profusion, cultured by the hand of nature alone, offered them a choice garden that, with slight attention, should yield abundant fruits. Here they maintained themselves for many years until, finding the overflow of the lower portion of the valley entered as an impediment both to pleasant travel and to the extension of their fields, they removed to their present location on the Coeur d'Alene Lake.

Spokane River is a little over 100 miles in length and has a fall of about 1,050 feet. For 9 miles below the outlet of the lake the river has a very flat slope. It then drops 40 feet at Post Falls, and it has a concentrated fall of over 140 feet within the city limits of Spokane. The Geological Survey has made a profile survey of Spokane River from its mouth to Chamokane Creek, a distance of 35 miles.³

CLIMATE.

The nearness of the Pacific Ocean, the prevailing winds, and the topography have given northern Idaho a milder climate than its latitude indicates. The following table, taken from the reports of the United States Weather Bureau, shows a summary of temperature records at St. Maries, Idaho, which is representative of the region considered.

Summary of temperature records, in degrees Fahrenheit, at St. Maries, Idaho, for 12 years.

[Altitude, 2,263 feet.]

	Jan.	Feb.	Mar.	Apr.	May.	June.	July.	Aug.	Sept.	Oct.	Nov.	Dec.	An- nual.
Highest.....	52	67	72	88	92	92	102	102	96	86	73	51	102
Lowest.....	-16	-26	0	20	28	29	37	32	25	15	-8	-2	-26
Average.....	30.1	32.5	39.0	47.4	54.2	60.0	66.0	64.8	57.2	48.9	39.1	32.6	47.8

As shown by the following table the part of the year that is free from frosts is so short that for the best results crops of quick growth must be selected and must be planted as soon as the danger of frosts is over in order to insure as long a growing season as possible:

Frost data at St. Maries, Idaho.

Length of record.....	12 years.
Average date of last killing frost in spring.....	May 8.
Average date of first killing frost in autumn.....	September 14.
Earliest date of killing frost in autumn.....	August 19.
Latest date of killing frost in spring.....	June 8.

³ Marshall, R. B., Profile surveys in Spokane River basin, Wash., and John Day River basin, Oreg.: U. S. Geol. Survey Water-Supply Paper 377, pls. 1-3, 1915.

6 CONTRIBUTIONS TO HYDROLOGY OF UNITED STATES, 1921.

The table below shows the mean monthly precipitation at St. Maries for a period of 12 years. During this period the annual precipitation varied between approximate limits of 24 and 34 inches, with a mean annual amount of 28.82 inches. The mean precipitation for June, July, and August is 3.94 inches, but in many years the amount will undoubtedly be less than this. Although the precipitation for the year is fairly plentiful, the comparatively low rainfall during the growing season makes an auxiliary supply of water advantageous, if not necessary, for the production of many varieties of crops on lands that have no other supply than rainfall. In winter the precipitation in the mountains is in the form of snow, which except for melting caused by occasional chinooks tends to accumulate until spring.

Mean monthly precipitation, in inches, at St. Maries, Idaho, for a period of 12 years.

January.....	3.38	August.....	1.03
February.....	2.53	September.....	1.46
March.....	2.84	October.....	2.32
April.....	1.76	November.....	4.41
May.....	2.62	December.....	3.56
June.....	1.87		
July.....	1.04	Annual.....	28.82

STREAM FLOW.

Records of stream flow have been maintained for many years on Spokane River at different points and for shorter periods on some of the tributaries of Coeur d'Alene Lake. The records of water levels of the lake have been maintained since 1903. These records are published in the water-supply papers of the United States Geological Survey and are readily available. Inasmuch as these records are voluminous, they are not inserted in this report, but some of the more important facts obtained from them are shown below:

Flow, in second-feet, of Spokane River at Spokane, Wash.

Maximum flow:	
May 31, 1894.....	48,000
May 17, 1917.....	41,700
Minimum flow:	
Prior to storage operation (Sept. 30, 1905).....	1,240
Subsequent to storage operation.....	⁴ 1,700
Mean annual flow.....	7,400
Estimated average inflow between Post Falls and Spokane.....	400

Water level, in feet, of Coeur d'Alene Lake.

Maximum elevation:	
May 31, 1894.....	2,137.6
May 17, 1917 (second highest).....	2,135.9
Mean of annual maximum elevations, 1903-1920.....	2,130.9
Minimum elevation:	
Prior to storage operation.....	2,119.9
Subsequent to storage operation.....	2,120.52

⁴ Varies below this, but this is a reasonable estimate of the flow that can be maintained.

The chief source of run-off is the melting snow in the mountains, and consequently the highest stages of water occur in spring. Chinook thaws cause occasional rises in winter. A good example of such a rise is that of January, 1918, when the lake reached a level of 2,135.9 feet, the same as in May, 1917, the second highest level on record. The records indicate that rises of such magnitude in winter are rare.

RESOURCES AND INDUSTRIES.

The economic importance of the streams and lakes of the country is well illustrated by Coeur d'Alene Lake. This lake has taken a prominent part in the development of the region in which it lies and is likely to take a more prominent part in the future. Its first important service was in furnishing a means of economical transportation prior to the construction of railroads. It continues to be of service in this respect, although railroads are now easily accessible from most of the region. At the present time a fleet of steamers is operated on the lake, maintaining a daily service from Coeur d'Alene to St. Maries throughout the year. In 1917 the traffic was reported to consist of 150,000 passengers and 60,000 tons of freight annually.⁵ Coeur d'Alene Lake and its connections that are now navigable lie wholly within the State of Idaho, and consequently the United States Government may not in the near future exercise the authority over the lake that it has over waterways utilized in interstate navigation. A large quantity of timber near Coeur d'Alene Lake makes lumbering an important industry of the region, and the lake and its tributaries are used extensively for floating logs to the sawmills. The summer cottages about the border of the lake are a noteworthy feature of development in the region, and the natural beauty of the lake and its environs may be counted as a valuable asset.

Although the resources and industries just mentioned are more or less directly involved in the present discussion, the resources with which this report is primarily concerned are those of agriculture and of storage for the development of power. More than 20,000 acres of overflow land, the origin of which has been explained, lies along St. Joe and Coeur d'Alene rivers. Near St. Maries about 2,000 acres has been diked, drained, and put under cultivation. As would be expected of lands formed as these have been, they are very productive. A county farm bureau has been organized, and under the supervision of a county agricultural agent assigned by the State scientific tests are being made to determine the varieties of crops best adapted to the lands. These tests show that the lands are well suited to truck gardening, a type of development that would make them very valuable. Other factors that make the lands valuable are the relative

⁵ Acher, A. H., Report on preliminary examination of St. Marys and St. Joe rivers, Idaho: 65th Cong., 2d sess., H. Doc. 1216, 1917.

scarcity of agricultural lands in northern Idaho; the nearness to Spokane and to the mining towns and other good markets of the mountain region; and the excellent transportation facilities, both by rail and by water.

The landowners are interested in the establishment of two drainage districts—No. 4, Benewah County, and No. 6, Kootenai County. These districts include lands below an elevation of 2,138 feet; and their areas are given by M. S. Parker, consulting engineer for the districts, as 10,056 and 15,729 acres, respectively. Additional areas of lands at higher elevations would be adapted to combination as farm units with overflow lands and probably could not be farmed so advantageously unless they were combined.

Data are not available to answer conclusively the question how the productivity of the undiked overflow lands would compare with the productivity of the diked lands. Considerable areas on Coeur d'Alene River have been covered with deposits of lead compounds washed down from the tailing dumps of the mining districts. These deposits have killed the vegetation and have left the lands in an unproductive state. The mining companies have settled the resulting damage claims privately or through condemnation proceedings or have bought the damaged lands outright. Those who are familiar with this condition believe that the lands could be restored to productivity if the deposits could be kept off the lands for two or three years.

The character of the soil of the lands nearest the mouths of the rivers apparently should receive further investigation. The process by which the lands have been built up would favor the sorting of the material deposited to a certain extent, so that for this and other reasons incident to the different conditions to which it has been subjected the soil of the lower lands is not necessarily equivalent to that of the lands farther up the rivers. Answering questions of this kind would be an essential part of such an investigation as should be made before any extensive scheme of reclamation is undertaken.

The value of the lake as a storage reservoir in connection with the development of water power arises from the fact that a dam of relatively low height will store a great amount of water and from the further fact of its strategic location at the head of a stream with great fall. Water power that can be developed from stored water as it is needed has a much greater value than water power that is limited by the fluctuations in the flow of a stream. Water power from storage enables a power company to contract to supply a larger amount of power throughout the year than it could contract to supply without storage, and the measure of the increase is not the kilowatt-hours derived from the stored water alone, but the kilowatt-hours derived from the stored water and that part of the natural flow of the stream that it supplements and that would run to waste except for the

storage. With the storage now developed by the dam at Post Falls it is probably practicable to develop more than 80,000,000 kilowatt-hours a year that would not be developed without the storage. This is nearly two-thirds of the electric power used by the Chicago, Milwaukee & St. Paul Railway in the operation of its lines over the entire Rocky Mountain and Missoula divisions, a distance of 440 miles. On the assumption that 3 pounds of coal would produce 1 kilowatt-hour, it would take 120,000 tons of coal a year to produce the power made possible by the storage now developed.

In the above calculations consideration is given not only to the water power that is now developed on Spokane River, but to the water power that it is estimated will ultimately be developed.

Obviously the extension of agricultural development conflicts with the extension of storage development. Both have merits that deserve careful consideration, and in considering them proper attention must be given to the other resources and industries that are concerned.

HISTORICAL STATEMENT.

The first white settlers in the Coeur d'Alene region were Jesuit missionaries, who established a mission a short distance above the mouth of St. Joe River. Capt. Mullan⁶ gives the date of the establishment as 1842; Bancroft⁷ gives it as 1841.

In 1846 the mission was moved to its present site on Coeur d'Alene River because the overflow in the lower portion of the valley near the old site was objectionable. In 1858-1862 the Mullan military road was constructed. Spokane was settled in 1872.⁸ Frederick Post probably first developed water power on Spokane River some time prior to 1876, for Bancroft⁹ states that in that year Post was induced by the settlers at Spokane to remove his mill from Trent to Spokane Falls by a gift of 40 acres of land and water-power privileges.

In 1879 Fort Coeur d'Alene, afterward Fort Sherman, now abandoned, was established at the outlet of the lake at the present site of Coeur d'Alene. In or about 1880 the railroad reached the region. During the eighties settlement proceeded very rapidly because of the greater accessibility of the region afforded by the railroad and because of mining discoveries and developments on the branches of Coeur d'Alene River.

Coeur d'Alene Lake and the lands surrounding it were included within the limits of the Coeur d'Alene Indian Reservation by Executive order November 8, 1873. The northern part of the reservation, including a large part of the lake, was ceded to the United States by agreement of September 7, 1889; and the lands were opened to

⁶ Op. cit., p. 18.

⁷ Bancroft, H. H., *History of Washington, Idaho, and Montana, 1845-1890*, p. 562, 1890.

⁸ *Idem*, p. 290.

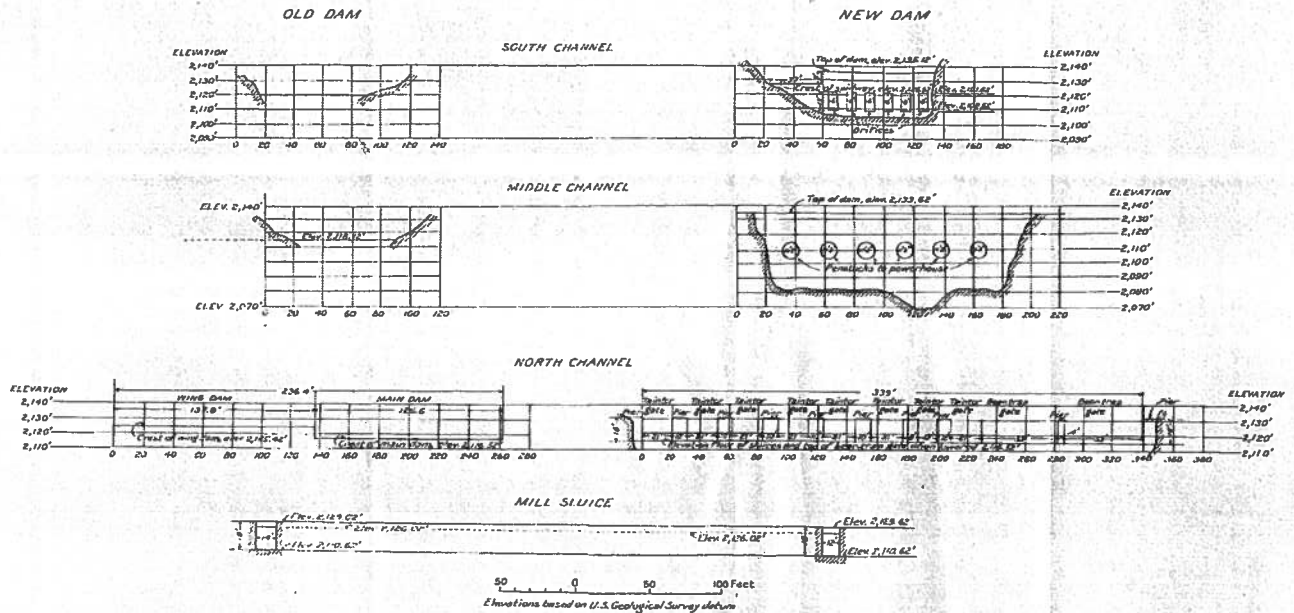
⁹ *Idem*, p. 391.

homestead entry in accordance with the provisions of section 22 of the act of March 3, 1891 (26 Stat., 989). A further cession was made by agreement of February 7, 1894, and the lands were opened in accordance with the provisions of section 14 of the act of August 15, 1894 (28 Stat., 286). The act of June 21, 1906 (34 Stat., 325), made provision for surveying the diminished reservation, allotting lands to Indians, and opening the unallotted lands to homestead entry.

The land at Post Falls on which the present power plant is situated is owned by the Washington Water Power Co., successor to Frederick Post, who obtained it from the Indians in 1871, the Indian grant being confirmed by the act of March 3, 1891, and patent issued in 1894. Prior to 1891 dams in the three channels at Post Falls were constructed by Post, but they affected the level of the lake very little and probably not at all. New dams were completed by the Washington Water Power Co. in June or July, 1906. (See Pl. II.) The new dams (hereinafter referred to as a single dam) have a greater discharge capacity than the old dams but are constructed with control gates that allow the water to be held up to an elevation of 2,126.5 feet and gradually released as the low-water season advances. The water was first held in the summer of 1907. From July 1 to October 1 of that year the water level of the lake averaged about 3 feet higher than in the same period in 1906, owing mainly to the new control operations. The effect of the operation of the new works on the water level is discussed on page 14.

In holding the water to a higher level the Washington Water Power Co. at first relied upon its legal right to overflow lands because of its successorship to the grant of water-power privileges acquired by Post, by and with the consent of the United States, and because of the alleged inferior character of the lands. The company maintained that it had the right to overflow the lands and that the owners had no legal rights to recover damages. In *Gaskill v. Washington Water Power Co.* (17 Idaho, 128), the Supreme Court of Idaho held, on October 29, 1909, that the power company had waived the above-mentioned right as a defense and that it had invoked condemnation procedure as a means of securing the right to overflow. On March 28, 1911, the Supreme Court of Idaho held, in *Washington Water Power Co. v. Waters* (19 Idaho, 595), that the construction of a dam in Spokane River at Post Falls and the increase in storage thereby for use in the low-water season for power purposes constitute a public use within the contemplation of the State laws granting the right of eminent domain.

Soon after the lake was first used as a reservoir the company undertook surveys of the lands below an elevation of 2,128 feet. Although the company was maintaining that it had a legal right to overflow, in 1907 and 1908 it acquired many easements from settlers by



SHOWING DETAILS OF ELEVATION OF OLD AND NEW DAMS ON SPURGE RIVER AT FORT FALLS, MINN.

purchase at about \$20 an acre, such easements generally giving overflow rights to an elevation of 2,128 feet.

On April 27, 1908, in pursuance of representations made by the Interior Department and representatives of the Washington Water Power Co., a bill was introduced in Congress by Hon. Burton L. French authorizing the Secretary of the Interior to grant overflow easements on the affected lands in Coeur d'Alene Indian Reservation. Later, however, because a strong local sentiment was found against the passage of the bill, Congressman French took steps to have it withdrawn from further consideration, and this was done about December 20, 1908.

On January 25, 1909, the company applied to the Department of the Interior for permit to overflow the Indian lands under the act of February 15, 1901 (31 Stat., 790). The permit was granted on February 22, 1909, on condition that the company would pay \$1.25 an acre for the Indian lands flooded, and such payment, amounting to \$7,801.25, was duly made.

In pursuance of protests made by settlers to the Secretary of the Interior against the continuance of the permit, proceedings were initiated in April, 1909, that culminated in a hearing before the register and receiver of the United States land office at Coeur d'Alene extending from December, 1909, to April, 1910. As a result of the hearing an order of revocation was issued on July 29, 1910, but the company immediately filed a motion for review of the decision, and on April 21, 1912, the department issued an order in which the revoking order was "vacated and set aside."

As above noted, the Supreme Court of Idaho held, March 28, 1911, that the right of eminent domain might be invoked for lands on Coeur d'Alene Lake flooded by the storage operations. Exclusive of lands in the former reservation covered by the Interior Department permit (including Heyburn Park), the right to overflow to an elevation of 2,128 feet has been acquired for approximately 9,000 acres of private lands, of which about 1,000 acres was condemned. It is to be noted that the department's decision setting aside the order of revocation was not inharmonious with that of the State court in confirming the public purpose of the company's operations and its right to condemn private lands.

In pursuance of the provisions of the act of June 21, 1906, for opening the reservation lands, the proclamation of May 22, 1909 (36 Stat., 2494), was issued. This proclamation provided specifically for the opening of lands to settlement and entry, including a drawing beginning August 9, 1909, receipt of application for entry beginning April 1, 1910, and general settlement and entry beginning September 1, 1910. The Government surveys included lands down to an elevation of about 2,121 feet. Most of the lands covered by the permit were

immediately applied for, although their agricultural value, unless they were effectively drained, was questionable. The homesteading of these lands, which by governmental notice was subject to the rights of the Washington Water Power Co. under the overflow permit, was thus actually in progress during the period between the issuance and vacating of the order revoking the permit when the order was under review and when it still might have become effective from the date of issuance. Some settlers perhaps were led to believe that the rights of the power company were dead; and relying on this belief, which later proved to be mistaken, they have suffered injury and loss.

PHYSICAL CONDITIONS.

Coeur d'Alene Lake is a part of the watercourse system through which the water of Spokane River passes on its way to Columbia River and the sea. Like any watercourse its level rises and falls in general relation with increases or decreases in the flow of water to be carried. Records of the Geological Survey show that in 1904, 1905, and 1906, prior to the operation of the present Post Falls dam, the average range of stage between the high and low water season was 9.1 feet on Coeur d'Alene Lake and 7.6 feet on Spokane River at Spokane. Doubtless the range of stage is greater at some places on Spokane River than on the lake.

The lake is unlike an ordinary river channel, however, in its large amount of surface area, which introduces the factor of storage to a marked degree. If it were not for the effect of storage the outflow from the lake would always equal the inflow. The general controlling influence of a lake upon a watercourse is too well understood to require an extended explanation, and therefore this phase of the subject will be treated only briefly.

When unaffected by storage manipulations the amount of flow out of Coeur d'Alene Lake depends primarily on the stage of the lake. Other conditions being unchanged, the same amount of water will pass out at a certain stage of the lake, say 2,130 feet, in one year as in another. If the inflow to the lake becomes greater than the outflow the stage of the lake and the outflow will increase, and the outflow will maintain a definite relation to the stage. If the inflow continues constant in amount the outflow will in time become equal to the inflow, a condition that would be much more promptly attained in an ordinary river channel. A part of the inflow has been used to raise the level of the lake, so that up to this point the total volume of inflow is greater than the total volume of outflow by the amount of such storage. If the inflow decreases the order of adjustment will be reversed.

It may be considered that as the inflow increases or decreases the outflow is continually striving to become equal to it, which merely

means that the watercourse is trying to operate as much as possible like an ordinary river channel. Because of the intervention of the storage influence, however, the sudden fluctuations of the inflow are reflected in the outflow only in a greatly reduced degree. As above indicated, if the inflow remains at approximately the same amount for several days the outflow may have time to become adjusted to it. If the inflow is large for a considerable length of time the stage of the lake will tend to increase until the lake can discharge from the outlet the quantity of water that it is receiving. The direct relation between the inflow to Coeur d'Alene Lake on the one hand and the stage of the lake and the outflow on the other is a fundamental fact that it is very important to understand in the consideration of problems involving any changes in the regimen of the lake.

The general details of both the new and the old works at Post Falls are shown on Plate II. The river has three channels at this place, and originally the restrictions to the flow caused a lakelike expansion immediately above the falls at low-water stages. Capt. Mullan's report states¹⁰ that the high-water mark at the falls was 18 feet above the level at the time of the examination made the last of August, 1859. At the time of the construction of the present works a bear-trap dam and a system of Taintor gates were installed, and the main north channel was considerably enlarged by the excavation of rock at the side, as indicated in the diagrams. As would be expected from a comparison of the details of the new and old works, the flood discharge capacity is now considerably greater than it was with the old dam.

The method of operating the dam at Post Falls as reported by representatives of the Washington Water Power Co. is as follows: When the spring rise commences all the gates at the dam are opened wide to give the maximum discharge capacity. As soon as the lake falls to an elevation of 2,126 feet or thereabout the bear-trap dam is raised and the Taintor gates are manipulated so as to maintain the water level as near 2,126.5 feet as possible. As the low-water season advances the stored water is gradually released as need requires. When the autumn rains commence a small amount of stored water is accumulated for use in the periods of low water that occasionally occur in winter.

The records of the flow of Spokane River at Spokane and of the stage of Coeur d'Alene Lake, published in the water-supply papers of the United States Geological Survey, furnish a basis for investigating the manner in which the gates at Post Falls dam have actually been operated. The outflow from Coeur d'Alene Lake under natural conditions depends primarily on the stage of the lake. Except at the lower stages the flow at Spokane may be considered as essentially the

¹⁰ Mullan, John, *op. cit.*, p. 110.

same as the outflow from the lake. Sufficient records have been obtained at times when it was known that manipulations of the dam were not influencing the level of the lake to indicate the normal relation between the stage of the lake and the outflow. If at any time this relation does not exist and other adequate explanation does not appear, it may be assumed that the outflow is being affected by the dam. The time at which the bear-trap dam was lowered may be satisfactorily checked merely from analyzing this relation and comparing the flow at Spokane with the level of the lake. Normally a sudden decrease in discharge at Spokane should reflect a corresponding decrease in the level of the lake, but when such a decrease is accompanied by a rise in the level of the lake or when the lake maintains a stage that is not in normal relation with the decreased flow it is generally convincing evidence that the control of the outflow from the lake by the Post Falls dam has begun. Of course the control of the flow from the lake necessarily interferes with the normal relation between the stage of the lake and the outflow.

A study of these data, which are available to anyone because they are published Government records, shows that the Washington Water Power Co. has operated the dam, except possibly in one year, in accordance with the procedure above set forth. The records indicate that in the spring of 1909, the third year of the operation of the dam, the control of the lake by the dam was begun when the lake level was about 2,128 feet. In all other years the control was apparently begun when the lake level was approximately 2,126 feet or below.

The highest discharge of Spokane River at Spokane prior to the construction of the present dam and since regular records of the level of the lake have been maintained occurred in 1904, when the lake reached a height of 2,132.8 feet. The discharge of 1904 and the actual discharges measured at Spokane when the lake reached a height of 2,132.8 feet at times since the construction of the present dam are listed in the following table:

Discharge, in second-feet, of Spokane River at Spokane at times when the level of Coeur d'Alene Lake was 2,132.8 feet.

Prior to construction of present dam:	
1904.....	27,900
Subsequent to construction of present dam:	
1910.....	26,800
1913.....	27,000
1916.....	28,200
1917 (spring).....	28,800
1917-18 (winter).....	28,600
Average.....	27,900

The differences in discharge in the different years are so small as to be insignificant. Similar comparisons made for lake levels down

to 2,128 feet show only differences that are also insignificant or that are plainly due to other factors than the effect of the new dam. The results are consistent with the conclusion that the outflow from the lake at levels above 2,128 feet has not been appreciably changed by the present Post Falls dam.

At first thought it would seem that if some stored water were being held in the lake by the dam at the beginning of a flood the lake would have less capacity for accumulation of more stored water and therefore would rise to a higher level than it would if the stored water were not being held. This is true theoretically, but considerable study of the conditions of flow that have existed shows that any increase in flood stage from this cause has been and probably will be inappreciable, even though storage should be maintained to a higher level than at present.

For example, let two cases be considered in each of which the inflow to the lake is the same from day to day, but in (1) there is no storage in the lake at the beginning of a flood and in (2) say 3 feet of stored water is being held. In (2) when there are signs that a considerable rise has begun the bear-trap dam and Taintor gates under proper methods of operation will at once be opened, and the outflow will be determined primarily by the height of the lake. Because the level of the lake in (2) is higher than in (1) the outflow will be correspondingly greater. If the outflow is greater in (2), but the assumed inflow is the same, the excess of storage of (2) over (1) will be reduced. As the excess of storage is reduced the difference in lake level between (2) and (1) will be reduced, and the excess of outflow in (2) over that in (1) will decrease correspondingly. As a result the excess of storage of (2) over (1) will be steadily reduced as time goes on, but by amounts that will be successively smaller for equal intervals of time. Reduction in the excess of storage means that the lake level in (2) will gradually approach the same height as in (1). Computations indicate that in a few days a difference in level of 3 feet at the beginning of a rise will be reduced to an amount that is practically inappreciable.

The situation may also be considered in the light of the principle previously stated that under natural conditions the outflow is always striving to adjust itself to the inflow. In any rise the outflow in trying to keep pace with the inflow would practically overcome the handicap incident to any probable amount of storage and would be practically in the same position at the peak of the rise that it would have been in if there had been no storage at the beginning.

A sudden high rise such as that in January, 1918, would be most likely to show the effect of initial storage because the outflow might have insufficient time to "catch up" with its normal position. How-

ever, just before the flood of January, 1918, the level of the lake was considerably lower than normal for the season of the year, even prior to the construction of the present dam, and therefore the maximum height of that flood was not increased because of storage.

A study of the stream-flow data indicates that in any year storage to a level of 2,124 feet on December 14, the approximate date of beginning of the flood of January, 1918, would provide sufficient

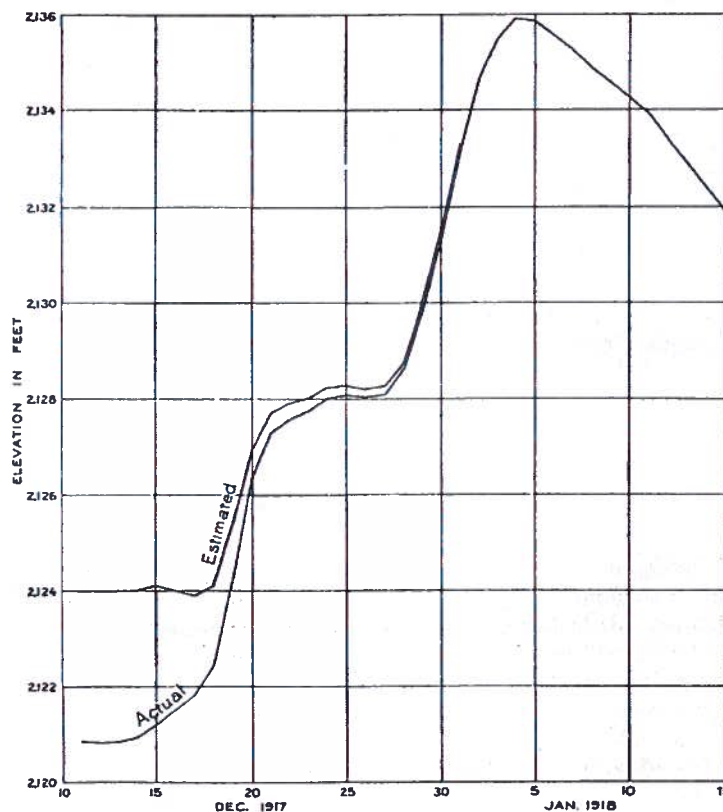


FIGURE 2.—Comparison of actual hydrograph for heights of Coeur d'Alene Lake in flood of January, 1918, and estimated hydrograph assuming storage in lake to level of 2,124 feet at beginning of flood.

storage regulation thereafter until the spring rise, even if storage were increased so as to assure a greater flow than it is now attempted to maintain. It is hardly conceivable that a greater amount of stored water need ever be held at that season under any condition. Figure 2 shows the actual hydrograph of the lake for the flood of January, 1918, and the estimated hydrograph on the assumption that the lake level at the beginning was 2,124 feet. A certain amount

of assumption was necessary in the computations on which the estimated hydrograph was based, but it was of such a nature that the result may be considered substantially accurate in showing the general tendency of adjustment. It indicates that by December 31 the difference between the estimated lake level and the actual level would be less than one-tenth of a foot.

Similarly, figure 3 shows the actual hydrograph of the flood of May, 1917, and the estimated hydrograph on the assumption that the level

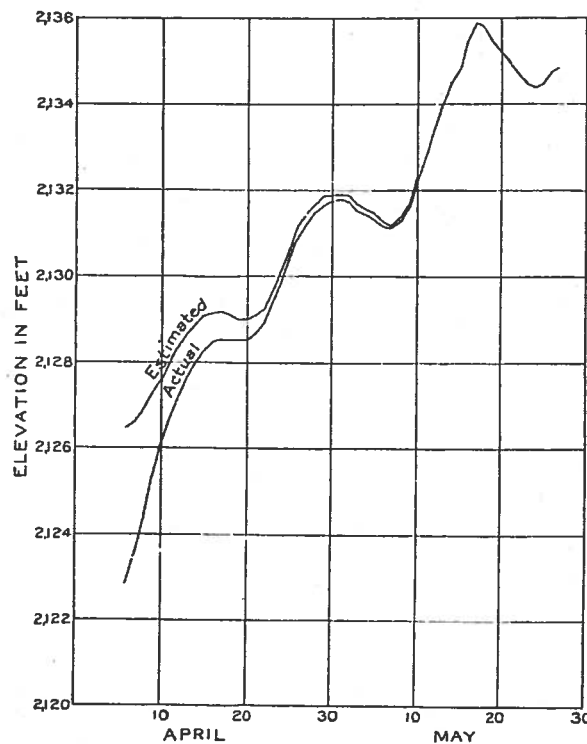


FIGURE 3.—Comparison of actual hydrograph for heights of Coeur d'Alene Lake in flood of May, 1917, and estimated hydrograph assuming storage in lake to level of 2,126.5 feet on April 6.

of the lake stood at an elevation of 2,126.5 feet on April 6. By May 10 the difference between the estimated lake level and the actual level would have been less than one-tenth of a foot. Of course, no condition is conceivable that would necessitate that amount of storage at that season, and the only purpose of the assumption is to test the principles that are being discussed.

Because of the reasons and facts above presented the conclusion is reached that the operation of the Post Falls dam has not appreciably

affected the natural level of Coeur d'Alene Lake above an elevation of 2,128 feet. For all practical purposes it may be considered that any rise of the lake above that elevation would have occurred even if there had been no control works at Post Falls.

The effect of the present dam on lake levels below 2,128 feet during the summer is graphically represented on figure 1 (p. 4), which shows the average dates on which the lake reached certain levels before and after the construction of the present dam. Records of the stage of the lake began in 1903. Of the four years for which records are available prior to the operation of the present dam—1903, 1904, 1905, and 1906—the last two were abnormal in the low stages that were reached. The years 1903 and 1904 were fairly representative in the amount of flow during the summer, and consequently the curve illustrating conditions prior to the construction of the present dam is based on the records for those two years. The conditions after the construction of the dam are based upon averages for the years 1907 to 1916, inclusive. These are all published records of the United States Geological Survey.

The average date of the first killing frost at St. Maries for a period of 12 years was September 14. (See p. 5.) This is a fair index of the end of the growing season for crops in the region that is being considered. Figure 1 (p. 4) is designed to show the length of time, prior to September 14, that lands at a certain elevation and under average conditions have been above the water level of the lake, before and after the construction of the present dam.

For convenience of comparison the lake areas at different elevations are also represented on figure 1. These areas were determined by J. C. Stevens, consulting engineer for the Washington Water Power Co., from all surveys and data in the possession of the company. The figures have been checked sufficiently by the writer to show that they are in reasonably close agreement with available information. Although more detailed knowledge may change these figures, such changes probably would not modify the general conclusions reached.

Unless conditions are favorable during July for crop growth the season will be too short to mature a crop of any kind. On figure 4 is a comparison of the elevations of the water surface of Coeur d'Alene Lake on July 1, 15, and 31, before and after the construction of the bear-trap dam, and the land areas overflowed at different elevations above 2,120 feet, the extreme lower-water level of the lake prior to the construction of the present dam. The areas shown include an undetermined area of water surface, such as lakes and swamps that are cut off from the main body of the lake as the level falls. (See p. 3.) The proportion of such undetermined area is so small that in the absence of more accurate data these areas may be considered

reasonably indicative of the relative distribution of land areas at the different elevations.

The effect of holding the water of the lake at a certain level is not confined to the lands below that level. As the lake falls the lands that are exposed are left saturated with water. In order to drain off from the soil, the water must overcome a certain amount of resistance from the soil particles and therefore must have some fall to create a flow. Consequently, the water table or the surface of the saturated soil will slope upward from the water surface of the lake. It may be observed from the diagrams on figure 4 that throughout July under average conditions the water surface of the lake is within 1 to 2 feet of most of the bottom lands near the lake. Although evaporation helps to dry the soil, conditions are very favorable for keeping the main part of the bottom lands well saturated with water throughout July. As these are average conditions the main part of the overflow land is not well suited to the production of wild hay or any other crops unless it is adequately drained.

Before the lake was used for storage the water surface during July under average conditions ranged from about 2 to 5 feet below the main part of the lands. This would make considerable difference in the facility with which the lands could be drained. Comparisons similar to those on

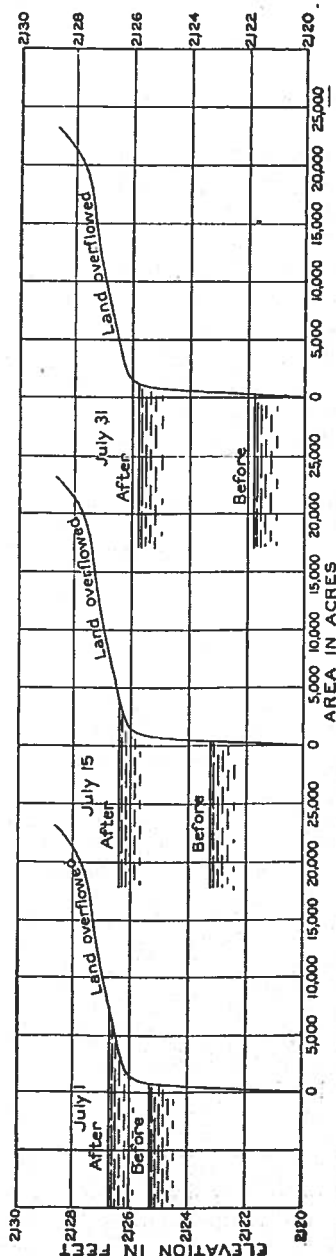


FIGURE 4.—Diagram showing elevation of water level of Coeur d'Alene Lake, Idaho, on certain dates before and after the operation of the bear-trap dam at Post Falls and area of lands overflowed at different levels above 2,120 feet.

figure 4 can readily be made for later dates in the season by reference to the data on figure 1.

The foregoing deductions point to the conclusion that the use of the lake for storage has introduced factors that would cause a serious water-logging of the overflow lands. The Washington Water Power Co. maintains that this effect does not extend above an elevation of 2,128 feet, to which it has flowage rights under the permit. The writer does not undertake to say whether the effect extends above that elevation. However, unless the water-logged lands were drained and diked to protect them against the spring overflow, they would not be valuable for agriculture because they could not be worked before the later part of June in average years. Although their condition would be favorable to the production of wild hay, and in seasons when the lake level fell early enough crops such as oats or potatoes might be raised, the value of the lands for agriculture of this type was very materially reduced by the use of the lake for storage. The truth of this conclusion was supported very strongly by the statements of the settlers.

IMPROVEMENT MEASURES.

FUNDAMENTAL PRINCIPLES.

Various proposals have been made for the modification of the natural conditions of Coeur d'Alene Lake and the overflow lands in order to secure a more extensive utilization of the resources. Storage has already been employed to a considerable extent for the development of water power, and a number of diking projects have been undertaken. It is a natural tendency for the different parties to consider their own interests most important and to desire to change conditions to suit themselves, perhaps with inadequate regard to the other resources involved and to the interest of the public. It is in the public interest that the resources of Coeur d'Alene Lake should be so developed as to afford the maximum possible benefit to all. In so far as there is conflict between the different uses, the use affording less benefit should give way to the use affording greater benefit. The resources involved are of great value, and the situation demands that any plan of improvement undertaken should be approved by a proper governmental agency as in accord with best public policy.

The United States is intimately concerned in any changes on the lake because it is a riparian owner upon it and because of the interstate aspects involved in the utilization of storage for the development of water power. The State of Idaho is interested because it claims title to the bed of the lake below the natural high-water mark ¹¹

¹¹ Calhoun v. Price (26 Idaho, 745).

and for various other reasons incident to the fact that the lake is within its jurisdiction.

The possibilities for improvement on Coeur d'Alene Lake should be studied in a comprehensive way, and a plan should be outlined that will assure the ultimate realization of the maximum possible benefit and enjoyment. Thereafter all improvements made should conform to this plan. Such a plan to be most successful would require the cooperation of all interests, including governmental agencies as well as the individuals and the organizations concerned. Considerable study and thought have been given to available information dealing with the subject, and it is the attempt here to give a composite picture of this information in so far as it bears upon the determination of a proper plan and policy of development.

IMPROVEMENT OF THE OUTLET OF COEUR D'ALENE LAKE.

For many years it has been recognized that the alluvial bottoms of St. Joe and Coeur d'Alene rivers would be benefited for agriculture if the outlet of Coeur d'Alene Lake could be improved in such manner as to relieve the lands from the damage of overflow. Capt. John Mullan was the first person known to consider this problem. In his report on the construction of the military road through this region ¹² he states:

The overflow of the Coeur d'Alene and St. Joseph rivers and the means of preventing it is a subject to which I have given much attention; and having made surveys, both in high and low water, I have been enabled to collect many facts and data, which I will treat of at greater length at a future point of my report.

Elsewhere in his report ¹³ in discussing the agricultural lands along the line of the military road he states:

One of the largest bodies of good land is in the valleys of the St. Joseph and Coeur d'Alene, and if these valleys are once drained, a body of 40,000 acres of the finest soil in the world will be reclaimed—soil 6 and 8 feet deep and as black as coal. This overflow can be prevented by widening the natural outlet and making an artificial one alongside of it; an appropriation of \$5,000 will meet this difficulty, and the ends to which it looks are well worthy the experiment. Rock blasting is the only method of accomplishing it and should be done during a low stage of water. The overflow is alone occasioned in the highest stages of water, when the mouth of the outlet of the lake is not capacious enough to discharge the volume of water sent into it by its feeders.

Capt. Mullan's estimate of the cost of improvement was apparently based on erroneous knowledge of the conditions at the outlet. Theodore Kolecki, a topographer of his party, who was sent (Aug. 27 and 28, 1859) to reconnoiter Post Falls, then called Little Falls of Spokane River, reported that he estimated "the average fall from the lake to the falls, a distance of 8 miles, to be 20 feet per mile."¹⁴ As a

¹² Mullan, John, *op. cit.*, p. 16.

¹³ *Idem*, p. 42.

¹⁴ *Idem*, p. 110.

matter of fact the fall at low water under natural conditions is little more than 1 foot to the mile. The assumption that the improvement work would consist mainly of rock blasting was also erroneous, for present information indicates that the material below the outlet is gravel for several miles. Nevertheless Capt. Mullan's proposal possesses historical interest.

The scheme of lowering the outlet has been considered at different times by groups of settlers and others. In 1905 T. A. Noble, engineer of the United States Reclamation Service, proposed a scheme that involved, among other things, the enlargement of the channel of Spokane River from the lake to Post Falls so as to make it possible to lower the low-water level of the lake 16 feet. The cost of deepening and widening the channel was estimated at \$3,000,000, but the writer has been unable to find data that would warrant placing much reliance on the accuracy of this estimate.

It has been in the interest of the Washington Water Power Co. to make studies of the feasibility of lowering the outlet as a means of developing storage capacity, and since about 1912, when such studies were started, a considerable amount of information has been collected by the company. It is understood that the conclusions reached from these investigations induced officials of the company to express themselves in 1915 as favorable to undertaking the dredging of the channel of Spokane River so as to reduce the low-water level of the lake about 4 feet, provided that the owners of property on the lake would secure without cost to the power company the rights necessary to complete the project. The proposal was not agreeable to the settlers.

Drainage districts for the reclamation of the flooded lands have been in process of organization within the last three or four years. In 1918 a project was planned for enlarging the channel of Spokane River for about 12,000 feet below the outlet by widening in places and by the removal of snags and other obstructions so as to increase the flow at flood stages. At the time of writing this report it is understood to be the intention of the drainage districts to carry out this work.

The outlet of Coeur d'Alene Lake can be modified for two purposes—(1) to relieve the damage to lands and property located thereon caused by high water and overflow, and (2) to develop storage for use in connection with the development of water power. The settlers are interested primarily in the first purpose and the water-power interests in the second. To a large extent an improvement for the first purpose would require certain excavation that would be necessary for the second purpose, and as each party would be benefited it does not seem equitable that the work should be paid for solely by one party. Any improvement should be made with a view to attaining both purposes as far as possible. The circumstances of the situation

appear to point definitely to the desirability of joint participation in a scheme of improvement which will obtain the greatest practicable benefit to each party and toward the cost of which each party should contribute in proportion to its benefit. Such a procedure would secure to each party the maximum benefit to itself for a minimum expenditure.

Although the Washington Water Power Co. has collected a considerable amount of information regarding the conditions in Spokane River below the outlet, this information is insufficient for a comprehensive consideration of a dredging project. Thoroughly realizing this fact, the writer has studied the available data with a view to determining what they indicate as to the general feasibility of such a project. It has been assumed that any improvement would be made with a purpose both to obtain relief from overflow and to increase storage.

The problem assumed the improvement of the channel so as to carry the maximum outflow of the spring flood of 1917 at an elevation of the lake 2 feet lower than that which the lake then reached. Then the channel carried approximately 41,500 second-feet at an elevation of 2,135.9 feet, and under the assumed condition it was to carry the same flow at an elevation of 2,133.9 feet. The cross sections of the river used in the studies and the places at which they were obtained are shown on Plate III. Although the individual cross sections are no doubt reasonably accurate, the places at which they were made are so far apart that considerable inaccuracy is involved in assuming that they properly represent the character of the channel between the cross sections.

The slope of the stream between the lake and the Post Falls dam for the spring flood of 1917 is also shown on Plate III. It was determined chiefly from the maximum heights of this flood as obtained by employees of the Washington Water Power Co. Some use was made of known heights of the flood of the spring of 1910 and of a general knowledge of conditions. The result probably has some inaccuracies, but it is perhaps sufficiently reliable to warrant certain general conclusions.

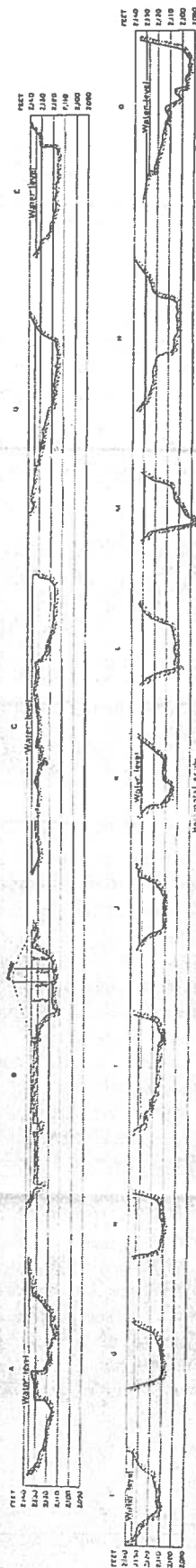
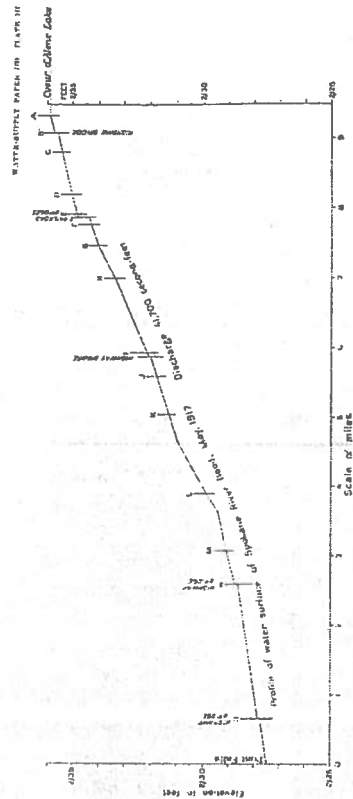
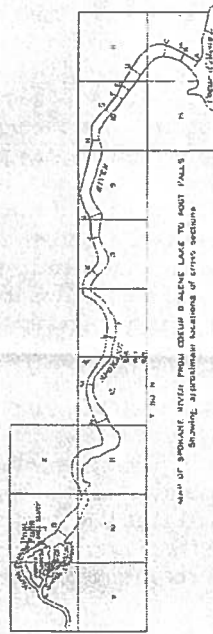
No borings have been made, but from more or less casual observation the channel of Spokane River for about 5 miles below the outlet of the lake appears to be in gravel of various grades, which would offer no special difficulty to dredging. The stream bed, however, contains sunken logs that might add appreciably to the cost of dredging. Below this point there is a stretch where the excavation of the channel would be more difficult and consequently more expensive because of boulders, steeper banks, and the possibility that rock might be encountered. These conditions constitute an important factor in determining how far downstream dredging of the channel

would be carried under any project of improvement. The farther downstream that dredging could be carried in order to lower the water level of the lake 2 feet the greater would be the slope secured, and consequently the smaller the size of the channel that it would be necessary to dredge out.¹⁵ Nevertheless, if the excavation were carried through the section of more difficult excavation it might cost more than a larger channel in the less difficult material.

To estimate the volume of excavation it is necessary to assume how far down the river the improvement will extend. The elevation of the water surface for the flood of 1917 at this limiting point subtracted from 2,133.9 feet, the assumed elevation at the lake, will give the amount of fall available in the improved channel. This fall and the distance from the outlet of the lake to the assumed point determine the slope of the channel. At each determined cross section may be calculated by means of engineering formulas a new cross section of the channel that would carry the 41,500 second-feet with the water surface at an elevation established by the slope thus determined. The new sections should be so planned as to require a minimum amount of excavation but at the same time should be fairly uniform. The enlargement found necessary at the different cross sections and the distance between them constitute the factors for the determination in a very rough way of the volumes of excavation that would be necessary. It was concluded that the assumed improvement could be made with the excavation of 2,500,000 to 3,000,000 cubic yards of material that would probably be very largely gravel. On the assumption that the cost of dredging would be 50 cents a cubic yard, it is estimated that the cost of excavation would be approximately \$1,500,000. To obtain the total cost of the project, including damages and many other items, this amount would have to be increased considerably.

The proposed improvement would lower the heights of flood approximately 2 feet and would probably increase the maximum flood flow of Spokane River, and the ability to draw the lake to a lower level would afford additional storage capacity. The reduction of flood heights would lower the height to which dikes would have to be built and would therefore be a benefit to the landowners of the diking districts. This would amount to a saving in dike construction equivalent to 2 feet on the bottom of all dikes. Whether the length of the dikes that will ultimately be built is 50 miles or 100 miles, it is evident that this saving would be large. The increase in storage capacity would of course be a great benefit to the development of water power on Spokane River.

¹⁵ For example, if the slope of a channel is twice as great as the slope of another channel, its cross-sectional area needs to be only about one-fourth as great to carry the same amount of water.



CROSS SECTION OF SPOKANE RIVER
Showing water level in August, 1914
(Looking downstream)

PROFILE AND CROSS SECTION OF SPOKANE RIVER FROM COEUR D'ALENE LAKE TO POST FALLS, IDAHO.

An increase in the maximum flood flow would cause some additional damage at Spokane, although this would hardly be appreciable for the relatively small increase in flood flow that would be involved in the example that is being considered. This possible additional damage, however, is a factor that should be thoroughly investigated prior to undertaking any improvement. Considerable damage is done by the flooding of buildings and basements in Spokane at times of the highest floods. It is understood, however, that the most critical features are the Olive Street concrete-arch bridge and the city's dam and pump works. Although the high water in 1917 was lower than that in 1894, which occurred prior to the construction of the dam at Post Falls; it was seriously questioned by officials of the city engineer's office whether a higher flood than that in 1917 would not be disastrous. The cost of proper protection would be determinable and should be duly considered in connection with any improvement project. The city would be a beneficiary from the increase in storage, because the increased stream flow in low-water season would be available for the operation of the pumps of its water-supply system.

There might also be possible damage to riparian owners and navigation interests on the lake. The writer believes that a lowering of 2 or 3 feet, such as would probably be involved in the scheme suggested, would interfere with navigation by necessitating the extension of docks and perhaps some dredging at a few critical places. The damage to riparian owners would apparently not be very serious, but substantial payment for it would probably have to be made to them.

The assumed improvement may be feasible. It is to be emphasized, however, that the limitation to a lowering of 2 feet has no special significance except as a concrete basis for considering the problem. The most definite conclusion that can properly be drawn is that a project for lowering the outlet of Coeur d'Alene Lake, if participated in jointly by landowners and storage interests, promises sufficient benefits to warrant a detailed investigation. Apparently the cost of even a 2-foot lowering would be large, and the increase in cost as the channel was deepened more would be relatively greater than the corresponding increase in benefits. Therefore, a deepening of more than a very few feet would probably not be feasible.

Less extensive schemes of improvement of the outlet may be practicable. It might be very beneficial if the three bridges immediately below the outlet were so reconstructed as to present less obstruction to the current. These bridges have comparatively short clear spans, the rest consisting of piles so closely spaced that they tend to catch driftwood and snags. It is reported that a fall of as much as 1 foot has been observed at one of these bridges. An obstruction of the current

to this extent probably would not continue very long, but the aggregate effect of the three bridges may amount to nearly half a foot, and this with the possibility of an increase by snags damming up from time to time presents a very undesirable condition. A modification of some of the log booms a short distance below the outlet of the channel and the removal of some snags and sunken logs, all with the purpose of decreasing the obstruction to flow immediately below the outlet, are improvement measures that might reduce the heights of maximum floods sufficiently to warrant their cost. More extensive improvements, and perhaps even these, would best await comprehensive study of the entire problem.

DIKING AND DRAINAGE.

Diking is the only effective means of preventing the flooding of the overflow lands during periods of high water. The height of floods may be reduced by enlargement of the outlet, but not sufficiently to prevent the floods from being an obstacle to the highest agricultural development of the lands. Relief from water-logging of the lands can be obtained only by proper drainage, and the lands must be diked before they can be drained successfully. Making the fullest practicable use of the lake as a reservoir need not increase the flood heights of the lake (see p. 16) and therefore would not make it necessary to construct higher dikes. It might increase the necessity for draining the diked lands, for if the water in the lake were held at a higher level in summer the water table of the diked lands would tend to maintain a correspondingly higher level. This would mean that more water would have to be pumped from the diked areas.

The rainfall during the growing season is rather low, so that for best results intensive agricultural operations, such as truck farming, require some other source of water supply.

The ability to control the elevation of the water table by a diking and drainage system might furnish a practicable means of subirrigation. If the level of the lake were lowered so much as to make it impossible to control the water table the growth of intensive crops might suffer for lack of water. This phase of the matter should at least be given consideration in the study of any scheme that involves lowering the level of the lake during the growing season, for the ability to maintain a relatively high water table may be an advantage rather than a disadvantage to the diked lands.

The determination of the height to which dikes should be built requires consideration of the probable maximum flood height. This flood height is not that which has occurred in the past but that which will occur in the future. The possibility of a reduction in flood heights by dredging out the outlet has already been considered. However, even if flood heights had been reduced in this manner, thereafter, as areas along Coeur d'Alene and St. Joe rivers that are

normally subject to overflow were diked, there would be a tendency for lake heights to increase and for backwater to develop on the rivers owing to restrictions of their overflow channels.

If it could be conceived that Coeur d'Alene Lake were limited to the size of an ordinary river channel in the flood of May, 1917, thereby greatly reducing the effect of storage, then it would follow that the outflow would nearly have equaled the inflow, and the stage of water level at the outlet would probably have been 3 or 4 feet higher than it was. Any reduction in the storage on the overflow lands would similarly increase the water-stage level at the outlet, though in a less degree. If 15,000 acres had been diked in that flood, the lake level would have been increased about 1 foot. If there had been 15,000 acres diked in the flood of January, 1918, the lake level would have been increased about 1½ feet. The increase in the height in the flood of January, 1918, would be greater than that in the flood of May, 1917, because the inflow was greater, causing a more rapid rise and making storage of relatively greater importance.

If the flood flow were restricted to narrower channels by dikes, the current would require a greater velocity in order to carry the water through. This would mean that the streams would have a greater fall and that backwater would be caused at points upstream. If there were extensive diking of lands along the river below St. Maries, for example, the flood heights at St. Maries would be increased not only because of the higher lake level due to decrease in storage capacity but because of backwater caused by the restricted channel. The combined increase in flood heights at St. Maries from these two factors might be as much as 4 or 5 feet. If the flood heights were increased 4 feet owing to the construction of dikes and reduced 2 feet by improvements of the channel at the outlet, there would be a net increase in flood heights at St. Maries of 2 feet. Obviously this is a very important matter. It emphasizes the desirability of an exhaustive study of the problem in order that dikes may be constructed to safe heights and that the dike systems may be so designed as to leave adequate capacity for flood flow. Construction of dikes without such study invites disaster. Many dikes in the region have failed already and have caused serious loss, chiefly because of inadequate engineering.

If flood levels of the lake are increased by diking, the flood discharge at Spokane will also be increased, and the consequent damage should be considered thoroughly.

DEVELOPMENT OF STORAGE.

The use of Coeur d'Alene Lake as a storage basin in connection with the development of water power has been decided by the courts to be a public use for which necessary private lands may be con-

demned. The Washington Water Power Co. has apparently settled practically all claims arising from the overflow of lands below an elevation of 2,128 feet that are not covered by the permit. Such lands constitute about 65 per cent and the lands under permit constitute about 35 per cent of the lands below that elevation for which overflow rights have been obtained. The use of storage as practiced by the company has been detrimental to a large part of the overflow lands, because it has raised the water table so high as to interfere seriously with the production of crops unless the lands are diked and drained. If the lands are diked and drained the raising of the water table can cause little injury and, as previously suggested, may even be of some advantage in dry seasons. Inasmuch as the highest development of the lands for agriculture requires that they be diked and drained, the present storage operations can not be very detrimental to lands that are of sufficient value to warrant reclamation in that manner. Neither would lands that are diked and drained be seriously damaged if storage were maintained to a higher level than at present, provided that flood heights were not increased, and the flood heights would not be increased appreciably if the control gates were properly operated. The importance of storage to development of water power is discussed on pages 8-9. It seems feasible to increase storage on Coeur d'Alene Lake to a considerable extent. At least prospects are sufficiently promising to warrant a careful investigation.

The possibilities of increasing the storage capacity by lowering the outlet and thereby making it possible to lower the level of the lake are set forth on pages 21-26.

COMBINED STORAGE AND AGRICULTURAL DEVELOPMENT.

In the preceding discussion it has been shown that holding the water of the lake at a higher level for purposes of storage will not cause serious injury to lands that are diked and drained. Consequently, further development of storage is not incompatible with the agricultural development of diked lands, but the undiked lands will be practically ruined for agricultural use if storage is materially increased by holding the water at a higher level. For such lands as it was feasible to dike there would be the alternative of diking so that they could be used agriculturally. Before diking the individual owner would be inclined to inquire how much it would cost to dike the lands, how much they would be worth when diked, and how much they would bring if sold to be used as a part of the storage reservoir. If the difference between the cost of diking and the value when diked was no greater than the price that the lands would bring for storage without diking the owner would have no incentive to dike them but would probably sell them.

The general public has a broader interest in the matter than the individual owner, and therefore consideration should be given to the problem from its point of view.

In the West, as a whole, agricultural possibilities are limited by other factors than the quantity or quality of available land. Because of the general aridity of the climate the primary limiting factor is the water supply that may be used at a reasonable cost for irrigation. Because of the economic principle that the agricultural industry is the foundation of all other industries, there is a disposition in many Western States to consider the use of water for irrigation as higher than its use for the development of power.

By somewhat similar reasoning it might appear that the agricultural use of the overflow lands should take precedence over their use as a reservoir in connection with the development of water power. Such a principle has some merit, but it should not be followed without regard to the circumstances of the case. For example, assume an acre of land on which 3 feet of water may be held for storage. This amount of water in its fall of more than 1,000 feet from the lake to Columbia River during the summer could generate enough power to raise water by pumping at some other place sufficient to irrigate and reclaim 3 or 4 acres of land that otherwise would not be reclaimed. In which is the public the more interested, the reclamation of 1 acre of overflow lands or that of 3 or 4 acres of desert lands? Of course, the identical power generated from this water might not be utilized for irrigation pumping, but it would add to the power supply of the region, and in so far as a favorable power supply is beneficial to the development of irrigation pumping it would be beneficial to the development of agriculture. It is evident that it is not necessarily in the public interest that agricultural use of the overflow lands should take precedence over their use for storage.

The writer believes that the public and the individual owner would follow the same line of inquiry for determining the lands that should be used for agriculture and the lands that should be used for a reservoir. The determination should rest, first, on the feasibility of diking and, second, if it is feasible, on the cost of diking, the value of the lands when diked, and the value of the lands for storage. If these factors can be reliably determined by impartial investigation, no good reason appears why all parties concerned should not consent to abide by the results.

Assume merely for illustration that no lands are diked; that storage is carried to a considerably higher level than at present, perhaps to 2,132 feet; and furthermore that available storage is developed to the economic limit by lowering the outlet of the lake. The low-water period for the summer and fall of 1919 and the winter of 1920 is probably the most critical with reference to power devel-

opment on Spokane River that has occurred since records of flow have been kept. In this period storage of the extent assumed would have been used for regulation of flow about 250 days. Now if an area having an average elevation of 2,130 feet were diked off from the reservoir, it is evident that the reduction in the amount of storage would be about 2 acre-feet per acre of the area. Such a reduction would not appreciably shorten the period through which storage regulation could be maintained. With allowance for loss by evaporation incident to storage, the reduction in the regulated flow over 250 days would be about 1 second-foot for each 300 acres of the assumed area. Although data are insufficient for a close determination it is estimated that such a supply, even if only 1 second-foot, would be worth several thousand dollars in the power development that it would make possible at the water-power sites, developed and undeveloped, on Spokane River. This suggests a line of reasoning by which the value of lands for storage may be determined for comparison with their value for agriculture.

Investigation would probably show that a considerable part of the lands could be more profitably diked than made a part of the reservoir site, because of a fortunate combination of high value when diked and a comparatively low cost of diking, although their value as a part of the site might be rather high. Although more land might be acquired for storage by proceedings under the right of eminent domain, the merits of a proper adjustment between agriculture and storage might not be adequately considered in such proceedings. The public interest will best be served by developing both agriculture and storage to the greatest possible extent and by deciding conflicts between the two uses on their respective merits.

FUTURE PROGRAM.

Most of the bad feeling and dispute between the owners of overflow lands on Coeur d'Alene Lake and the Washington Water Power Co. has been a natural outgrowth of the conflicting interests. The landowners have not obtained a broad knowledge of all the circumstances of the situation, but the power company has collected a considerable amount of data and has had means to present effectively the features favorable to its side of the case. Many of the company's data have become a matter of public record in the various suits and hearings that have been held and have become available to the settlers in other ways. The circumstances, however, have been essentially such that the landowners have lacked the organization and other facilities for dealing advantageously with the company. The best hope for future progress in the development of the resources of Coeur d'Alene Lake and the overflowed lands lies in founding operations on the grounds that the different interests have in common. It may be

assumed that both the agricultural and power interests recognize that the resources should be so developed as to realize the maximum amount of benefit from them all, and that individual rights may need to be subordinated to this principle—although, of course, not without due compensation for any resulting damage. It may also be assumed that all parties, including the State and National governments, are interested in the solution of the problem upon this principle. So far insufficient studies have been made, and, as has been emphasized in this report, what is needed most is a comprehensive investigation in order that the problem of development may be correctly solved. There are important questions of economics and engineering that should be thoroughly considered. No reason appears why the cost should be very large, and the advantages gained would many times repay the cost.

It would be very appropriate to the circumstances if the investigation were undertaken by Government agencies under a cooperative agreement, perhaps especially sanctioned by an act of Congress, and when a plan of development had been decided upon, all interested parties might very fittingly cooperate to carry it out. In any work that is undertaken the principle that the different parties should contribute to the cost in proportion to their benefits should be followed as nearly as practicable.

The interest of the public in the operation of the Taintor gates and the bear-trap dam at Post Falls might desirably be recognized in a more direct way in the future than in the past. The United States has a right to require that these works shall interfere as little as possible, consistently with effective operation, with the use and development of the lands by the settlers. The power company should hold the water level of the lake no higher than is necessary to insure adequate storage for proper regulation. The water supply can be predicted to a certain extent, and it may be that when conditions were favorable for a good supply the power company could safely draw the lake to a lower level than when a poor supply was expected, thereby benefiting the lands. Even though it is assumed that the power company has done all to this end that might be reasonably expected, which it has, in the writer's opinion, and that this fact might have been ascertained at any time by properly authorized agencies, the settlers who are most intimately concerned have had no easy means of assurance that such was the case, and the situation has encouraged misunderstanding. It seems appropriate for the Government to interest itself in cooperating with the power company in measures toward holding the level of the lake as low as possible with proper regard to storage, in order that the settlers may have ample assurance that the water is not being held unnecessarily high and that their interests are being properly guarded.

EXHIBIT 28

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MARVIN ERICKSON and SHARON
ERICKSON, husband and wife,

Plaintiff,

v.

STATE OF IDAHO,

Defendant.

Case No. 85186

STATE'S TRIAL MEMORANDUM

INTRODUCTION

This is a quiet title case concerning ownership of an artificially-created dredge spoil island and adjacent submerged lands in Kidd Island Bay of Lake Coeur D'Alene.

The main issue in this case is the location of the natural or ordinary high water mark ("OHWM") of Lake Coeur D'Alene on the date Idaho was admitted into the Union on July 3, 1890. The location of the OHWM is important because the State owns the beds of navigable water below the OHWM, and the OHWM defines the boundary between State and private ownerships.

Plaintiffs allege that the summer level of Lake Coeur

STATE'S TRIAL MEMORANDUM -- Page 1 of 36

D'Alene has been artificially raised from 2121 feet to 2128 feet above mean sea level ("msl") United States Geological Survey datum (or 2125 feet msl National Geodetic and Vertical Datum).¹ Plaintiffs' Complaint, Paragraph IV. Plaintiffs claim ownership to a small "island" located in Kidd Island Bay which is located above 2128 feet. They also claim ownership to lands adjacent to the "island" that are below 2128 feet. The "island" was created in the late 1950's when residents of Kidd Island Bay dredged and bulldozed the bay in order to deepen it, depositing silty dredge spoil in various locations, including the "island" claimed by Plaintiffs.

The State will show that the OHWM of Lake Coeur D'Alene in 1890 was 2128 feet. This position is supported by the following evidence:

1. Hydrologic evidence from Lake Coeur D'Alene and the Spokane River shows that the Washington Water Power Company dam at Post Falls does not affect the level of Lake Coeur D'Alene above 2128 feet. The dam has not "raised the level of the lake" or "flooded" previously unaffected lands as alleged by

¹The elevations of the surface of Lake Coeur D'Alene are commonly reported as "Washington Water Power datum." The elevation of the surface of Lake Coeur D'Alene, the "lake datum," was first established by the National Geodetic Survey in 1899, as adjusted by the United States Geological Survey in 1900. The WWPCO datum is equivalent to the USGS datum established in 1900, and as used in USGS Surface Water Supply Reports. The WWPCO datum, however, is three feet higher than the official National Geodetic and Vertical Datum (successor to the Geodetic Survey), and which later corrected the elevation of Lake Coeur D'Alene. The Washington Water Power datum is commonly used in published reports and discussions throughout the course of the dispute over the OHWM, and will be used in discussions in the case at bar.

Plaintiffs. The only effect of the dam is to prevent the lake from naturally receding below 2128 feet in the summer. In other words, it stores the spring runoff into the fall and then gradually releases it. The high water level of the lake, however, is controlled by the outlet of the lake where the Spokane River begins near Coeur D'Alene.

2. A detailed analysis of soils, sediments and landforms adjacent to Lake Coeur D'Alene shows that the Post Falls dam has not changed the OHWM of the lake compared to the natural fluctuation of the lake before the dam. Prior to the construction of the Post Falls dam in 1907, the lake fluctuated between seasonal elevations of about 2121 feet and 2128 feet similar to the way it fluctuates today. Silty soils below about 2129 feet were formed from quiet water deposition, and soils below this level possess various other characteristics which show that they were developed under strong influence of the lake. Soils below about 2129 feet also show no soil horizon development as is typical of soils valuable for agricultural purposes.

3. An analysis of the present shoreline of the lake and its vegetation, in conjunction with the hydrologic and soil analysis, supports a determination of an OHWM at approximately 2128 feet.

4. Survey evidence will show that the shoreline of Lake Coeur D'Alene was meandered at varying levels in the original township surveys done by the United States in the 1890's; some of the meanders were near 2121 feet, but many more were at or above

the 2128 feet elevation. The State will introduce evidence to illustrate this variability. Although the original surveys, and the associated survey notes provide some evidence of the condition of the lake before the dam was built, these survey lines were never intended to be used to establish the OHWM of a body of water, and use of this information for this purpose is improper.

5. Numerous old photographs of the Lake Coeur D'Alene area prior to the Post Falls dam show a lake level similar to that of today. These photographs also show that the lake fluctuated widely between high and low levels. Comparing these old photographs with the area today corroborates the physical evidence that shows the OHWM to be 2128 feet.

PROCEDURAL BACKGROUND

There has been little in the way of pre-trial procedure in this case other than discovery. The State's "Motion to Strike Plaintiffs' Demand for Jury Trial" filed on December 6, 1991, and argued on January 14, 1992. The Court has never specifically issued an order in response to the State's motion, but the case has been scheduled for trial as a bench trial.

The State has also filed a motion to limit evidence concerning the testimony of two witnesses that Plaintiffs intend to use as experts. The State asserts that Ernest Warner is not qualified to testify concerning the OHWM of Lake Coeur D'Alene, and Walt Willard is not qualified to testify concerning the growth requirements of black cottonwood trees. The Court has not

yet ruled on this motion.

ISSUE FOR RESOLUTION AT TRIAL

This Court must determine who holds title to the land adjacent to Lake Coeur D'Alene between 2121 feet and 2128 feet. This title determination depends upon identification of the OHWM of Lake Coeur D'Alene in 1890. The State owns all lands below the 1890 OHWM.

ARGUMENT

I. The State Obtained Title To The Bed Of Lake Coeur D'Alene To The OHWM Upon Its Admission To The Union In 1890 Under The Equal Footing Doctrine.

The State obtained title to the beds of all navigable waters located within the State of Idaho under the equal footing doctrine. Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement Dist., 112 Idaho 512, 516, 733 P.2d 733 (1987)("IFI"). The parties agree that lake Coeur D'Alene is a navigable lake. Plaintiffs' Response to State's Request for Admission No. 1 (to be submitted to the Court at trial pursuant to I.R.C.P. 36(d)). Since Lake Coeur D'Alene is a navigable lake, the State of Idaho acquired title to the bed of the lake upon its admission to the Union in 1890.

The "bed of a navigable lake" is all of the land lying under or below the OHWM. Idaho Code § 58-1302(b). The OHWM is defined by Idaho Code § 58-104(9) as "the line which the water impresses upon the soil by covering it for sufficient periods to deprive the soil of its vegetation and destroy its value for agricultural purposes." See also Driesbach v. Lynch, 71 Idaho 501, 506, 234

P.2d 446 (1951); Heckman Ranches, Inc. v. State, 99 Idaho 793, 796-97, 589 P.2d 540 (1979) (citing Idaho Code § 58-104(9)). As long as the body of water is navigable overall, title to every inlet, arm, marsh, floodplain or other land subject to being covered with shallow water from the main body and located below the OHWM is held by the State. State v. Trudeau, 139 Wis.2d 91, 408 N.W.2d 337, 342 (Wis. 1987).

In the trial of this case, there will be evidence of meander lines and meander corners established by government surveys. A meander line or corner does not establish a boundary line between a lake and the upland area. Heckman Ranches, 99 Idaho at 796. Meander lines established by government survey are "survey lines drawn along the banks of navigable streams [or lakes] for the purposes of defining the sinuosities of the banks of the stream [or lake], and as the means of ascertaining the price to be paid by the purchaser to the government for meandered fractional lots." Id. The boundary line between the navigable waterway and the upland is the OHWM. Id.

The State holds title to the beds of navigable waterways in trust for the use and benefit of the public. Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc., 105 Idaho 622, 625, 671 P.2d 1085 (1983); IFI, 112 Idaho at 516. State action with respect to the beds of navigable waterways is subject to the public trust doctrine, an ancient common law principle first recognized in Idaho in Callahan v. Price, 26 Idaho 745, 146 P.2d 732 (1915). The public trust doctrine

preserves inviolate the public's use of submerged lands for purposes such as commerce, navigation, fisheries, wildlife habitat, recreation, aesthetic beauty and water quality. IFI, 112 Idaho at 516.

If the Court determines that the OHWM of Lake Coeur D'Alene is 2128 feet, the State would own the island claimed by Plaintiffs even though portions of it rise above 2128 feet. As a matter of law, the State owns all islands formed in navigable waters after statehood. Mather v. State, 200 N.W.2d 498, 500 (Iowa 1972); Nielsen v. Stratbucker, 325 N.W.2d 391, 394 (Iowa 1982); Grape v. Laiblin, 181 Kan. 677, 314 P.2d 335, 340 (1957); see generally, Annot., 54 A.L.R.2d 643 (1957). The rationale for the rule is that the island is seen as an extension of the bed of the waterbody. The case at hand is somewhat unique because it involves an artificial island, not a natural island, and the general rule applies to islands in river. The State asserts that the general rule should be applied to the case at hand because as with natural islands, the artificial island in dispute is an extension of the bed of the lake, and consists of material dredged from the lake bottom.

II. The OHWM Does Not Include Flood Lands, But Does Include Lands Which Are Normally Covered With Water For Some Period Of Time During Most Years.

The key legal point in this case is the definition of OHWM, and the application of the definition to the facts of this case. The OHWM is defined by Idaho Code § 58-104(9) as set forth in Section I. of this Argument.

The controlling OHWM case in Idaho is Heckman Ranches, in which the primary issue on appeal was determination of the OHWM adjacent to the Salmon River. The case includes a detailed discussion of the methodology for determining the OHWM. In IFI, 112 Idaho at 522, Chief Justice Shepard noted in a specially concurring opinion that "[t]he extensive discussion of the determination of the natural or ordinary high water mark in Heckman is worthy of note and consideration by the trial court upon remand." The State asserts that the discussion in Heckman Ranches is similarly worthy of consideration by the Court in the case at hand.

There are several important points to be gleaned from Heckman Ranches:

1. Regardless of where a meander line is located, it is the OHWM that marks the boundary between State ownership and upland ownership. Heckman Ranches, 99 Idaho at 797.
2. Determination of the OHWM requires an evaluation of not only the vegetation in an area, but also physical features such as lines of escarpment and the suitability of land for agricultural purposes. Id. at 797-799.
3. Determination of the OHWM is a site-specific determination based upon the characteristics of the body of water in question. The Heckman Ranches Court noted that its holding was "based upon the particular facts and circumstances in this case. . . . Given topographical features, soil composition or less erosive water action the result may have been otherwise."

Id. at 799 (emphasis in original).

4. The vegetation test contemplates a distinction between terrestrial or upland vegetation and lowland or aquatic vegetation that tolerates wet conditions. Id. at 798-99; see also specially concurring opinion of Justice Bistline (. . . it is the absence of any terrestrial vegetation which has been the determining factor")(emphasis in original).

5. Land which was inundated for only a small portion of the year was found to be below the OHWM "[b]ecause of the soil's composition and extremely erosive action of the water along this portion of the Salmon River, ... In an area where water erosion is severe enough to move large submerged boulders, as was testified here, even periodic inundation may deprive the soil of its value for agricultural purposes." Id. at 799.

6. With respect to the term "agricultural purposes," the Court stated as follows: "In this context, whether the soil is valuable for agricultural purposes refers to the existence of vegetation and the soil's suitability for raising agricultural crops. Whether cattle could roam on the soil does not aid in determining the location of the natural or ordinary high water mark." Id. (emphasis added). The State's main witness in Heckman Ranches, William Scribner, had opined that "agricultural purposes" meant "land which could be cultivated for crops or at least at the minimum used as hay ground or relatively high quality pasture land." Id. at 798.

7. The OHWM does not include flood levels or unusual

freshets that cannot be anticipated. As stated by Mr. Scribner, flooding would not destroy land for agricultural purposes. This is consistent with the Court's opinion in Raide. It is also the thrust of Justice Bistline's specially concurring opinion in Heckman. The OHWM is not flood level; neither is it the low level of the lake. It is, as the definition says, ordinary high water.

Another case of some value in the case at hand is Raide v. Dollar, 34 Idaho 682, 689, 203 P. 469 (1921). In Raide, the plaintiff had sued to recover damages when the defendant retrieved logs that had been cast upon the plaintiff's land by a flood of the North Fork of the Coeur D'Alene River. The defendant had argued that the lands in question were below the high water mark of the river at that point and owned by the public, so the plaintiffs could not recover damages. The Court cited a definition of OHWM which is nearly identical to the statutory definition², and observed that the land in question

was under cultivation, that hay, grain and vegetables were raised thereon, and that some twenty-five bearing fruit trees were then growing upon the land.

While the evidence discloses that portions of this land were occasionally overflowed during spring freshets, yet appellant's position that the land was below the high-water mark is untenable, in view of the finding of the court that the logs were cast upon the land by an unusual and extraordinary flood. By the term "high-water

²The OHWM definition set forth in Idaho Code § 58-104(9) was first codified by the Idaho Legislature in 1967. 1967 Sess. Laws ch.236, § 1, p.694.

mark" is meant those points along the shore where water rises to such a height as may reasonably be anticipated, but does not include extraordinary freshets as cannot be anticipated.

Raide, 34 Idaho at 689-90 (citation omitted). Thus, evidence that the land in question was under cultivation³, including fruit trees, hay, grain and vegetables, was used to establish that the area was above the OHWM.

Establishment of the OHWM was discussed in two other Idaho cases, Payette Lakes Protective Ass'n v. Lake Reservoir Co., 68 Idaho 111, 189 P.2d 1009 (1948) and Driesbach v. Lynch, 71 Idaho 501, 234 P.2d 446 (1951), but neither of these cases provides any great detail of assistance to the Court in the case at hand. In Payette Lakes, much of the evidence consisted of various lake elevation gage readings that showed fluctuations in the lake level. In Driesbach, 71 Idaho at 506, the Court discussed the conflicting evidence of the OHWM only in general terms referring to the absence of vegetation.

Putting the statute and the cases together, this Court can see that determining the OHWM of Lake Coeur D'Alene requires an evaluation of factors such as soils, escarpments along the shoreline, and vegetation. This case is complicated by the fact that the OHWM must be determined based upon where it was located

³"Cultivate" means "to prepare for the raising of crops: prepare and use for such a purpose . . . to loosen or break up the soil about (growing crops and plants) for the purpose of killing weeds and modifying moisture retention of the soil esp. with a cultivator 2: to protect and encourage the growth of. . . Webster's Third New International Dictionary (1966).

in 1890, prior to the construction of the Post Falls Dam, and historical information must be evaluated to understand the history of the lake. A further complication is the sheer size of Lake Coeur D'Alene, and how the physical factors such as soils, vegetation and escarpments vary around the shoreline, e.g. shallow estuaries and rock shorelines.

In making its determination, this Court should not lose sight of the purpose for the OHWM definition, i.e. defining the extent of public ownership and public rights in the lake. As will be established at trial, Lake Coeur D'Alene has historically been used widely for public transportation, recreation, and commercial purposes such as log flotation. Important public rights are at stake in this case.

As will be discussed more fully below, a complete evaluation of all the evidence available in the case will show that the OHWM of Lake Coeur D'Alene should be established at 2128 feet msl USGS datum.

III. The Evidence Will Show That The OHWM Of Lake Coeur D'Alene Should Be Established At 2128 Feet msl USGS Datum.

A. Introduction.

The State has five different types of evidence which help establish the OHWM of Lake Coeur D'Alene in 1890: Hydrology, soils and geology, vegetation, surveying data, and historical photographs and information. The State has also developed evidence in order to respond to Plaintiffs claim that the Post Falls Dam "raised" the level of the lake, that the resulting flood killed trees that were previously above water, and that

STATE'S TRIAL MEMORANDUM -- Page 12 of 36

certain surveys and federal land patents which conveyed land down to an elevation of 2121 feet prove that the OHWM of the lake is 2121 feet.

A party seeking to quiet title to real property must affirmatively prove title. Golden Condor, Inc. v. Bell, 106 Idaho 280, 285, 678 P.2d 72 (Ct.App. 1984). The proof of a party must establish his or her own title, rather than showing the weaknesses of any adverse claim. The evidence the State will introduce to affirmatively establish its title to the bed of Lake Coeur D'Alene below 2128 feet is summarized in the following sections.

B. The Post Falls Dam Did Not "Raise" The Level Of Lake Coeur D'Alene, And The Lake Is Unaffected By The Dam At Levels Above 2128 Feet.

The Post Falls Dam has not "raised" the level of Lake Coeur D'Alene, and the lake above 2128 feet is unaffected by the dam. The dam was constructed to prevent the water in the lake from receding from its high spring and early-summer levels down to its normal late-summer and fall low levels, as naturally occurred before the dam. The seasonal runoff is stored in the lake during the summer for gradual release later in the year for power production. The ordinary high level of the lake above 2128 is controlled by the outlet of the lake near Coeur D'Alene, 9 miles above the dam at Post Falls. As the State will show during trial, the dam cannot, hydrologically speaking, act to raise the level of the lake because the dam is generally open (i.e. not positioned to store water) in the spring; the system functions

STATE'S TRIAL MEMORANDUM -- Page 13 of 36

naturally during runoff. The level of the lake rises because of the constriction at the outlet, and this controls how high the water in the lake will go, not the dam.

It is a common misconception that the dam has "raised" the level of the lake by several feet. Plaintiffs' Complaint, paragraph IV. Even the Idaho Supreme Court in West v. Smith, 95 Idaho 550, 553, 511 P.2d 1326 (1973) observed in dicta that the level of the lake had been "raised."⁴

There is an abundance of compelling evidence, however, to prove that the dam has not "raised" the level of the lake. The evidence is best summarized in Davenport, R.W., Coeur D'Alene Lake, Idaho, and the Overflow Lands, USGS Water Supply Paper 500-A (1921) at 1, a contemporaneous account of the dispute between Washington Water Power Co. and landowners along the St. Joe and Coeur D'Alene River drainages⁵:

The purpose of using Coeur D'Alene Lake for storage is to equalize the flow of low-water periods and to increase the mean flow during such periods by the release of flood water stored in the spring, thereby assuring a greater output of power from the Washington Water Power Co.'s hydroelectric plants on Spokane River. The use of the lake for storage, although it has not increased the

⁴The West Court's observations are dicta, and the State was not a party to the case and thus not able to present evidence to refute whatever evidence the private parties presented to the trial court. The district court in West apparently had some very poor information because it did not know when the dam was built and first operational, and incorrectly found that the lake has been maintained at a level of 2128 since 1910.

⁵Water Supply Paper 500-A also provides excellent background information concerning the physical setting of Lake Coeur D'Alene.

maximum area of lands that may occasionally be flooded, involves the maintenance of a higher water level during low-water periods than would naturally exist, and the consequent retarding of drainage is detrimental to the interests of the landowners.

(Emphasis added.) See also Stevens, J.C., The Physical Effect on Lake Coeur D'Alene of the Operation of the Washington Water Power Company's Dam at Post Falls, Idaho, United States Geological Survey (1909); Noble, T.A., Report on Coeur D'Alene Overflow Cases (1911).⁶

The State will introduce the testimony of Professor Howard Copp, a hydrology professor from Washington State University with 40 years experience teaching in the field of hydrology. Professor Copp has reviewed the work of some of the earlier authors, and performed his own investigation into the effects of the Post Falls dam on Lake Coeur D'Alene. Professor Copp has come to the same conclusions as the earlier authors based upon his investigation.

The effect of the dam on the Lake Coeur D'Alene is illustrated of the hydrographs of the lake before and after the dam. Professor Copp will explain the hydrographs that have been generated to show the hydrologic behavior of Lake Coeur D'Alene. The graphs date to 1892, and show the rise and fall of the lake before the dam was completed in 1907, and how the level was

⁶Two of these overflow cases are Gaskill v. Washington Water Power Co., 17 Idaho 128, 105 P. 51 (1909) and Washington Water Power Co. v. Waters, 19 Idaho 595, 115 P. 682 (1911). The issue of whether the dam raised the lake was not before the Court on appeal in either case.

maintained later into the summer after the dam was operational.⁷ For example, the 1894 hydrograph shows that the lake attained an elevation of about 2137.6 feet in early June, and the lake was above 2128 feet from mid-April until early July; the level had receded, however, to 2123 feet by early August. Hydrographs after 1907 shows the typical spring rise in the lake, but a plateau at 2126 feet (2128 feet after the mid-40's) later in the season when the lake was regulated by closing the dam to prevent the water from lowering.

Another common misconception is that Lake Coeur D'Alene looks like a reservoir, with its generally long, narrow shape and irregular shoreline with many narrow arms and bays, because the Post Falls dam has flooded the area. The lake has its unique appearance because it is a flooded river valley, but it was flooded thousands of years ago when glacial gravel was deposited near the City of Coeur D'Alene and dammed a narrow, steep-sided valley that existed where the lake is today. Davenport at 3; Anderson, Alfred L., Some Miocene and Pleistocene Drainage Changes in Northern Idaho, Idaho Bureau of Mines and Geology Pamphlet No. 18 (1927) at 19.

Professor Copp has generated several graphs and charts based upon hydrologic data of lake levels and flows of the Spokane River to illustrate certain hydrologic conclusions for the Court.

⁷Until 1903, the lake elevations were "derived" from the flow of the Spokane River at the Monroe St. Bridge in Spokane because there were no direct readings of the lake level. Professor Copp will testify that such derived calculations are reasonably accurate, within about plus or minus 10%.

One set of three graphs shows various plots of discharge of the Spokane River at Post Falls and lake elevations to establish how the level of Lake Coeur D'Alene above 2128 feet is regulated by the outlet and not the dam.

Professor Copp has also generated several graphs to illustrate how long often and long the lake normally rises above the 2128 feet level during the year in order to distinguish spring flood⁸ flows and freshets from the OHWM. These charts will show that the lake rises above 2128 feet nearly every year, and that the mean high level between 1913 and 1993 is 2131.44 feet. The lake has risen as high as about 2139 feet on occasion. Furthermore, the evidence will show that, when the dam is open during spring runoff, the lake will be above the 2128 feet level about 55 days per year on the average before storage is commenced.

In summary, the hydrologic evidence will show that the Post Falls Dam has not "raised" the level of Lake Coeur D'Alene, and that spring water levels are not controlled by the dam. It will also show that prior to the dam, the lake level fluctuated widely and that the dam acts to stop the summer retreat of the water until the fall. The evidence will also establish that the lake is above the 2128 level for significant periods of time on an average year. In other words, the State is not seeking to

⁸A "flood" is defined as "a rising body of water (as in a stream, lake, or sea, or behind a dam) that overflows its natural or artificial confines and that covers land not normally under water;" Gary, M., R. McAfee Jr., and C. Wolf, eds., Glossary of Geology, American Geological Institute (1972).

establish the OHWM of the lake at a "flood" level, but at a level to which the lake can reasonably be expected to rise in spring.

C. Evidence From Soil Analysis Shows That Prior To The Dam, The Lake Persisted To The Level Of 2128 Annually For Periods Of Time Sufficient To Create Lake Sediment Soils Rather Than Upland Soils.

The State did a systematic analysis of the soils in two bays of Lake Coeur D'Alene between elevation 2121 feet and about 2131 feet. The State retained Dr. Maynard Fosberg, Emeritus Professor of Soil Science from the University of Idaho, and Dr. Alan Busacca, Professor of Soils from Washington State University. Both of these individuals have excellent credentials in the field of soil morphology and soil genesis. These gentlemen were instructed to examine soils for evidence of the level of Lake Coeur D'Alene prior to the construction of the Post Falls Dam.

In order to study the problem, soil transects were dug in two bays of the lake, Loffs Bay and Beauty Bay. A soil transect is a series of soil pits dug from low to higher elevation. These two bays were chosen, after some initial reconnaissance, because they had little disturbance by humans. This would maximize the chances to "read" the history of the near-shore part of the lake. A topographic map of the transect areas was developed by the State's surveyor, James Meckel, in order to establish the elevations of the soil pits. Samples of volcanic ash (tehptra) collected in the soil pits were analyzed by Dr. Franklin F. Foit, a geologist at Washington State University who has developed a technique to identify ash samples by computer matching with known samples.

The evidence gathered as a result of this soil analysis will be presented to the Court. This evidence consists of boxed soil samples which were collected from the various pits in the two bays, soil profile description sheets with descriptions of the various layers of soil identified, photographs of the pits, a final report of the analysis, and the results of volcanic ash analysis done on ash recovered from the soil layers.

In summary, Drs. Fosberg and Busacca conclude that the construction of the Post Falls Dam has not changed the normal and ordinary high water mark of Lake Coeur D'Alene compared to the natural range of fluctuation of the lake in the era before the dam was constructed.

There are a number of features of the soils in the bays that support this conclusion. In general, sediment and soil features below about 2128 feet have almost no marks of soil development except for extreme mottling due to the oxidation/reduction process. The sediment below 2128 feet are silty due to quiet water deposition, except that at Loffs Bay, sediments become sandy again at about 2123 feet because of wave splash at late summer and winter low pool. In contrast, sites above this level show features of upland soils such as uniform brown colors, dark, thick surface horizons, and abundant earthworm activity.

If the pre-dam normal lake level had been substantially lower than 2130 feet, the soils of lower elevation sites would show evidence of longer bouts of above-water plant rooting and soil development than they do; inundation since 1907 would not

have obscured upland soil development features if they had been there in soils below 2129 feet. No such evidence was found.

The presence of volcanic ash or tephra in some of the samples supports the conclusions of Dr. Fosberg and Dr. Busacca. At Loffs Bay, a layer of ash was found that was correlated to the 1800 St. Helens eruption, about 4-6 inches below the current surface of the soil at elevation 2128.5 feet. The fact that sand is located beneath the ash layer (and above it) helps establish that splash (beach formation) was a normal event at 2128.5 before the year 1800. Similarly, a large amount of tephra correlated to the Mt. Mazama (Crater Lake) eruption about 6800 years B.P. were found in samples at Beauty Bay above and below the 2128 feet level. The color and texture of the ash deposits below 2128 feet (pure white and massive) show that it was continuously waterlogged and anaerobic; the deposits above 2128 feet are dark yellowish brown with a blocky structure, showing that it has weathered in an upland environment. The difference between these samples is striking, and the comparison will be shown at trial.

This soil evidence is particularly important in the case at hand because it is virtually the only direct, tangible evidence in the case that this Court will see that is subject to direct interpretation and not speculation. Looking at the soil development is similar to examining the rock column to determine the history of the past environment; it is an accurate record of past environmental conditions when interpreted by highly qualified individuals like Drs. Busacca and Fosberg. The soils

evidence directly shows that below about 2128 feet, the soil was strongly lake influenced before the dam. Drs. Fosberg and Busacca can also testify that the soil examined would have little value for agricultural purposes because of the soil structure developed as lake sediments.

D. Examination Of The Present-Day Shoreline Of Lake Coeur D'Alene And Its Vegetation, In Conjunction With Hydrologic And Soils Data, Shows The OHWM In 1890 Was About 2128.

The State retained the services of Professor Frederic Johnson, an Emeritus Professor of Forestry at the University of Idaho, to study the question of the OHWM of Lake Coeur D'Alene, and to address certain vegetation information gathered by Plaintiffs. Professor Johnson is a plant ecologist, particularly forest ecology, who is now "semi-retired" after a long and distinguished teaching career at the University of Idaho. Professor Johnson has extensive field experience in plant ecology in northern Idaho, and specific knowledge of the ecology of black cottonwood and ponderosa pine, two species of importance in this case.

One of Professor Johnson's tasks was to examine the present-day shoreline of Lake Coeur D'Alene in order to study its physical and vegetative attributes. During the summer of 1994, he examined a number of portions of shoreline to identify vegetation lines, lines of escarpment, stain lines on rocks, and other physical evidence pertinent to the OHWM of the lake. When Professor Johnson identified a terrace or vegetation line, the State's surveyor, Jim Meckel, would survey the elevation of the

STATE'S TRIAL MEMORANDUM -- Page 21 of 36

point based upon the level of the lake on that day, and note it in his records. Mr. Meckel and Professor Johnson never communicated concerning what elevations were being established; Professor Johnson simply identified a point, and Mr. Meckel determined the elevation. A total of 14 points around the shoreline of the lake were examined, comprising a variety of shoreline types, from relatively flat estuarine areas to rock faces, and including more typical "beach" areas with a sandy/rocky surface and moderate slope. Inhabited and heavily disturbed shorelines were avoided, as were areas with thick brush where a boat could not land. The elevations of the points identified by Professor Johnson will be introduced at trial. Professor Johnson will describe these sites for the Court with photographs.

At trial, the State will show that despite the diversity of the shoreline of the lake, there was great similarity of the elevations of the escarpments and vegetation line around the lake, from one point to another. Generally, four terraces or escarpments were identifiable from about elevation 2128 feet to 2132 or 2133 feet, depending of the location of the site. Some variability is inherent in the elevations because of the different aspect of the sites, i.e. whether exposed to storms or on a relatively quiet bay area. Professor Johnson will describe the plant species generally found today along the lake edge.

Professor Johnson will testify that it is very difficult to make any conclusions about the OHWM of Lake Coeur D'Alene in 1890

based on today's summer pool because the dam keeps the level of the lake up until fall, so the lake does not recede in summer as occurred before the dam. Since vegetation is opportunistic, the present vegetation could have developed in the recent past. In Professor Johnson's opinion, the soils evidence is a much more reliable indicator of conditions in 1890 because soils take much longer to develop than vegetative communities.

The identification of terraces along the lake shore above 2128 feet is relevant to this case because it shows the high level to which Lake Coeur D'Alene is capable of rising. As explained in Section III.B., supra, the Post Falls Dam does not affect the level of the lake above 2128 feet. Thus, terraces above 2128 feet are not due to the operation of the dam. The hydrologic data also shows that the mean annual high water level of the lake is 2131.44 feet, which closely approximates the level of the upper terraces identified by Professor Johnson. This is not, however, the level of the lake that the State asserts is the OHWM. The level the State seeks to have established as the OHWM is 3 $\frac{1}{2}$ feet below this level.

An examination of the sites around the lake shed light on application of the OHWM definition, Idaho Code § 58-104 (9), to the facts of this case. The shoreline of Lake Coeur D'Alene is diverse, with estuaries, rocky shore and beaches. The Court should apply the various aspects of the OHWM test with an understanding of all conditions that can be encountered on the lake. For example, it will be shown at trial that at Powderhorn

Point, the shore is comprised of cobbles and sand, an area obviously unsuited for agricultural purposes well above 2128 feet. Similarly, many of the other portions of the shoreline, such as East point, Swede Bay and Rock Point, are areas of rock and sand with little or no vegetation. In other areas, such as at Beauty Bay, vegetation grows successfully directly in standing water. The point is that the Court cannot apply the OHWM test strictly according to the definition at all places along the shoreline because of the variability of the shore. An absence or presence of vegetation in and of itself is not conclusive because some vegetation thrives below standing water, and some areas are rock which could never support vegetation. All aspects of the test must be applied to all areas of the lake as much as possible to form an accurate picture.

Professor Johnson has examined a number of tree stumps located between 2121 feet and 2128 feet. The evidence will show that most of the stumps located in these areas are black cottonwoods, with all others, except one, ponderosa pines. Professor Johnson believes that these trees may have existed in what were swampy areas of the shallow estuaries of the lake before the dam was constructed. After the dam stored water in the lake during the summer months and retarded drainage, these areas probably held water through most of the growing season. This may have killed the trees, although there is no evidence as to what killed them; many have been cut by saw. In any event, Professor Johnson will testify that black cottonwoods and

ponderosa pine can tolerate significant periods of inundation during the growing season and thrive, long enough to survive annual high water in the lake before the dam was built.

Maintenance of a summer level at 2128 feet during the entire growing season may explain the death of the trees; they may have died even though the lake level was never "raised."

Professor Johnson will testify that in his opinion, based upon his analysis of the current shoreline of the lake, hydrographic and soils data, and knowledge of the growth requirements of black cottonwood trees and ponderosa pines, the OHWM of Lake Coeur D'Alene in 1890 was at approximately the level of the summer pool of the lake, 2128 feet.

E. The Survey Information to Be Presented In The Case Supports An OHWM Of 2128 Feet.

A large amount of survey information will be presented to the Court during the course of the trial in this matter. The State asserts that although survey evidence may provide some information as to the conditions of Lake Coeur D'Alene prior to the construction of the Post Falls Dam, it cannot reliably be used alone to determine the OHWM. This is because the purpose of the surveys was simply to define the sinuosities of a body of water for the purpose of ascertaining the price to be paid by a purchaser for a government lot. Heckman Ranches, 99 Idaho at 796. It was not the intention of the surveyors to define the boundary between State and upland ownership, and it was never intended that the survey work be used for that purpose. There is no basis to justify defining the limit of the State's sovereign

ownership based upon the work of a federal surveyor over a century ago, who was not attempting to determine the OHWM.

In order to understand the basics of the survey evidence pertinent to the case at hand, it is important to understand how the United States Government originally surveyed the western states, such as Idaho, prior to disposing of the lands pursuant to the federal homestead laws.

In order to determine acreages and legal descriptions for lands to be homesteaded, the United States performed systematic surveys of the western territories. The methods for performing these surveys were set forth in various General Land Office (now Bureau of Land Management, or "BLM") manuals. For example, in 1890, a version of the manual was published, Manual of Surveying Instructions for the Public Lands of the United States and Private Land Claims. The 1890 manual is of significance in the case at hand because some of the surveys adjacent to Lake Coeur D'Alene were conducted in 1891 and 1892, when this manual was in effect. Another version of the Manual was published in 1894.

Of importance to the case at hand is the subject of "meandering," or establishment of lines to approximate the sinuositities of a navigable body of water. "Meandering" is explained on pages 33-35 of the 1890 Manual, and was done for both lakes and rivers. A "meander corner" was established at those points where either the township or section lines intersect the banks of a navigable stream. 1890 Manual at 33. In "meandering," the surveyor was instructed to commence at one of

the corners, course the bank or boundary line, and measure the distance of each course from the commencing corner to the next "meander corner." Id. By this process, navigable waters were defined for the purpose of establishing fractional government lots for sale to settlers.

Section 4 of the "Meandering" section at page 34 of the 1890 Manual contains the following instruction of importance to the case at hand: "Meander lines should not be established at the segregation line between dry and swamp land or overflowed land, but at the ordinary low-water mark of the actual margin of the rivers or lakes on which the swamp or overflowed lands border." This section is important because in one portion of the survey of T50N, R4W, the original surveyor, Mr. Miller, noted swamp lands in the area of Cougar Bay when he surveyed it in 1891 and 1892.

A new version of the Manual was published in 1894. The manual was substantially the same with respect to meandering generally, with the following exception: Meander lines were now to be established at the ordinary high-water mark of the actual margin of the rivers or lake which swamp or overflow lands bordered, rather than the ordinary low-water mark.

The State has obtained the services of James Meckel, a Coeur D'Alene surveyor with a extensive experience in matters related to meander lines and corners adjacent to Lake Coeur D'Alene, and the work of the original government surveyors who performed the work, including Mr. Miller. Mr. Meckel will testify about the procedures of these early surveyors, and address some of the

evidence presented by Plaintiffs.

Mr. Meckel has collected a large number of Corner Perpetuation and Filing Records, documents recorded in the county which document the location of survey corners that surveyors observe while doing field work. These records show that meander corners for Lake Coeur D'Alene were set at a variety of different elevations, including some that were set below the elevation of the summer pool of the lake, or 2128 feet. A larger number of the original meander corners, however, were set at levels above the present-day summer pool of 2128 feet. These discrepancies may be explainable by the time of year that the original meander corners were set, i.e. low water in fall or high water in spring, but this cannot explain all of the discrepancies. For example, the evidence will show that within a few days of setting a meander corner at about 2121 feet on the east side of Kidd Island Bay, Mr. Miller set a meander corner just east of this adjacent to the lake above 2128 feet.

The State has also had Mr. Meckel review a survey study done by LePard and Frame for the State in 1969, including the LePard and Frame work sheets and drawings; this study will be introduced by the State. The purpose of this study was to determine the relationship of the original meander surveys to the existing high water line of Lake Coeur D'Alene in Government Lots 46 and 47, Section 14, T50N, R 4W, B.M (the area adjacent to the lake by the beach at North Idaho College). This study showed that meander lines set in 1880 and 1904 were at elevation 2129.0 feet and

2129.7 feet, respectively.

Mr. Meckel has also reviewed the original survey notes Mr. Miller made to document his survey of T50N, R4W, and the original GLO plat of the survey, and noted some puzzling inconsistencies about the work done, which will be explained at trial.

The State will show at trial that although survey evidence is of some use in determining the conditions of Lake Coeur D'Alene in 1890, it is improper to use the information as direct evidence of the OHWM. It is Mr. Meckel's opinion that the original government surveyors were not particularly careful about establishing these meander corners and lines; they probably had no idea of the significance that we would attempt to attach to them today. The surveyors were simply getting lines drawn for government lots, and we cannot read more into it.

F. Evidence Of Deeds Or Federal Patents Of Lands To Elevation 2121 Feet Does Not Bear On The Location Of The OHWM, Or In Any Way Preclude The State From Asserting Title To These Lands.

There are a number of federal land patents and deeds adjacent to Lake Coeur D'Alene which show private ownership of Kidd Island Bay and Cougar Bay below 2128 feet. Plaintiffs' alleged indicia of ownership of the dredge spoil "island" in Kidd Island Bay is derived from one of these patents. These patents, however, do not bear on the location of the OHWM of Lake Coeur D'Alene.

First, these the legal description in these federal patents, and subsequent deeds in the chain of title, are derived from the original government surveys. As explained above, the meander

STATE'S TRIAL MEMORANDUM -- Page 29 of 36

lines were not boundary lines between State and upland ownership.

Second, as a general rule, a party cannot grant what they do not own. The beds of navigable water below the OHWM passed to the State on July 3, 1890 under the equal footing doctrine. The federal acts authorizing the disposition of public lands do not include lands below the OHWM because these lands were granted to the State at statehood. See Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed 331 (1894); Narrows Realty Co. v. State, 329 P.2d 836, 839 (Wash. 1958).

The question for resolution of this Court is the location of the OHWM of Lake Coeur D'Alene. Any deeds or patents submitted by Plaintiffs as evidence thereof is irrelevant to this central inquiry.

G. Historical Photographs Show That The OHWM of Lake Coeur D'Alene Has Not Been Altered By The Dam.

The State will introduce a number of old photographs, and a few recent newspaper articles with old photographs located in them, which depict conditions in the lake prior to the Post Falls Dam. Most of these photographs are of the Coeur D'Alene City waterfront and Fort Sherman area in the late 1800's. These photographs illustrate a few pertinent matters, and corroborate some of the hydrologic and vegetation evidence:

1. Under natural conditions, Lake Coeur D'Alene fluctuated greatly, with pre-dam historic high-water levels as high as about 2137 feet, and low water levels down to about 2120 feet. We cannot determine elevations of the lake from the photographs, but the shoreline shows quite clearly in a number of the photographs,

STATE'S TRIAL MEMORANDUM -- Page 30 of 36

both at times of high and low water.

2. Some of the photographs shows deciduous trees, both with and without leaves, growing out of the water. These may well be cottonwood trees. These photographs will show that under natural conditions, trees were inundated, and inundation of trees was not caused by "raising" the lake level.

3. One photograph obtained by Plaintiff Marvin Erickson, apparently a pre-statehood photograph, shows a portion of the shoreline of the lake near the city beach in from of North Idaho College. Comparing the photograph with evidence of piling remnants found on the shore today shows a striking resemblance between the pre-statehood shoreline and the shoreline at 2128 feet in the summer.

H. Tax Assessment Information.

The State has obtained information from the Kootenai County Assessor's Office as to every lot that borders Lake Coeur D'Alene. This information shows that although some lots along Lake Coeur D'Alene are assessed for flooded lands (such as the Plaintiffs), the great majority of property owners along the lake are not assessed for flooded lands. This evidence simply underscores the point established earlier about the variability of survey meander lines and how lands adjacent to the lake were granted by the United States: Some lands were meandered below 2128 feet, but many more were meandered above 2128 feet.

I. The Evidence Points To 2128 Feet As The OHWM.

At trial, the State will introduce a considerable body of

evidence that points to 2128 as the OHWM of the lake in 1890. The Court must apply the evidence in the case at hand to the statutory OHWM definition, using guidance that the Idaho Supreme Court has provided in the reported cases on the issue. This Court must examine the evidence from soils, vegetation and physical escarpments along the shoreline.

The soil evidence is of critical importance in the case at hand because it is direct physical evidence of the conditions along the shore of Lake Coeur D'Alene before the dam was built. The composition of soil was identified as a critical factor by the Supreme Court in Heckman Ranches, 99 Idaho at 799. The soils the State has identified are essentially lakebed soils that have no soil horizon development as is typical of upland soil. There is no evidence of developed soils that were flooded. The soil evidence paints a picture of a fluctuating lake before the dam very similar to the lake of today.

The State will show evidence of lines of escarpment at different levels above 2128 feet which represent the highest water levels of the lake, levels that are not affected by the dam. Evidence of flood debris above these levels show flood or storm water lines. These lines of escarpment provide valuable evidence of the action of water on a shoreline. Heckman Ranches, 99 Idaho at 797-98. In the case at hand, the State will use these higher lines to show that it is not seeking an OHWM that is a flood, or even a "high water" mark; it is seeking an elevation of 2128 feet as an ordinary high water mark, a level to which the

lake level that can reasonably be expected to rise. See Raide, 34 Idaho at 690. The hydrologic evidence shows that the State is seeking an OHWM which is well below average high water of the lake, at a level where the lake persists for a reasonably long period of time.

The evidence will show that the lands below 2128 feet have little or no value for agricultural purposes. Many areas of the shoreline are obviously too rocky or sandy for any agricultural use. Heckman Ranches, 99 Idaho at 799 makes it clear that value for agricultural purposes refers to vegetation and the "soils suitability for raising agricultural crops." (Emphasis added.) The evidence will show that the bays where soil was examined show no soil horizon development and are of a physical consistency as lakebed formations that would be very difficult to cultivate in any manner. Cf. Raide, 34 Idaho at 689-90 (land was above OHWM where it was cultivated for hay, grain, vegetables and fruit trees). Whether parties in the past cut wild hay does not bear on whether the land is suitable for agriculture and cultivation.

The amount of time that an area is inundated also bears on the location of the OHWM. Heckman Ranches, id. at 799. The evidence will show that Lake Coeur D'Alene rises above the 2128 feet level for nearly two months per year. These levels above 2128 feet are not created by the dam. This period of inundation has had direct physical effects on the soils in question, as discussed above.

The presence or absence of vegetation around the shoreline

varies considerably. The important inquiry is whether the vegetation is of a terrestrial or wetland type. Heckman Ranches, id. The State will show areas of the lake well above 2128 feet virtually devoid of vegetation, and vegetation that grows in standing water all summer, such as reed canary grass, rushes and sedges. Today, little but these types of plants grow below 2128 feet, although some species such as black cottonwoods, alder and ponderosa pine grow right at the water's edge with their feet in the water. Vegetation that grew in estuary areas before the dam maintained the summer level of the lake was probably of wetland variety, such as black cottonwoods and associated wet species. When the present vegetation is considered in the context of the soils and hydrologic evidence, it supports the conclusion that the OHWM of the lake is 2128 feet.

The State represents the ownership interest of all the people of the state of Idaho in this case. The Plaintiffs' sole interest is in trying to establish title to a small artificial island in Kidd Island Bay so he can recreate on it in the summer with his family. The State, and this Court, must bear in mind the important public property interest at stake in applying the OHWM definition. The lands at issue are public trust lands if State-owned. The OHWM definition must be applied to preserve the public's rights in these important submerged lands.

CONCLUSION

The evidence presented by the State in this case will show that the OHWM of Lake Coeur D'Alene in 1890 was at or about 2128

feet msl. The Post Falls Dam does not affect the level of the lake above 2128 feet, but simply prevents the lake from receding to its low level as occurred before the dam. The most direct, tangible evidence in the case, evidence of soil development, shows that the soils below about 2129 feet developed under strong lake influence; age of the soil horizons can be established by layers of volcanic ash. The survey evidence is inconclusive, and cannot be relied upon to determine the OHWM. Examination of the shoreline shows that the level the State asserts is the OHWM is well below normal high water and flood levels of the lake. Historical evidence corroborates the other evidence. For these reasons, title to the bed of Lake Coeur D'Alene should be quieted to 2128 feet msl USGS datum (2125 feet msl NGVD Datum).

DATED this 23rd day of October, 1995.

Steven J. Schuster
STEVEN J. SCHUSTER
Deputy Attorney General
Department of Lands

Matthew J. McKeown by SJS
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Natural Resources
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CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of October, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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