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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Should questions arise during the processing of this application please contact:
SCOTT L. CAMPBELL
Elam, Burke and Boyd
P. O. Box 1539
Boise, ID 83701-1539
343-5454

Ident. Number: A63-03174
Date Received: 9/19/1989
Receipt No: C011672
Received By:

AMENDED

NOTICE OF CLAIM TO A WATER RIGHT ACQUIRED UNDER STATE LAW

AMENDED

1. Name: JERRY L. TLUCEK
   Address: RT. 1
   MELBA, ID 83641 208-495-2550

   AND/OR

   Name: MARY LOU TLUCEK
   Address: RT. 1
   MELBA, ID 83641 208-495-2550

RECEIVED
AUG 13 1990
Department of Water Resources

2. Date of Priority: NOV 27, 1959

3. Source: GROUNDWATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County
01N	01W	22	SE SE		ADA

5. Description of diverting works:
   WELL, 385', 12", 100 HP VERT. TURB. PUMP, 8" LINE, 60 HP BOOSTER

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION	03/15	11/15	1.850		

7. Total Quantity Appropriated is:
   1.850 C.F.S. (and/or) A.F.A.

8. Total consumptive use is ~~XXXXX~~ 399.0 Acre Feet Per Annum.

9. Non-irrigation uses:

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
01N	01W	22	NE SE		IRR	35.0

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4	1/4 of 1/4	Lot	Use	Acres
01N	01W	22	SW	SE		IRR	39.0
			SE	SE		IRR	40.0
						Section Acres	114.0
						Total Acres	114.0

11. Place of use in counties: ADA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

15. Basis of Claim: LICENSE

Water Right Number: 28285

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do ____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 0

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Jerry L. Sweet Date: 8/8/90

Mary Lou Sweet Date: 8-8-90

State of Idaho)
County of Canyon) SS.

Subscribed and sworn (or affirmed) before me this 8th day of Aug. 19 90

Seal

Lynn Perry
Notary Public

Residing at Melba

My Commission Expires 11-12-92

17. Notice of Appearance:
Notice is hereby given that I, Scott L. Campbell (Print Name) will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature Scott L. Campbell

Address P.O. Box 1539, Boise, Idaho 83701-1539

Date 8/10/90

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: **A63-03174**
Date Received: 9/19/1989
Receipt No: C011672
Received By: _____

AMENDED **NOTICE OF CLAIM TO A WATER RIGHT ACQUIRED UNDER STATE LAW** **AMENDED**

1. Name: JERRY L TLUCEK
Address: RT 1 208-495-2550
MELBA ID 83641
AND/OR
Name: MARY LOU TLUCEK
Address: RT 1 208-495-2550
MELBA ID 83641

2. Date of Priority: NOV 27, 1959

3. Source: GROUNDWATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4	of 1/4	of 1/4	Lot	County
01N	01W	22		SE	SE		ADA

5. Description of diverting works:
WELL, 385', 12", 100 HP VERT. TURB. PUMP, 8" LINE, 60 HP BOOSTER

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION	03/15	11/15	1.850		

7. Total Quantity Appropriated is:
1.850 C.F.S. (and/or) A.F.A.

8. Total consumptive use is 399.0 Acre Feet Per Annum.

9. Non-irrigation uses:

10. Place of Use:

Township	Range	Section	1/4	of 1/4	Lot	Use	Acres
01N	01W	22	NE	SE		IRR	35.0

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4	1/4 of 1/4	Lot	Use	Acres
01N	01W	22	SW	SE		IRR	39.0
			SE	SE		IRR	40.0
						Section Acres	114.0
						Total Acres	114.0

11. Place of use in counties: ADA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

15. Basis of Claim: LICENSE

Water Right Number: 28285

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do ____ do not ____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): _____ Date: _____

_____ Date: _____

State of Idaho)
) SS.
County of _____)

Subscribed and sworn (or affirmed) before me this _____ day of _____ 19 _____

_____
Notary Public

Seal

Residing at _____

My Commission Expires _____

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

Ident. Number: A63-03174
Date Received: 9/19/1989
Receipt No: C011672
Received By: _____

NOTICE OF CLAIM TO A WATER RIGHT ACQUIRED UNDER STATE LAW

1. Name: JERRY L. TLUCEK
   Address: RT. 1 208-495-2550
   MELBA, ID 83641
   AND/OR
   Name: MARY LOU TLUCEK
   Address: RT. 1 208-495-2550
   MELBA, ID 83641

2. Date of Priority: NOV 27, 1959

3. Source: GROUNDWATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County
01N	01W	22	SE SE		ADA

5. Description of diverting works:
   WELL, 385', 12", 100 HP VERT. TURB. PUMP, 8" LINE, 60 HP BOOSTER

6. Water is used for the following purposes:

Purpose	From	To	C.F.S	(or)	A.F.A.
IRRIGATION	03/15	11/15	1.850		

7. Total Quantity Appropriated is:
   1.850 C.F.S. (and/or) A.F.A.

8. Total consumptive use is 700.0 Acre Feet Per Annum.

9. Non-irrigation uses:

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
01N	01W	22	SE SW		IRR	40.0

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4		Lot	Use	Acres
01N	01W	22	NE	SE		IRR	40.0
			NW	SE		IRR	40.0
			SW	SE		IRR	40.0
			SE	SE		IRR	40.0
					Section Acres		200.0
					Total Acres		200.0

11. Place of use in counties: ADA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

15. Basis of Claim: LICENSE

Water Right Number: 28285

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do ____ do not ____ wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: _____

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): _____ Date: _____

_____ Date: _____

State of Idaho)
) SS.
County of _____)

Subscribed and sworn (or affirmed) before me this _____ day of _____ 19 _____

_____
Notary Public

Seal

Residing at _____

My Commission Expires _____

Form No. 42-1409 (2) a 1/88

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

IN RE THE GENERAL ADJUDICATION OF RIGHTS TO THE USE OF WATER FROM THE SNAKE RIVER BASIN WATER SYSTEM

CIVIL CASE NUMBER: 39576
Ident. Number A63-3174
Date Received 9-18-89
Receipt Number C011672

RECEIVED
SEP 18 1989
Department of Water Resources

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

Please type or print clearly

1. Name of Claimant (s) Jerry L. and/or Mary Lou Tlucek Phone (208) 495-2550

   Mailing Address Route 1, Melba, Idaho Zip 83641

2. Date of Priority (Only one (1) per claim) November 27, 1959

3. Source of water supply (a) groundwater
   which is tributary to (b) N/A

4. a. Location of existing point of diversion is: Township 1 N. Range 1 W. Section 22,
   ____ 1/4 of SE 1/4 of SE 1/4, Govt. Lot, ____ B.M., County of Ada

   Additional points of diversion if any: ____

   b. If instream flow, beginning point of claimed instream flow is:

   Township ____ Range ____ Section ____, ____ 1/4 of ____ 1/4 of ____ 1/4,

   Govt. Lot ____ B.M., County of ____

   ending point is: Township ____ Range ____ Section ____, ____ 1/4 of ____ 1/4 of

   ____ 1/4, Govt. Lot ____ B.M., County of ____

5. Description of existing diversion works (Dams, Reservoirs, Ditches, Wells, Pumps, Pipelines, Headgates , Etc), including the dates of any changes or enlargements in use, the dimensions of the diversion works as constructed and as enlarged and the depth of each well. Well is approximately 385 feet deep, 12-inch diameter casing, 100 h.p. vertical turbine pump, 8-inch diameter discharge line to a 60 h.p. booster pump to mainline and handlines for irrigation.

6. Water is claimed for the following purposes:

		(both dates are inclusive)			(cfs)		(acre feet)
For	irrigation	purposes from	Mar 15	to Nov 15	amount	1.85	or
For		purposes from		to	amount		or
For		purposes from		to	amount		or
For		purposes from		to	amount		or

7. Total quantity claimed (a) 1.85 (cfs) and/or (b) _____ (acre feet)

8. Total consumptive use claimed is 700 acre feet per annum.

9. Non-irrigation uses; describe fully (eg. Domestic: Give number of households served; Stockwater: Type and number of livestock Etc.) _____

10. Description of place of use:
    a. If water is for irrigation, indicate acreage in each subdivision in the tabulation below.
    b. If water is used for other purposes, place a symbol of use (example: D for Domestic) in the corresponding place of use below. See instructions for standard symbols.

TWP	RNG	SEC	NE 1/4				NW 1/4				SW 1/4				SE 1/4				Totals
			NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	NE1/4	NW1/4	SW1/4	SE1/4	
1 N.	1 W.	22												40	40	40	40	40	200

Total number of acres irrigated 200

11. In which county (ies) are lands listed above as place of use located? Ada

12. Do you own the property listed above as place of use? Yes xx No _____
    If your answer is No, describe in Remarks below the authority you have to claim this water right.

13. Describe any other water rights used at the same place and for the same purposes as described above.
    _____ or None (xx)

14. Remarks:
    _____

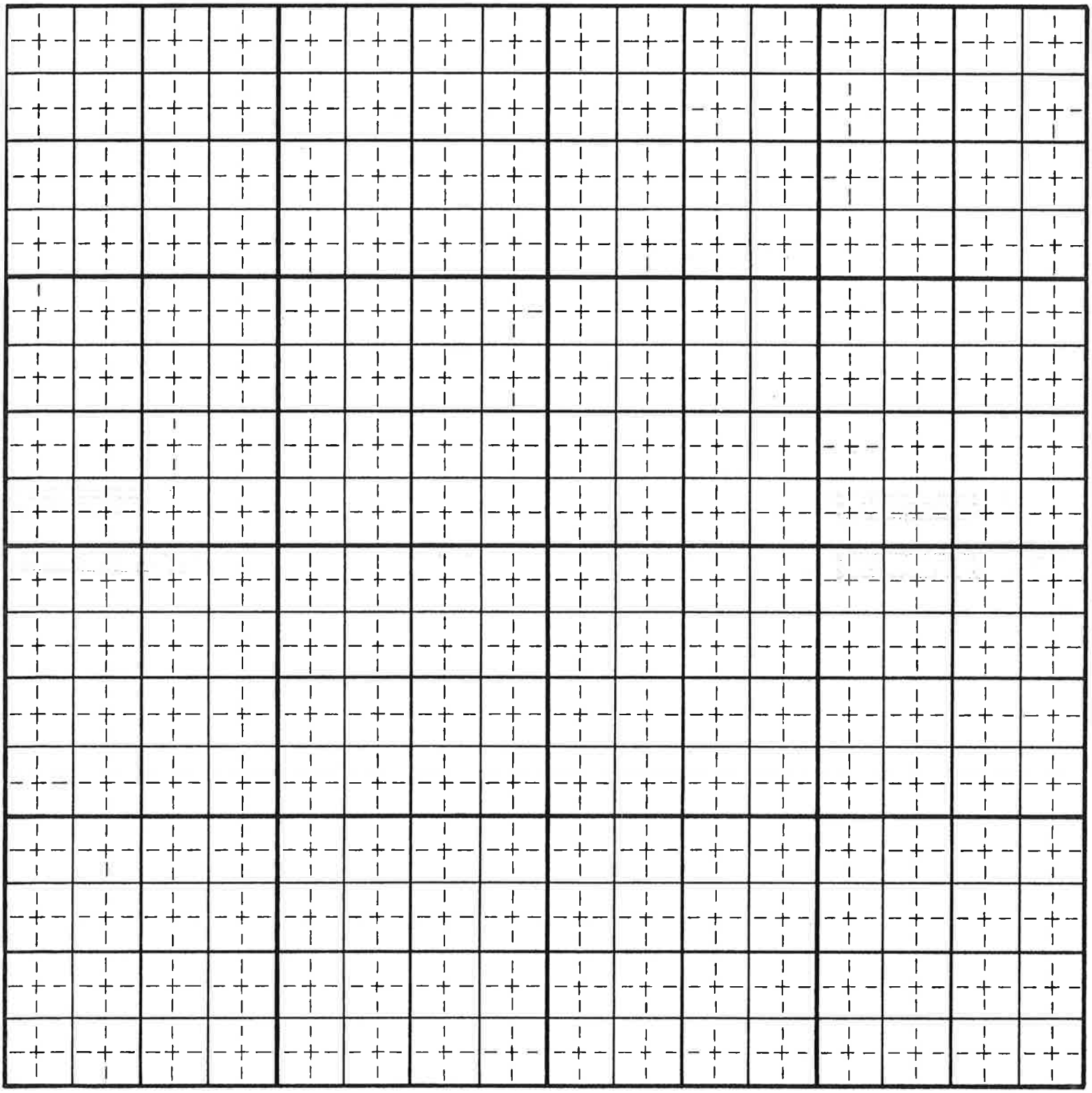
Last Name Tlucek Ident No. _____

Copies: White -State, Yellow-Claimant

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

Scale: 2 inches equals 1 mile

SEE EXHIBIT A



Last Name Tlucek Ident No. _____ *Copies: White-State, Yellow-Claimant*

15. Basis of Claim (check one) Beneficial Use _____ Posted Notice _____ License xx Permit _____
Decree _____
If applicable provide IDWR Water Right Number 63-03174
Court _____ Case Number _____ Decree Date _____
Plaintiff vs Defendant _____

16. Signature (s)
(a.) By signing below, I/We acknowledge that I/We have received, read, and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do _____ do not xx wish to receive and pay a small annual fee for monthly copies of the docket sheet.
Number of attachments _____

For Individuals: I do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant (s) Jessy L. Tlucek Date 9/13/89

_____ Date _____

For Organizations: I do solemnly swear or affirm that I am _____
Title
of _____ , that I have signed the foregoing
Organization
document in the space below as _____ of _____
Title Organization
and that the statements contained in the foregoing document are true and correct.

Signature of Authorized Agent _____

Title and Organization _____ Date _____

State of Idaho/or _____)
) SS.
County of Canyon)

Subscribed and sworn (or affirmed) before me this 13th day of Sept. 19 89

SEAL

Notary Public Lynn Perry

Residing at Melba

My Commission Expires 11-12-92

Please Print Name

17. Notice of Appearance:
Notice is hereby given that I, Scott L. Campbell will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above should be mailed to me at the address listed below.

Signature _____

Address P.O. Box 1539, Boise, ID 83701

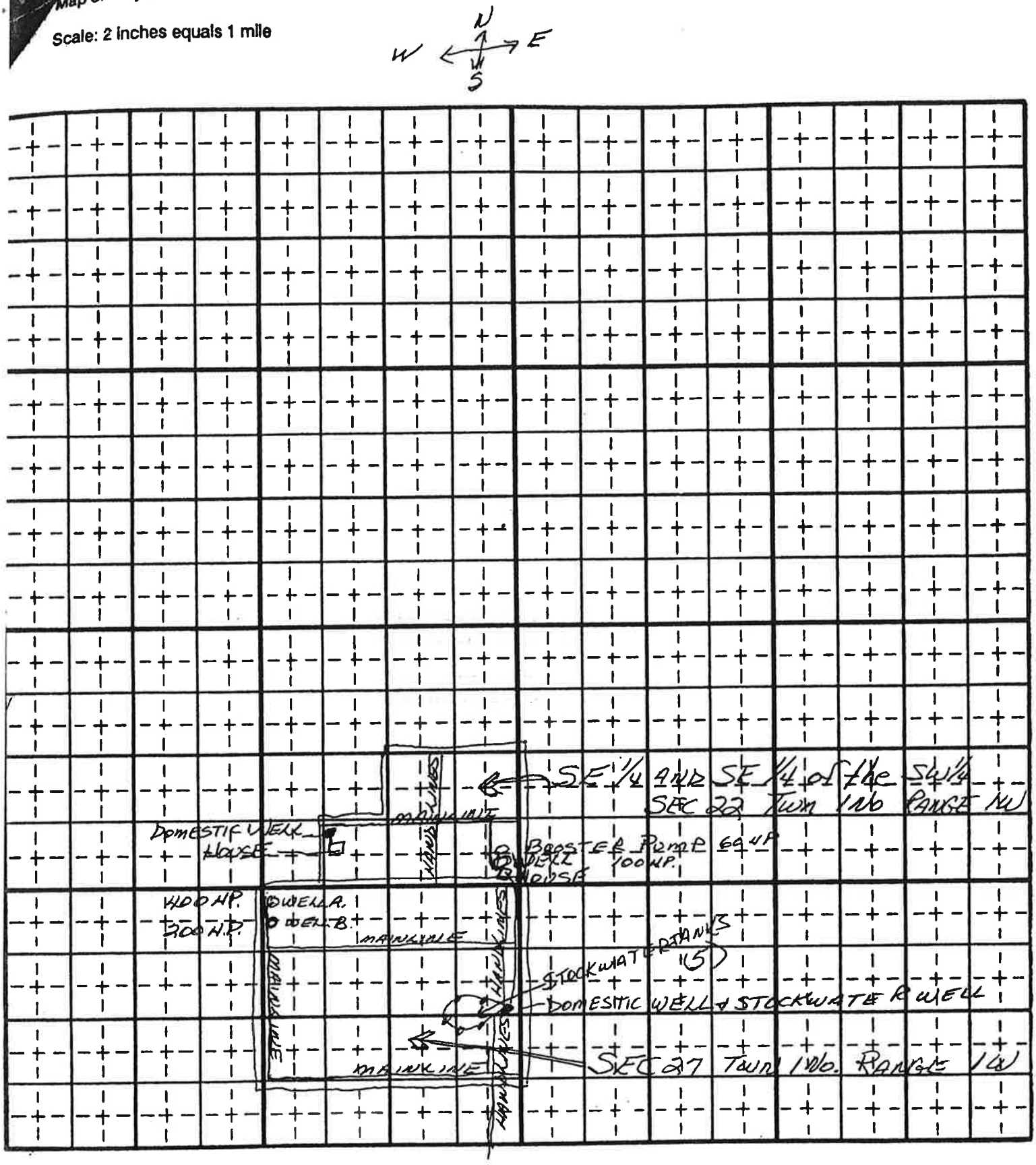
Date _____

Last Name Tlucek Ident. Number _____

Copies White-State, Yellow-Claimant

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

Scale: 2 inches equals 1 mile



Last Name TLUCEK Ident No. 648 ACRES 300 ACRES

Copies: White-State, Yellow-

Blumberg No. 5110

EXHIBIT A

4/5/1989 SRBA CLAIMS RECEIVING CHECKLIST #2

CLAIMANT'S NAME Thuche (paid by Clam) CLAIM IDENT. NO. A63-3174

DATE RECEIVED 9/18/89 CK # 0090 AMOUNT $ C0011677

	YES	NO	Required Info?
1. Is the name and address complete with zip code?	___	___	*
2. Is a priority date entered?	✓	___	*
Is the priority date acceptable in view of mandatory filing dates? See Adjudication Memos #1 and #4 to determine if a Permit is required.	✓	___	*
3. (a) Is a source entered?	✓	___	*
(b) Is a tributary to entered? (if required) N/A ✓	___	___	
4. Is the legal description of the p.d. sufficient?	✓	___	*
5. Is there a description of the diverting works?	✓	___	
6. Are the water uses appropriate for the form? The short form is limited to domestic and stockwater uses with direct diversion. All claims that include storage or instream stockwater must use long form.	✓	___	*
Is the period of use included?	✓	___	
Is a quantity claimed for each use?	✓	___	*
7. Is a total quantity claimed entered?	✓	___	
8. If required is a consumptive use entered? N/A ___	___	___	
Is the consumptive use correct? N/A ___	✓	___	
9. Are the non-irrigation uses listed properly? If this claim is on the short form, and more than one domestic use is listed, single ownership must be stated. If not under single ownership, see Adjudication Memo # 4. N/A ✓	___	___	*
10. Is (are) the place(s) of use and purpose(s) indicated?	✓	___	*
11. Is (are) the county(ies) entered?	✓	___	
12. Is the ownership of p.u. checked?	✓	___	
13. Are other water rights listed or "none" indicated?	✓	___	
14. If required, are remarks correct? (If the claimant does not own the place of use, authority for filing the claim must be explained in the remarks.) N/A ✓	___	___	
15. Is the basis of the claim indicated?	✓	___	
16. If the claimant requested a monthly docket sheet, is payment enclosed? (If yes, describe payment status in "Comments" below.) N/A ✓	___	___	
17. Is the claim signed by the claimant, and is the signature appropriate? Organizations must complete the organization block.	✓	___	*
18. Has the claim been signed, sealed, and dated by a notary?	✓	___	*
19. Was this claim filed on time, or was an extension granted?	✓	___	*
20. Is the fee enclosed correct? Exempt ___	✓	___	*
21. If this claim is based on an existing water right, has the identification number been entered? N/A ___	✓	___	
22. Should this claim be data entered?	✓	___	

Claim checked by: Bruce Ahrl Date: 12/5/89

Claim must be returned to claimant: ___(Yes) ___(No)

Claim must be notified of modifications: ___(Yes) ___(No)

Receipt Prepared by: _____ Date: _____

Claim data entered by: _____ Date: _____ Checked by: _____ Date: _____

Sent to claimant by: _____ Date: _____

Comments: This claim is an expansion of # of acres - since an attorney filed it, we can assume he knew what he was doing.

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROOF READING REPORT

Water Right Number - 63-03174 Adj. Flag Translation: Standard Water Right Number Old (D) Number - 28285

Last Name	First Name	Address
*** C - CURRENT OWNER *** BUNN	KENT	1 - 4215 EMERALD ST. 2 - 3 - City- BOISE State- ID Zip- 83706 Phone -

Priority Date	Region	Stage	Status
11/27/1959	14	L - LICENSE	

Source - GROUNDWATER

Tributary -

Point of Diversion

Twn	Rng	Sec	Tract	Lot	RFlg	County	Stream Index (Blank if no Index Code)
01N	01W	22	SE SE		(1)	ADA	

Water Use

Code	Description	Period From	Period To	Diversion Rate	Diversion Volume
01	IRRIGATION			1.850	

Total Div. Rate	Total Div. Volume	Total Div. Capacity	Total Consumptive Use	KW Usage
1.850				

Place of Use

Twn	Rng	Sec	Tract	Lot	Acres	Code	Description	County
01N	01W	22	NE SE		35.0	01	IRRIGATION	(1) ADA
01N	01W	22	SW SE		39.0	01	IRRIGATION	(1) ADA
01N	01W	22	SE SE		40.0	01	IRRIGATION	(1) ADA

Total Acres: 114.0

Diversion Means -

Non-Irrigation Use -

Other Rights for Same Use -

Remarks
No Remarks found.

Old Water Right Numbers
No Old Water Right Numbers found.

Conditions of Approval
No Conditions of Approval found.

Water right number - 63-03174 Adj. flag translation: Standard Water Right Number

Decree Plaintiff	Decree Defendant	Decree Date
		00/00/0000

Audit Fields - 05/06/85 05/01/88 CONVERT

Water Rights Dates and Flags Area

Proof Due Date	00/00/0000	Field Exam Made	00/00/0000	Field Exam Fee	
Approved/Denied	00/00/0000	Protested Date	00/00/0000	Swan Falls	
Proof Made Date	00/00/0000	Hearing Date	00/00/0000	Temporary Right	P
Start Work Date	00/00/0000	Verified Date	05/06/1985	DLE/Carey Act	
Order Show Cause	00/00/0000	Receipt Number		Water District	
Licensed Date	08/28/1979	Appl Received	00/00/0000	Transfer/Amended	
Decree Date	00/00/0000	Presumption Flag			
				Microfilm Roll Number	

RECEIVED
MAY 02 2008
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
APR 30 2008
By
Clerk
Deputy Clerk

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

In Re SRBA

Case No. 39576

Subcase No. 63-3174

STANDARD FORM 5

STIPULATED ELEMENTS OF A WATER RIGHT

This form is used to report the stipulated elements of one water right acquired under state law and/or one federal reserved water right. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right.

The parties agree that the Snake River Basin Adjudication Court has jurisdiction of the parties and subject matter to enter a partial decree for this water right; that they have been served with sufficient process, according to the law; and that they have appeared, prosecuted, and defended their positions with regard to this water right dispute.

The parties and IDWR agree and stipulate that the elements of this water right should be described per the attached. The parties and IDWR have further indicated their concurrence by initialing each of the attached pages.

CLAIMANT(s)/OBJECTOR(s):
Jerry L. Tlucek
Mary Lou Tlucek

Scott L. Campbell 4/22/08
Scott L. Campbell Date
Attorney for Claimants/Objectors

IDWR Concurrence:

4-23-08
Donald V. Shaff Date
Adjudication Bureau Chief

4/24/08
Garrick L. Baxter Date
Deputy Attorney General
Attorney for IDWR

04/10/2008

IDAHO DEPARTMENT OF WATER RESOURCES

RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3174

NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER

QUANTITY: 1.850 CFS
513.00 AFY

TRIBUTARY:

This right when combined with Right No. 63-23182 shall provide no more than 1.85 cfs nor more than 900 AF per annum.

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION: T01N R01W S22 SESE Within ADA County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/15 11/15	1.850 CFS 513.00 AFY

The use of water for irrigation under this right may begin as early as March 1 provided other elements of the right are not exceeded. The use of water before March 15 under this remark is subordinate to all water rights having no subordinated early or late irrigation use and a priority date earlier than the date a partial decree is entered for this right.

PLACE OF USE: IRRIGATION in ADA County

T01N R01W S22	SESW	40.00	T01N R01W S22	NESE	~~35.00~~ 40.00
T01N R01W S22	NWSE	40.00	T01N R01W S22	SWSE	~~39.00~~ 40.00
T01N R01W S22	SESE	40.00			

~~114~~ 200 ACRES TOTAL

SLC

This right is limited to the irrigation of 114 acres within the place of use described above in a single irrigation season.

This right and Right No. 63-23182 are limited to the irrigation of a combined total of 200 acres in a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

Right No. 63-23182 is an enlargement of this right pursuant to Section 42-1426, Idaho Code.

CERTIFICATE OF MAILING

I certify that on April 28, 2008, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

CLERK OF THE DISTRICT COURT
SNAKE RIVER BASIN ADJUDICATION
253 THIRD AVENUE NORTH
P.O. BOX 2707
TWIN FALLS, IDAHO 83303-2707

2. Copies to:

JERRY L. TLUCEK
MARY LOU TLUCEK
Represented by:
DYLAN B. LAWRENCE
101 S. CAPITOL BLVD 10TH FLOOR
P.O. BOX 829
BOISE, ID 83701-0829

JERRY L TLUCEK
MARY LOU TLUCEK
Represented by:
SCOTT L. CAMPBELL
101 S. CAPITOL BLVD 10TH FLOOR
P.O. BOX 829
BOISE, ID 83701-0829

DIRECTOR OF IDWR
P.O. BOX 83720
BOISE, ID 83720-0098

Signature of person or attorney mailing form

RECEIVED
MAY 09 2008
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY - 8 2008
By
Clerk
Deputy Clerk

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

In Re SRBA	) SPECIAL MASTER'S REPORT
Case No. 39576	)
	) FINDINGS OF FACT AND
	) CONCLUSIONS OF LAW
	)
	) FOR WATER RIGHTS 63-03174
	) and 63-23182

I. FINDINGS OF FACT

Notices of claim were filed for the above-captioned water rights pursuant to I.C. § 42-1409. The Director of the State of Idaho Department of Water Resources (IDWR) examined the water system for this reporting area. The *Director's Report* contained a recommendation or abstract for the elements of these water rights.

The claimants of the water rights, Mary Lou and Jerry L. Tlucek, through their attorney of record Scott L. Campbell, timely filed an objection in each subcase. On April 30, 2008, the parties filed a *Standard Form 5 – Stipulated Elements of a Water Right* in each of the subcases, which resolved the objections. The Idaho Department of Water Resources concurred with the stipulations.

II. CONCLUSIONS OF LAW

Therefore based on the file and record herein and pursuant to the *Standard Forms 5*, IT IS RECOMMENDED that water rights 63-03174 and 63-23182 be **decreed** with the elements as set forth in the attached ***Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b).***

Dated May 8, 2008

Theodore R. Booth
Special Master
Snake River Basin Adjudication

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

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 63-03174

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY - 8 2008
By
Clerk
Deputy Clerk

NAME AND ADDRESS: JERRY L TLUCEK
MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA, ID 83641

SOURCE: GROUND WATER

QUANTITY: 1.85 CFS
513.00 AFY

THIS RIGHT WHEN COMBINED WITH RIGHT NO. 63-23182 SHALL PROVIDE NO MORE THAN 1.85 CFS NOR MORE THAN 900 AF PER ANNUM.

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION: T01N R01W S22 SESE Within Ada County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation	03-15 TO 11-15	1.85 CFS 513.00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE:

Irrigation

T01N R01W S22	SESW 40.0	Within Ada County
	NWSE 40.0	NESE 40.0
	SESE 40.0	SWSE 40.0
200.0 Acres Total		

THIS RIGHT IS LIMITED TO THE IRRIGATION OF 114 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON. THIS RIGHT AND RIGHT NO. 63-23182 ARE LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

RECOMMENDATION

MAY - 8 2008

SPECIAL MASTER

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

In Re SRBA)
)
Case No. 39576)
)

PARTIAL DECREE PURSUANT TO I.R.C.P. 54(b) FOR

Water Right 63-23182

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY - 8 2008
By
Clerk
Deputy Clerk

NAME AND ADDRESS: JERRY L TLUCEK
MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA, ID 83641

SOURCE: GROUND WATER

QUANTITY: 0.80 CFS
387.00 AFY

This right when combined with Right No. 63-3174 shall provide no more than 1.85 cfs nor more than 900 AF per annum.

PRIORITY DATE: 05/01/1973

This water right is subordinate to all water rights with a priority date earlier than April 12, 1994, that are not decreed as enlargements pursuant to Section 42-1426, Idaho Code. As between water rights decreed as enlargements pursuant to Section 42-1426, Idaho Code, the earlier priority right is the superior right.

POINT OF DIVERSION: T01N R01W S22 SESE Within Ada County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
Irrigation	03-01 TO 11-15	0.80 CFS 387.00 AFY

PLACE OF USE:

Irrigation

T01N R01W S22	SESW 40.0	Within Ada County
	NWSE 40.0	NESE 40.0
	SESE 40.0	SWSE 40.0

200.0 Acres Total

RIGHT NOS. 63-3174 AND 63-23182 ARE LIMITED TO THE IRRIGATION OF A COMBINED TOTAL OF 200 ACRES IN A SINGLE IRRIGATION SEASON. THIS RIGHT IS LIMITED TO THE IRRIGATION OF 86 ACRES WITHIN THE PLACE OF USE DESCRIBED ABOVE IN A SINGLE IRRIGATION SEASON.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This right is based upon an enlargement of Right No. 63-3174 pursuant to Section 42-1426, Idaho Code.

THIS PARTIAL DECREE IS SUBJECT TO SUCH GENERAL PROVISIONS NECESSARY FOR THE DEFINITION OF THE RIGHTS OR FOR THE EFFICIENT ADMINISTRATION OF THE WATER RIGHTS AS MAY BE ULTIMATELY DETERMINED BY THE COURT AT A POINT IN TIME NO LATER THAN THE ENTRY OF A FINAL UNIFIED DECREE. I.C. SECTION 42-1412(6).

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

John M. Melanson
Presiding Judge of the
Snake River Basin Adjudication

RECOMMENDATION
MAY - 6 2008
/s/ R Booth
SPECIAL MASTER

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY - 8 2008
By
Clerk
Deputy Clerk

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

In Re SRBA)
)
Case No. 39576)
)
)

NOTICE OF ISSUANCE OF SPECIAL MASTER'S RECOMMENDATION

Water Right(s): 63-03174
63-23182

On May 08, 2008, Special Master THEODORE R. BOOTH issued a SPECIAL MASTER'S RECOMMENDATION for the above subcase(s) pursuant to SRBA Administrative Order 1 (AO1), Section 13a.

Pursuant to SRBA Administrative Order 1, Section 13a, any party to the adjudication including parties to the subcase, may file a Motion to Alter or Amend on or before the 28th day of the next month.

Failure of any party in the adjudication to pursue or participate in a Motion to Alter or Amend the SPECIAL MASTER'S RECOMMENDATION shall constitute a waiver of the right to challenge it before the Presiding Judge.

DATED May 08, 2008.

DIANA R DELANEY
Deputy Clerk

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAY - 8 2008
By
Clerk
Deputy Clerk

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

In Re SRBA)
)
Case No. 39576)
)

CERTIFICATE OF MAILING

Water Right(s): 63-03174
63-23182

CERTIFICATE OF MAILING

I certify that a true and correct copy of the SPECIAL MASTER'S REPORT, SPECIAL MASTER'S RECOMMENDATION FOR PARTIAL DECREE and NOTICE OF ISSUANCE OF SPECIAL MASTER'S REPORT AND RECOMMENDATION were mailed on May 08, 2008, with sufficient first-class postage prepaid to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

JERRY L & MARY LOU TLUCEK
JERRY L TLUCEK
MARY LOU TLUCEK
Represented by:
DYLAN B LAWRENCE
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829

JERRY L & MARY LOU TLUCEK
JERRY L TLUCEK
MARY LOU TLUCEK
Represented by:
SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

DIANA R DELANEY
Deputy Clerk

RECEIVED
MAR 04 2008
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAR - 3 2008
By
Clerk
Deputy Clerk

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

In Re SRBA	)	**Subcase 63-03174 and 63-23182**
	)	
Case No. 39576	)	**ORDER SETTING STATUS**
	)	**CONFERENCE and VACATING TRIAL**
	)	**IN 63-03174**

On January 4, 2008, the Tluceks filed their *Motion for Summary Judgment* in Subcase no. 63-03174, together with supporting briefing and affidavit. Oral argument on the motion was heard on February 11, 2008. In the process of preparing an order on summary judgment, this Special Master has become aware of some questions regarding the relationship between 63-03174 and 63-23182.

Water right no. 63-23182, which was reported in the Basin 63 Part III *Director's Report*, is a claim for an enlargement of water right 63-03174. Because 63-03174 was reported in the *Director's Report* for Basin 63 Part II, and because 63-23182 was not identified by IDWR in the Basin 63 Part II *Case Management Proposal* (dated July 28, 2006) as an overlapping water right to 63-03174, these two subcases have heretofore proceeded on separate tracks, with 63-03174 being procedurally ahead of 63-23182.

The *Director's Report* in 63-23182 recommends an irrigated place of use of 86 acres, which was an enlargement of water right 63-03174 that occurred on May 1, 1973. The total number of acres allowed to be irrigated under both rights is 200 acres. The *Director's Report* for 63-23182 also recommends a remark which states: "This right when combined with Right No. 63-3174 shall provide no more than 1.85 cfs nor more than 513 AF per annum." The Tluceks have timely filed an objection on 63-23182, including an objection to IDWR's recommendation of quantity.

In the course of proceedings in 63-03174, it is clear that IDWR's recommendation of 513 AFY in 63-03174 is based upon IDWR's standard for the Treasure Valley area of

4.5 acre feet per acre multiplied by 114 acres, which is the number of acres licensed to be irrigated under water right 63-03174. *See* Supplemental Director's Report, Section III. D.; Deposition Testimony of Dave Tuthill, *Campbell Aff.* Exhibit B, at pp. 22-30. In other words, the recommended 513 AFY appears to be made without allowance for any additional annual volume for the 86 acres of the enlargement claim.[1]

In *Freemont-Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 460, 926 P.2d 1301 (1996), the Idaho Supreme Court stated: "Section 42-1426 of the Idaho Code does not proscribe enlargements that include an increase in volume of water diverted, so long as the enlargement does not exceed the rate of diversion originally authorized . . .." It appears to this Special Master that irrespective of the legal issues raised on summary judgment in subcase 63-03174 regarding whether IDWR has the authority to impose a volumetric limitation where one was not expressly stated in the 1967 license, any volumetric limitation that may ultimately become part of the partial decree for 63-23182 will be inextricably linked to the determinations made in subcase 63-03174. It is the opinion of this Special Master that subcases 63-03174 and 63-23182 need to proceed on the same track.

In accordance with the foregoing, and for the purpose of discussing with the claimants and IDWR how best to proceed with both subcases together, a status conference will be held on **March 11, 2008 at 10:30 AM Mountain Time** at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 225-383-1099 and when prompted entering the code 675342. The March 28, 2008, trial is **vacated**.

Dated March 3 2008

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

[1] If IDWR's standard 4.5 acre feet per annum were applied to the total of 200 acres, the resulting volumetric limitation would be 900 acre feet per year. The Tlucek's argue that the volumetric limitation of water right 63-03174 is 903 acre feet per year, which is arrived at by calculating the volume of water that could be diverted under a continuous diversion of 1.85 cfs for the entire irrigation season. Among other things, it is not clear to this Special Master whether or not IDWR's calculation of 513 AFY for right 63-03174 took into account the additional volume necessary, if any, for the 86 acre enlargement.

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER SETTING STATUS CONFERENCE AND VACATING TRIAL IN 63-03174 was mailed on March 03, 2008, with sufficient first-class postage to the following:

JERRY L & MARY LOU TLUCEK
JERRY L TLUCEK
MARY LOU TLUCEK
Represented by:
DYLAN B LAWRENCE
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829

JERRY L & MARY LOU TLUCEK
JERRY L TLUCEK
MARY LOU TLUCEK
Represented by:
SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
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
slc@moffatt.com
dbl@moffatt.com
22377.1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,

Case No. 39576

Subcase No. 63-03174

DISCLOSURE OR WITNESS

COMES NOW Jerry L. Tlucek and Mary Lou Tlucek (hereafter "Tluceks"), by and through their counsel of record, Scott L. Campbell and Dylan B. Lawrence of the firm Moffatt, Thomas, Barrett, Rock & Fields, Chartered, in accordance with the Amended Trial Scheduling Order, entered by this Court on November 1,2007, and pursuant to Rule 16, Idaho Rules of Civil Procedure, hereby discloses their witness.

The following individual may be called as a witness in the trial of this matter:

1. Jerry L. Tlucek, 15188 South Can-Ada Road, Melba, Idaho 83641

DATED this 15th day of February, 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of February 2008, I caused a true and correct copy of the foregoing **DISCLOSURE OF WITNESS** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Dylan B. Lawrence

2008 Water District Meetings - Round No. 2 (March - April)

Scheduled Date	WD No.	WD Suffix	Water District Name	Meeting Location	Address	City	Time	Attending Staff
January 7, 2008	57	B	Catherine Creek	Bill White Residence	18138 Oreana Loop Rd	Oreana	1:00 PM	Vicky Music
February 4, 2008	57	C	Castle Creek	Bob Collett Residence	24912 Collett Rd	Oreana	1:30 PM	No Attendance Required
January 7, 2008	57	D	Sinker Creek	Owyhee County Courthouse	Courtroom	Murphy	1:00 PM	No Attendance Required
March 4, 2008 *	57	R	Reynolds Crk & Tributaries	Wilson School House	Johnston Lane	Wilson	1:30 PM	No Attendance Required
March 3, 2008 *	61	A	Canyon Creek	Mountain Home Irrigation Dist.	140S 3rd E	Mountain Home	2:00 PM	No Attendance Required
January 14, 2008	61	C & E	Bennett & Cold Springs Creek	Glenns Ferry City Hall	110 E 2nd	Glenns Ferry	2:00 PM	Rob Whitney
January 14, 2008	61	D	Little Canyon Creek	Glenns Ferry City Hall	110 E 2nd	Glenns Ferry	1:00 PM	Rob Whitney
January 14, 2008	63		Boise River	Eagle Senior Center	312 E State St	Eagle	10:30 AM	John Westra
March 3, 2008 *	63	B	Smith Creek	Randy Davison Residence	2019 Prairie Road	Prairie	2:00 PM	No Attendance Required
March 13, 2008 *	63	S	Stewart Gulch	Quail Hollow Golf Course Clubhse	4520 N 36th St	Boise	1:30 PM	No Attendance Required
January 10, 2008	65		Payette River & Tributaries	USDA Service Center Conf. Rm.	1805 Hwy 16	Emmett	1:00 PM	State Office Staff
March 3, 2008 *	65	A	Squaw Creek	Ola Hall	Ola Road	Ola	12:00 PM	Steve Lester
March 5, 2008 *	65	B	Porter Creek	The Longbranch	473 Hwy 55	Horseshoe Bend	11:00 AM	No Attendance Required
March 3, 2008 *	65	D	Boulder Creek	Donnelly Bible Church		Donnelly	10:00 AM	Steve Lester
March 3, 2008 *	65	K	Lake Fork Creek	Donnelly Fire Station		Donnelly	1:00 PM	No Attendance Required
February 4, 2008	67		Weiser River	US Bank Community Room	Superior St	Cambridge	1:00 PM	John Westra & Cynthia Clark
January 28, 2008	67	A	Little Weiser River	Indian Valley Fire Hall	Fire Dept./Post Office	Indian Valley	1:30 PM	Steve Lester & Angie Grimm
April 6, 2008 *	78	A	Big Creek	Methodist Church	201 N Heigho St.	New Meadows	2:00 PM	No Attendance Required
March 24, 2008 *	78	C	Goose Creek	Fire Station	Main Street	New Meadows	2:00 PM	No Attendance Required

*** Second Round of Water District meetings.**

Note: Given current workdloads, staff will not be attending further Round 2 meetings with the exception of Squaw Creek and Porter Creek.

RECEIVED
NOV 07 2007
DEPARTMENT OF
WATER RESOURCES

Scott L. Campbell, ISB No. 2251
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
slc@moffatt.com
22377.1

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **AMENDED NOTICE OF DEPOSITION OF JAN SHURTE**

PLEASE TAKE NOTICE that Jerry L. Tlucek and Mary Lou Tlucek have rescheduled the testimony upon oral examination of Jan Shurte, before an officer authorized to administer oaths to take place on Monday, November 26, 2007, at 9:00 a.m., and continuing thereafter from day to day until completed, at the offices of MOFFATT THOMAS BARRETT ROCK & FIELDS, CHARTERED, located at 101 S. Capitol Boulevard, 10th Floor, Boise, Idaho 83702, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
Andrew J. Waldera, ISB No. 6608
Andrew J. Snook, ISB No. 7761
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
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Telephone (208) 345-2000
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22377.1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,

Case No. 39576

Subcase No. 63-03174

MOTION TO VACATE TRIAL SCHEDULING ORDER AND RESET DATES

COMES NOW Jerry L. Tlucek and Mary Lou Tlucek (hereafter "Tluceks"), by and through their counsel of record, Scott L. Campbell of the firm Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and hereby moves this Court to vacate the trial scheduling order currently in place and reset the necessary dates in the above-captioned matter.

This motion is supported by the record before the Court, as well as the reasons set forth below as follows:

1. The current Trial Scheduling Order, issued on October 1, 2007, provides that motions for summary judgment must be heard by November 30, 2007. *Affidavit of Scott L. Campbell*, ¶3. Pursuant to Rule 56(c) of the Idaho Rules of Civil Procedure, a motion for summary judgment, affidavits and supporting briefs must be properly served at least twenty-eight (28) days prior to the time fixed for the hearing, or in this case by Friday, November 2, 2007.

2. A motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. Rule 56(c).

3. To date, the record of depositions, admissions, and affidavits necessary to develop the basis for a summary judgment motion, specifically with regard to depositions, has not been sufficiently established. *Campbell Aff.*, ¶4.

4. On or about September 17, 2007, the Supplemental Director's Report (hereafter "Report") regarding this action was received at the law offices of Moffatt, Thomas, Barrett, Rock & Fields, Chartered. *Campbell Aff.*, ¶5.

5. In connection with the Report, Tluceks intended to conduct depositions of the individuals associated with the drafting and development of the Report. Because of scheduling conflicts, counsel for Idaho Department of Water Resources (hereafter "IDWR") and counsel for the Tluceks were unable to communicate directly and coordinate depositions dates for a substantial period of time. Thereafter, IDWR provided Tlucks' counsel with the names of certain individuals, including Don Shaff, who were allegedly proper for such depositions. *Campbell Aff.*, ¶6.

6. Upon conducting the deposition of Don Shaff on October 25, 2007, Tluceks' counsel discovered that individuals in addition to those previously identified by the IDWR for depositions concerning the Report were actively involved in preparing it. *Campbell Aff.*, ¶7.

7. Tluceks' counsel was informed by the IDWR that individuals for depositions in connection with the drafting and development of the Report were David Tuthill, Jan Shurte, and Carter Fritschle. *Campbell Aff.*, ¶8.

8. Upon attempt by Tluceks' counsel to conduct depositions of the individuals named above in paragraph 7, Tluceks' counsel was informed by the IDWR that those individuals would not be available for depositions until on or after November 19, 2007. *Campbell Aff.*, ¶9.

9. As a result of the unavailability of said individuals identified above in paragraph 7, Tluceks' counsel has not been able to depose said individuals, and consequently has not had the proper opportunity to fully develop the record of this case. *Campbell Aff.*, ¶10.

Therefore, in light of the delay resulting from IDWR's inability to make the identified witnesses available in a timely fashion, and the current lack of time available to properly move for summary judgment, Tluceks respectfully request that the Court exercise its discretion by vacating the current trial scheduling order in place and resetting the necessary dates in this matter to times convenient to both the Court and counsel of record.

REQUEST FOR EXPEDITED CONSIDERATION

The Tluceks request the Court consider this Motion on an expedited basis.

DATED this 30th day of October, 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of October, 2007, I caused a true and correct copy of the foregoing **MOTION TO VACATE TRIAL SCHEDULING ORDER AND RESET DATES** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

_____
Scott L. Campbell

RECEIVED
FEB 05 2008
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
FEB - 4 2008
By _____ Clerk
_____ Deputy Clerk

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

In Re SRBA	)	**ORDER RESETTING HEARING**
	)	
Case No. 39576	)	**SUBCASE NO: 63-03174**
	)	

The Hearing for this subcase, that was set for FRIDAY, FEBRUARY 1, 2007 at 11:00 AM (MT), is reset as follows:

MOTION FOR SUMMARY JUDGMENT

MONDAY, FEBRUARY 11, 2008 AT 11:00 AM (MT)

MOFFATT THOMAS
11TH FLOOR
101 S CAPITOL BLVD
BOISE, ID

IT IS SO ORDERED.

Dated: FEBRUARY 04, 2008

Theodore R. Booth

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER RESETTING HEARING was mailed on February 04, 2008, with sufficient first-class postage to the following:

JERRY L & MARY LOU TLUCEK
MARY LOU TLUCEK
Represented by:
DYLAN B LAWRENCE
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829

JERRY L & MARY LOU TLUCEK
JERRY L TLUCEK
MARY LOU TLUCEK
Represented by:
SCOTT L CAMPBELL
101 S CAPITOL BLVD 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

FILED
2008 JAN 29 PM 2 24

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

In Re SRBA	**Subcase 63-03174**
Case No. 39576	**ORDER STRIKING PORTIONS OF SUPPLEMENTAL DIRECTOR'S REPORT;**
	ORDER GRANTING STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER

On January 18, 2008, the State of Idaho, by and through Deputy Attorney General James D. Carlson, filed the *State of Idaho's Motion for Protective Order* (*Motion*), seeking a protective order pursuant to I.R.C.P. 26 (c) vacating the oral depositions of Deputy Attorneys General Garrick L. Baxter and Andrea L. Courtney. The *Motion* was accompanied by a memorandum in support thereof and the affidavits of Garrick L. Baxter and Andrea L. Courtney. On January 22, 2008, the claimant of the above-captioned water right, Jerry L. Tlucek and Mary Lou Tlucek, by and through their attorneys Scott L. Campbell and Dylan B. Lawrence, filed a *Response to State of Idaho's Motion for Protective Order*. The matter was heard on January 22, 2008.

The issues involved in the State's *Motion for Protective Order* originate with the *Supplemental Director's Report Regarding Subcase No. 63-3174* filed on September 14, 2007. The Department filed the *Supplemental Director's Report* in response to the ***Order Requesting 706 Report from IDWR***, filed April 25, 2007, which asks IDWR to explain the basis for its inclusion of an annual volume limitation, expressed in acre-feet per year (AFY) in the *Director's Report* for the subject water right claim. For the most part, the *Supplemental Director's Report* consists of legal analysis regarding the Department's conclusion that it is authorized by "statute, practice, and policy" to include the AFY

limitation in the *Director's Report* for the claim, even though the license on which the claim is based has no such expressed limitation.

On January 4, 2008, the Tluceks filed a *Motion for Summary Judgment*, together with a *Brief* in support thereof, and the *Affidavit of Scott Campbell in Support of Motion for Summary Judgment*. Oral argument on summary judgment is scheduled for February 1, 2008. In their *Brief*, the Tluceks raise and argue the issue of whether the *Supplemental Director's Report* complies with the Idaho Rules of Evidence. Specifically, the Tluceks argue that the *Supplemental Director's Report* is a legal brief as opposed to an expert report pertaining to facts, and secondly, that it was the Department's attorneys who wrote the report, not qualified experts with specialized scientific or technical expertise. Accordingly, the Tluceks argue, the SRBA Court "should totally disregard the Supplemental Director's Report." *Brief* at p. 4. As explained below, this Special Master agrees in part with the Tluceks that the those sections of the *Supplemental Director's Report* that set forth legal argument --as opposed to factual analysis -- do not entirely comply with the Idaho Rules of Evidence regarding expert reports and expert testimony. Although IDWR's role is similar to that of an expert to which I.R.E. 706 typically applies, it is not identical.

The role of the Director in the adjudication is defined by I.C. § 42-1401B which provides:

> **Role of the director in an adjudication.** – (1) The director's role under this chapter is as an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.
> (2) The director shall not be a claimant on behalf of the state or any subdivision of the state in an adjudication.
> (3) The director shall not be a party to an adjudication.

I.C. § 42-1401B. The purpose of the 706 report is to provide the litigants with the underlying basis for the Director's recommendation. As such an accurate explanation requires that the department provide a factual analysis and state the rule of law on which

it relied in forming the recommendation. Excluding the legal basis for the recommendation undermines the utility of the 706 report, and it is therefore appropriate for a 706 report prepared by the department to include some discussions of law. That being said, in the instant case the *Supplemental Director's Report* was very light on factual analysis[1], and the legal analysis therein goes beyond a foundational statement to the point of advocacy.

This ruling should not be construed so as to wholly prevent IDWR from making statements to the SRBA Court, whether in "706 Reports" or otherwise, as to the legal foundations under which IDWR conducts its business.[2] Obviously the Department is required to have a very detailed and comprehensive understanding of the body of law in Idaho concerning water rights and the administration thereof. For example, assume that IDWR had recommended a water right disallowed by reason of five years non-use. In a 706 report regarding such a case, the report would be expected to include a discussion of the factual information that IDWR relied upon in making its conclusion of non-use, and a discussion of IDWR's expert analysis and interpretation of that information. Such a report would be incomplete without at least a reference to Idaho's forfeiture statute, I.C. § 42-222, as well as any relevant case law on the subject, and any relevant Department administrative rules, policies, guidelines, etc. In other words, it is not improper for an expert to make a foundational statement as to his or her understanding of the law relevant to their area of expertise. This is particularly true for IDWR, which is obligated to recommend water rights in accordance with Idaho law.

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[1] The deposition testimony of Dave Tuthill, Jr., Exhibit B to the *Affidavit of Scott L. Campbell in Support of Motion for Summary Judgment* provides several examples of factual information that could have been included in the *Supplemental Director's Report*, but was not. On pages 27-28, Director Tuthill explains how in the 1970's IDWR developed a map showing irrigation requirements statewide, and how that study has been updated since that time. On pages 22-24, Director Tuthill explains that for the Boise Valley, 4.5 acre-feet per acre is adequate for irrigation purposes based upon a 60% to 70% efficiency, and how, as a practical matter, the 4.5 acre feet limitation wouldn't limit water usage unless the user were to be extremely inefficient in applying water. On pages 25-26, Director Tuthill explains that the volumetric limitations imposed by IDWR are based upon the highest consumptive-use crops that could be grown in the area. Finally, on pages 78-84 of the deposition testimony of Don V. Shaff (Exhibit A to *Campbell Aff.*), Mr. Shaff discusses IDWR's perspective on why volumetric limitations on groundwater irrigation rights are necessary for purposes of water rights administration and forecasting future water supplies.

[2] It should also be noted that the legal conclusions of the Department are not afforded *prima facie* weight pursuant to I.C. § 42-1411(4) as are its factual conclusions.

On balance, because the legal basis of the Director's recommendation is not binding on the Court, and the case will not be tried to a jury, in the interests of avoiding delay, **Section III. C. of the *Supplemental Director's Report* is hereby stricken from the record in this subcase and will not be considered by this Special Master.** Because of the striking of the section of the *Supplemental Director's Report* that would be pertinent to the Tluceks desired depositions of Deputy Attorneys General Baxter and Courtney, this Special Master does not need to decide the issues presented herein which juxtapose the I.R.E. 706 right to depose the expert with the attorney-client privilege set forth in Idaho Rule of Professional Conduct 502.

In accordance with the foregoing, the State's *Motion* for a protective order is **granted** pursuant to I.R.C.P. 26(c), and the subpoenas of Deputy Attorneys General Baxter and Courtney are **quashed** pursuant to I.R.C.P. 45(d).

Dated: Jan 29, 2008

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER STRIKING PORTIONS OF SUPPLEMENTAL DIRECTOR'S REPORT ORDER GRANTING STATE OF IDAHO MOTIONFOR PROTECTIVE ORDER was mailed on January 29, 2008, with sufficient first-class postage to the following:

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MARY LOU TLUCEK
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FACSIMILE

From: Lela L. Wood
Administrative Assistant to Dylan B. Lawrence

Date: January 23, 2008

Re: Subcase No. 63-03174

File No.: 22377.0001

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	Name	Organization	Fax No.	Voice No.
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	Director	Idaho Department of Water Resources	287-6700	287-4800
	Lori Pulsifer	QNA Court Reporting	286-7426	484-6309

Message:

Please see following notices vacating the depositions of Andrea L. Courtney and Garrick L. Baxter.

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,

Case No. 39576

Subcase No. 63-03174

NOTICE OF VACATION OF DEPOSITION OF GARRICK L. BAXTER

PLEASE TAKE NOTICE that Jerry L. Tlucek and Mary Lou Tlucek (the "Tlucks"), by and through their counsel of record, MOFFATT THOMAS BARRETT ROCK & FIELDS, CHARTERED, have vacated their subpoena and notice of deposition of Garrick L. Baxter previously scheduled for Thursday, January 24, 2008, at 9:00 a.m., pursuant to Special Master

Booth's verbal order of January 22, 2008, granting the State of Idaho's Motion for Protective Order.

DATED this 23 day of January 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of January 2008, I caused a true and correct copy of the foregoing **NOTICE OF VACATION OF DEPOSITION OF GARRICK L. BAXTER** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

James D. Carlson
Office of the Attorney General
P. O. Box 83720
Boise, ID 83720-0010
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( ) Hand Delivered
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Dylan B. Lawrence

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S:\CLIENTS\4419\54\Disclosure of Witnesses GP01.doc

Attorneys for Ron Sali Properties, Inc. Profit Sharing Plan

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Adjudication Bureau

STRICT COURT - SRBA
TWIN FALLS CO., IDAHO
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2007 OCT 4 AM 10 45

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JAN 29 2008
Department of Water Resources
Adjudication Bureau

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

In Re SRBA	) SUBCASE NO. 63-00132, 63-00133,
	) 63-00134, 63-00134A, 63-00134B,
Case No. 39576	) 63-00186A, 63-00186B, 63-17205,
	) and 63-31772
	)
	) **DISCLOSURE OF WITNESSES**

COMES NOW, Ron Sali and Ron Sali Properties, Inc. Profit Sharing Plan ("Ron Sali"), by and through its attorneys of record, Givens Pursley LLP, and pursuant to the July 12, 2007, Supplemental Trial Scheduling Order in the above-captioned matter, hereby notify the court and the parties of the names of the following witnesses that they may call at the trial of this matter: Ron Sali and any witness designated by any other party.

GIVENS PURSLEY LLP

BY: _____
Michael C. Creamer, counsel for Ron Sali and
Ron Sali Properties, Inc. Profit Sharing Plan

CERTIFICATE OF SERVICE

I certify that on this 2nd day of October 2007, I caused to be served the original and copies of the DISCLOSURE OF WITNESSES on the following persons by the indicated methods:

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Represented by:
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David J. Barber
Office of the Attorney General
Natural Resources Division
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Boise, ID 83720-0010

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Michael C. Creamer, counsel for Ron Sali and
Ron Sali Properties, Inc. Profit Sharing Plan

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

In Re: SRBA,

Case No. 39576.

) Subcase No. 63-03174

DEPOSITION OF DAVID R. TUTHILL, JR.

Volume I

(Pages 1 through 34)

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Monday, November 26, 2007

Beginning at 9:43 o'clock a.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)

APPEARANCES

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FOR THE IDAHO DEPARTMENT OF WATER RESOURCES:
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* * *

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INDEX OF EXHIBITS

Exhibit No. — Description — Page Marked
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Exhibit No. 2 1990 Claims Investigation Manual, (initial draft) 16
Exhibit No. 3 Updated Claims Investigation Manual (revised approxiately 1999) 16

* * *

THIS DEPOSITION was taken on behalf of JerryL. Tlucek and Mary Lou Tlucek on Monday, the 26th day of November 2007, at the offices of Moffatt, Thomas, Barrett, Rock & Fields, Chartered, 101 South Capitol Boulevard, 10th Floor, Boise, Idaho 83702, before LoriA. Pulsifer, Court Reporter and Notary Public within andfor the State of Idaho, to be used in an action pending in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls,said cause being Subcase No. 63-03174 in saidcourt.

The following testimony was adduced, to wit:

* * *

DAVID R. TUTHILL, JR.,
having been first duly sworn, testified as follows:

EXAMINATION

BY MR. CAMPBELL:

Q. Good morning, Mr. Tuthill.
A. Good morning, Mr. Campbell.
Q. And, first, I would like to ask some preliminary questions. Have you ever had your deposition taken before?
A. Yes.
Q. And would you state your full name, please, for the record?

A. David R. Tuthill, Jr.
Q. And we have met before; correct?
A. Yes.
Q. I will just go through some basic issues. Do you understand that I will be asking questions that you need to answer audibly? Do you understand that, sir?
A. Yes.
Q. Do you understand that your testimony is under oath?
A. Yes.
Q. Do you understand that if you have any confusion or my questions are ambiguous and you do not understand that you can just tell me that and I will rephrase them? Do you understand that?
A. Yes.
Q. Mr. Baxter and Ms. Courtney are here to protect your interests, and they may offer objections. Unless they instruct you not to answer the question, you can go ahead and answer the question. Do you understand that?
A. Yes.
Q. Now, do you mind if I call you "Dave"?
A. Please do.
Q. Thanks, Dave. With respect to this particular matter, Dave, we are dealing with a water right by the

reference number of 63-3174. It is owned by my clients, the Tluceks.

I have been given information to indicate that you were involved in making the recommendation to the Snake River Basin Adjudication Court with regard to this particular water right. Do you know if that is correct?

A. Yes.

Q. And is it correct?

A. Yes.

Q. In terms of this particular proceeding in the Adjudication Court, there is a subcase which has generated, at the request of Special Master Booth, a Supplemental Director's Report concerning this particular water right, 63-3174. Are you aware of this Supplemental Director's Report?

A. Yes.

MR. CAMPBELL: First of all, let me have this marked Exhibit No. 1, if we could.

(Deposition Exhibit No. 1 was marked for identification.)

MR. CAMPBELL: Garrick, you already have a copy of it. Unless you need another copy of the same document --

MR. BAXTER: It is the same one we used for Ms.

Shurte?

MR. CAMPBELL: Yes.

MR. BAXTER: Okay.

BY MR. CAMPBELL:

Q. Dave, if you would, look at Exhibit No. 1 and tell me if you can identify that document.

A. Yes. It is the Supplemental Director's Report to which you have referred.

Q. And can you tell me if you had any role in the preparation of this document?

A. Yes. I discussed with other staff the elements of this report.

Q. By "elements," what do you mean exactly?

A. The basic, fundamental premise that it is appropriate to include a quantity identifier for a ground water irrigation water right.

Q. By "quantity identifier," are you referring to the annual volume limitation?

A. Yes, on both the rate of flow and annual volume -- total annual volume diverted.

Q. Can you tell me what your comments were to the individuals that you spoke to with respect to that particular issue?

A. My recollection is that our discussion was that I was aware that there was an objection to the total

volume quantity, and I was aware that we were preparing a report to address that. I have read the report and agree fully with the statements in the report, based on our IDWR policy in this regard.

Q. This report was prepared and submitted to the court -- the final version -- on September 14, 2007; is that right? That is the date on page 9?

A. Yes. That's correct.

Q. And did you review the final version of this document before it was sent to the court?

A. I don't recall reviewing the final version. I was aware of what was happening, but I don't recall reviewing the final version.

Q. But it is your testimony that you agree with all of the material in this report, as far as a policy?

A. Yes, yes. That is correct. Yes.

Q. In terms of the date of submission of this report to the Adjudication Court, what was your position with the Department of Water Resources?

A. I was the Director of the agency.

Q. And in terms of the recommendation that you said you prepared, which is, I believe, a part of this report, can you tell me what your position was at the time the recommendation was prepared? It is Exhibit 2

to the report, I believe.

A. I believe, in December of 2005, I was the Administrator of the Water Management Division for the Department. I believe that's correct.

Q. And what was your function? What were your duties in that regard?

A. I was responsible for the Water Management Division activities of the agency, including Water Right Adjudication.

Q. So is it fair to say that you had the responsibility to supervise all of the Department's staff that dealt with the Snake River Basin Adjudication?

A. Yes. That's correct.

Q. And with respect to the recommendation for Water Right No. 63-3174 which is attached to Exhibit No. 1, marked as Exhibit 2, can you describe to me what you did with respect to the preparation of that recommendation?

A. This particular water right happened to be in an area that I was personally reviewing. So I was responsible for the initial recommendation on this particular water right.

Q. And do you recall what actions you took prior to the preparation of this recommendation?

A. This is a -- in my view, it is a very straightforward water right in that the ground water right was licensed and it did identify a certain amount of acres irrigated in the license and a certain rate of flow.

So while I don't remember my actions on this particular water right at the time, my actions at the time would have been to review the license and the claim and the maps and the other information available and to make a recommendation for this water right.

Q. With regard to the recommendation, itself, in Exhibit No. 1 -- do you have that document before you?

A. Yes.

Q. The quantity element for the recommendation has two sets of numbers, 1.850 CFS and 513.00 AFY. Can you tell me what the 513.00 AFY represents?

A. It represents an annual volume diverted limitation, 513 acre feet per year, which I believe is 4.5 acre feet per acre times the 114 acres identified in the license.

Q. In terms of the 513 acre feet per year annual volume amount, can you tell me what the basis for inclusion of that particular descriptor under "Quantity" for this particular water right recommendation is?

A. Yes. The basis stems from the Idaho Department

of Water Resources' policy dating back into the early 1970s when we began including volumetric limitations on irrigation water rights diverted from ground water and surface water.

Since the early '70s, on our licenses, we have been including a volumetric limitation, total annual volume diverted; and this recommendation is in keeping with that IDWR policy.

Q. Do you know where that policy is documented with the Department? Let me ask the question this way. Is the policy documented with the Department of Water Resources?

A. Yes. It is documented in our claim investigation guidance, our new claim investigation guidance developed around 1990. There is a statement that, for groundwater irrigation rights, the total annual volume diverted is to be included.

As far as the Department policy to include this volumetric parameter on irrigation rights, I don't know that it has been documented. I don't recall specific documentation on this policy.

Q. Do you know if the Department has any -- has adopted any rule, under the Administrative Procedures Act, setting forth this particular policy?

A. There is one manifestation of this policy in

the beneficial use examination rules. I believe there's a requirement that, as a beneficial use examination is made, the examiner must identify volume diverted for a right unless it's for municipal or fire protection purposes. So that's one manifestation in the rules. I'm not aware of another.

Q. And those denominate the beneficial use examination rules?

A. I believe so. I haven't checked those recently. I believe so.

Q. Perhaps we will take a break and I will pull my copy of the Department rules. Do you know of any other documents with the Department where this policy of including the annual volume limitation on ground water irrigation water rights is set forth, besides the ones you have described?

A. I'm not aware of explicit policy. However, this parameter is consistent, in our view, with our process of documenting and identifying water rights.

So this policy is consistent -- or this process and this technique is consistent with our understanding of the combined assessment of our rules and policies and statutes, but I don't know of any other place where it's documented.

Q. With regard to your comment that the annual

volume limitation placing that limitation on water rights is the policy of the Department for ground water rights and surface water rights, can you tell me if that has been the policy of the Department with regard to recommendations in the Snake River Basin Adjudication since its inception?

A. With the Lemhi Basin Adjudication, which was initiated around 1970, we began including in our recommendations ground -- both rate of flow and volume diverted limitations for both ground water and surface water rights.

In our finding to the court, our proposed finding, we did include limitations on all irrigation rights for both parameters, both rate of flow and volume diverted.

However, we received objections, primarily to those for surface water diversions, which identified that the volumetric limitation was overly limiting because many of the surface water diversions were not able to achieve the efficiency contemplated in the volumes provided.

As a result, the agency determined that we would withdraw our recommendations for volume limitations, volumetric limitations, on the surface water rights for the older systems because many of those

older systems could not achieve the 60- to 70-percent efficiency contemplated in the volumetric limitation.

That technique was adopted in -- that had been developed in the Lemhi Basin Adjudication was also adopted in the Payette River Basin Adjudication for which recommendations were prepared in the later 1970s.

Initially, for that Adjudication, we had been preparing volumetric limitations on both ground water and surface water irrigation rights and, ultimately, removed those limitations from the surface water rights.

New water rights that are -- that have been filed and have been applied for since the early '70s have, to my knowledge, all received volumetric limitations for ground water and surface water.

I double-checked with our Bureau Chief, and that is still the process for new applications for permit. So since the '70s, we have been including the volumetric limitations for ground water and surface water.

However, with the Snake River Basin Adjudication, we continued with the process that had been adopted in the Lemhi and Payette Basin Adjudications of including the volumetric limitations for all of the ground water rights for which higher efficiencies are expected because of delivery systems

with ground water but not including those limitations on the older surface water rights where that limitation had not been added through the permitting process.

Q. Thank you for that very comprehensive answer. My next question relates to whether or not this change in procedure for older surface water rights in the Adjudication process where the Department determined that to impose an annual volume limitation was not appropriate.

Was that change documented in any fashion in the Department's records, by rule or policy memorandum or anything else of that nature?

A. The change which had been initially adopted in the Lemhi Basin of not including volumetric requirements for the older surface water irrigation rights was included in the Lemhi Adjudication and was communicated to those working on the Payette Adjudication in the mid '70s and was incorporated into the recommendations of the Payette River Basin Adjudication. I don't recall specifically a policy memorandum to that effect.

Q. Okay.

A. That same methodology was used in the Snake River Basin Adjudication, to my knowledge. It was used throughout the Adjudication in the recommendations, to my knowledge, but was not clearly reflected in the

initial guidance documents for the eight field examiners.

So as we look at the Field Examiner Handbook, we don't clearly see that reflected in the initial edition. But in the 1990 edition, it's clearly identified as a requirement to include volumetric limitation for ground water irrigation rights.

Q. But not surface water rights?

A. I would have to take a look at it. I don't recall.

MR. CAMPBELL: Well, why don't we do that? Let's go off the record for just a moment.

(An off-the-record discussion was held.)

(Deposition Exhibit Nos. 2 and 3 were marked for identification.)

BY MR. CAMPBELL:

Q. Dave, we are back on the record now. We have had a brief escape from the formalities of having everything transcribed or recorded.

I believe, during the break, you mentioned that you believe that Exhibit 6 to Exhibit No. 1 contained portions of the Claims Manual, I think you called it; is that correct?

A. Yes.

Q. And then, also, there appears to be three pages

of that document; is that right?

A. Correct.

Q. And Exhibit No. 6, these three pages -- could you describe specifically what your understanding of those three pages constitute?

A. These constitute a portion of the Field Investigation Manual dated 1990, including the first three pages of Chapter 6 entitled "Purpose of Use, Quantity for Each Purpose, and Total Quantity."

Q. And the Claims Examination Manual -- what function does that particular manual serve?

A. This is an IDWR document which serves to provide guidance to our staff for preparing recommendations for the SRBA.

Q. And the SRBA is the Snake River Basin Adjudication; is that right?

A. That is correct.

Q. So in terms of claim examination or beneficial use examination, is this particular set of materials, these three pages -- is it used in general water right examination for new water rights? Beneficial use examinations? Is that --

A. No. It's used for our field examiners as they prepare recommendations for our recommendations in the Adjudication but not for other water allocation

purposes.
Q. So this particular document, Exhibit 6 to Exhibit No. 1, is a portion of a manual that is used exclusively for the Snake River Basin Adjudication purposes; is that correct?
A. Yes.
Q. You have two documents which have been handed to you, Exhibits 2 and 3. I will represent to you that I printed those off from the Department's website. I would ask you if you can identify either one of those documents?
A. Exhibit 2 is entitled "1990 Claims Investigation Manual," but the font is different from the font of Exhibit 6. It doesn't look like the Revised Claims Investigation Manual. So this site -- it looks -- it appears, to me, just at first glance, to be our initial Claims Investigation Manual.
Q. By "initial," you mean what?
A. Our earlier version of -- I recall now that 1990 is likely the date of the first Claims Investigation Manual. So that appears to be the document that you have printed off.
Q. That would be Exhibit No. 2?
A. Yes. That's correct.
Q. Okay.

A. And Exhibit No. 3 appears -- is the updated manual which we updated in the late 1990s.
Q. Does a review of those two documents suggest to you that you need to change any of your testimony previously?
A. I might have mentioned that the revision was done in 1990. It was really closer to 1999.
Q. Okay.
A. Thank you.
Q. Thank you. And with respect to the particular issue that we are dealing with today, the annual volume limitation on ground water irrigation water rights, can you point to any language in either Exhibit 2 or 3 that supports your prior testimony relating to the requirement of including that particular quantity descriptor in recommendations in the Snake River Basin Adjudication? If you need to refer to Exhibit No. 1, that is fine, too.
A. Yes. It appears that Exhibit No. 3 is consistent with the portion of Exhibit No. 1 entitled -- the attachment to Exhibit No. 1 entitled "Exhibit 6."
Q. Okay.
A. And the first three pages of Exhibit 6 which is a part of Exhibit No. 1, as we are looking at them today, appear to be the same as those in this document,

Deposition Exhibit No. 3.
Q. And what portion of either one of those two documents are you relying upon for your prior testimony as it relates to the annual volume limitations for ground water irrigation water rights?
A. In Chapter No. 6, under Title II, "Purposes of Use and Quantity," Item A, "Irrigation," has two components, No. 1, "Instantaneous Quantity;" and, No. 2, "Annual Volume."
Under No. 2, "Annual Volume," there is a paragraph that describes the inclusion of an annual volume for all ground water irrigation rights.
Q. Are you talking about the top of page 3?
A. Correct.
Q. The first paragraph?
A. Correct.
Q. Is that what you are talking about?
A. Yes.
Q. In terms of Exhibit No. 3 or Exhibit No. 2, were either one of those two documents ever formally adopted by the Department as a rule under the Administrative Procedures Act?
A. No, they were not. They are guidance -- in-house guidance documents. I might add that the second paragraph under Item II (A)(2), "Annual Volume,"

in Chapter 6, refers to the inclusion of volume for non-ground water rights, such as surface rights, where we say that they should be recommended if contained in a license, transfer or reasonable decree.
Q. Would you read that particular sentence in full, please?
A. "Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring, or other source with limited quantities of water and should be recommended if contained in a license, transfer or reasonable decree."
Q. And in terms of that particular language, if the annual volume is not contained in a license, would that mean that it would not be included in the recommendation?
A. For a stream or a spring, that is correct.
Q. And can you tell me the distinction between a surface water source, a stream or a spring, where a license does not contain an annual volume limitation versus a ground water right, irrigation ground water right, documented by a license where there is no annual volume limitation?
A. Yes. This stems from relative efficiencies of the two sources related to the application of water to a beneficial use. In the Lemhi Adjudication, we found

that the surface systems did not achieve the 60- to 70-percent efficiencies that would be needed to provide that the volume identified would be adequate.

The 4.5 acre feet per acre in the Boise Valley is adequate for irrigation purposes if 60- to 70-percent efficiency is achieved, as an example.

In the Lemhi, when we were looking at this, at the objections to our initial proposed findings, we determined that 60- to 70-percent efficiencies could not be achieved for surface water systems, which led to this attribute being removed from our recommendation.

And this same concept prevailed with the Payette River Basin Adjudication and the Snake River Basin Adjudication.

On the other hand, for ground water systems, the efficiencies of 60 to 70 percent can be routinely achieved and our experience has been that the volumes recommended for irrigation rights where the sources of ground water have been adequate.

So we have not -- we have not removed that parameter from our recommendations, as we did for the surface water systems.

Q. And that is the case even if a license was issued by the Department before this policy was instituted in the mid '70s, regardless of the fact that

the initial license issued by the Department did not contain this restriction; is that correct?

A. That is correct.

Q. Can you tell me if there would be a higher degree of regulatory impact with respect to the amount of water that could be used under a licensed ground water irrigation water right without an annual volume limitation compared with one that did have an annual volume limitation?

In other words, would there be more restriction upon the water use if the annual volume limitation were imposed versus not imposed?

A. As a practical matter, it would be a rare situation if that were to occur. Our experience in the Eastern Snake Plain Aquifer, for example, has been that, rarely -- rarely, if ever -- does an acre of ground irrigated from ground water exceed the parameter that we have adopted for that basin.

We haven't reviewed that around the state as much as we have in the Eastern Snake Plain Aquifer because, there, we have been measuring ground water for some time.

So as a practical matter, I don't envision a situation where there would really be a restriction on the right, based on the volume that has been

recommended.

However, conceivably, there would be a restriction if -- if, for example, the user were to be extremely inefficient in applying water, then, perhaps, the volumetric parameter could be exceeded.

So it is conceivable that this parameter could be violated in a given situation. Our experience is that it would be -- that, with a reasonably efficient system, this parameter would not be violated.

Q. Let me explore your answer just a little bit. By the parameter not being violated, are you suggesting that an irrigation use with a ground water right that had no annual volume limitation would not exceed the limitation which the Department would impose normally?

A. As a practical matter, with a reasonably efficient system, a ground water user would not exceed the volume that has been imposed.

Q. And that is based upon what assumptions?

A. That is based on our experience in the Eastern Snake Plain Aquifer, having measured thousands of these.

Q. In terms of the water use in the Eastern Snake Plain Aquifer, is that water use identical to the water use by Mr. Tlucek under Water Right No. 63-3174?

A. No two systems are identical.

Q. So you do not know if his particular water use

is the same as the Eastern Snake Plain Aquifer water use that you have described; is that correct?

A. What I do know, along that line, is that we have identified a volumetric requirement based on the highest consumptive-use crop in an area and based on the climate of that area.

So the volumetric limitations in the Eastern Snake Plain Aquifer are, for the most part, lower than those that would be provided in the Treasure Valley.

So we have accounted for climatic differences as we have identified volumetric limiters, but I certainly agree that systems can vary greatly from one to another.

Q. Does your answer have anything to do with consideration of different cropping patterns or crops grown by a particular water user?

A. Yes, because we have provided what has been considered to be adequate water. In a practical sense, it has found to be adequate water for the highest consumptive use crop which, in most parts of the state, is alfalfa.

Q. And if a particular water user grows more than alfalfa -- that is, if he grows corn, alfalfa, triticale, other types of crops, ground-cover crops that, say, are irrigated through the first part of

November in the Treasure Valley -- does that factor into the determination of your answer?

A. In my experience, there is still adequate water, even for the most consumptive-use crops that could be grown in the Treasure Valley, because the limitation on the amount of evapotranspiration is based on temperature and weather more than the type of crop.

The crop types -- with alfalfa, the limitation is based on the ability of the temperature and humidity to evapotranspirate.

I would feel comfortable that the amount of water that we have provided would be adequate for any kind -- any cropping pattern. I have not seen a situation yet where the amount of water that we have provided would not be adequate for any type of a cropping pattern for a crop raised in the Treasure Valley.

Q. By "adequate," what do you mean exactly?

A. That would be adequate for not only the consumptive use but, also, for an irrigation -- a system efficiency loss of between 30 and 40 percent. The 4.5 acre feet per acre provided in the Treasure Valley is mindful of losses that occur in irrigation practices.

Typically, we would see a diversion of much less than 4.5 acre feet per acre. In fact, I would

be surprised if any system diverts that much if the diversion is from ground water in the Treasure Valley because that is considered to be an ample water supply for not only the consumptive use but also for losses up to 30 to 40 percent.

Q. You mentioned evapotranspiration of crops. Why is that a consideration in the annual volume limitation parameter?

A. Because, in irrigation systems, the limitation on the ability of the field to use water is based on the crop type and the radiative ability of the sun to evaporate water.

Also, wind is a factor and other climate issues are -- parameters are factors. But the primary limiter to the amount of water necessary for a certain acre is climate-based and not crop-based.

We have used the crop in our computation that is the most requiring of water. In most cases, it's alfalfa. As corn or other crops are grown, we find that they have a reduced water requirement and not an increased.

Q. In terms of this calculation that you have identified, can you tell me how this quantity of water, the 4.5 acre feet, was derived by the Department?

A. Yes. We commissioned a study on water use

requirements. Initially, this study was done by Suiter & Cory; and I believe that was done in the '70s. From that study, we developed, statewide, a map showing irrigation requirements which were developed from the study and used an irrigation efficiency of 60 to 70 percent.

This process resulted in a statewide map that was used, beginning in the early 1970s, by the Department for attributing a volumetric requirement to new water right appropriations for irrigation, both surface and ground water.

That study was updated by Dr. Rick Allen as part of his graduate work at the University of Idaho. Since then, he has continued to update that information.

So the water -- the crop requirements are based on a number of factors but they are localized to a specific climate throughout the state and local -- and identified for specific crops within those climatic areas.

This work has been the subject of ongoing scrutiny by the agency as new data has developed over the years. Our most recent update was prepared in the late 1990s -- I would say 1996 or 1997 -- resulting in the current guidance map of irrigation requirements around the state.

Q. Turn to Exhibit 3 or Exhibit 6 to Exhibit 1, if you would, Mr. Tuthill. Page 3 of Exhibit 6 to Exhibit 1 has a reference to "Municipal." Do you see that particular page?

A. Yes.

Q. And under sub item 2, under "Municipal," it says "Annual Volume." Can you read the sentence that is found under that subheading, please?

A. Yes. "Municipal water rights should not be recommended with an annual volume unless contained in a license, transfer or reasonable decree."

Q. In terms of that particular statement, is your understanding that that is the policy of the Department of Water Resources with regard to the Snake River Basin Adjudication recommendations?

A. Yes.

Q. And can you tell me why the Department has a different position with respect to municipal water rights versus ground water irrigation water rights, as to the annual volume element?

A. Yes. This difference in policy is represented by Department investigations dating back into the 1970s where we became aware of unique attributes of municipal water rights throughout the West.

This policy is documented in Administrator's

memorandums that are available. We have continued to implement that policy for more than twenty years. The basis of this difference in policy is our understanding of the Great and Growing Cities Doctrine and how it applies to appropriation water rights.

Q. These memoranda you identified, are they on your website?

A. They are on our internal website. I don't recall if they are on our external website, but they can be provided. I think, in years past, we have provided sets of our administrative memoranda to you; and it would be among that. We could take a look and find those specific municipal memoranda.

MR. CAMPBELL: That would be helpful. If I can obtain copies of those documents, that would be valuable.

Is that possible, Mr. Baxter?

MR. BAXTER: Yes, that is possible.

MR. CAMPBELL: How long would it take to obtain those? Mr. Tuthill, do you know?

MR. BAXTER: If I might answer, we can have them to you, probably, by tomorrow.

BY MR. CAMPBELL:

Q. With regard to these Administrator's memoranda, are these adopted as rules under the Administrative

Procedures Act?

A. No, they are not.

Q. And you mentioned the Great and Growing Cities Doctrine, I think you said?

A. Yes. That's my understanding of the term.

Q. What is that? I am not sure I understand what you mean by that.

A. My understanding of municipal rights is that they are unique among water rights in Western states – not only Idaho but in other states, as well. The uniquenesses are described in our Administrator's memoranda.

Q. Okay.

A. I can further describe it, if you wish.

Q. Does the memorandum, or the memoranda, describe this Great and Growing Cities Doctrine? Is that what you are saying?

A. Yes. I believe -- I believe that that term is imbedded. But my understanding is that this is a term that's used in various locales to describe the uniqueness of municipal rights as manifested in Idaho by our statutory unique description of municipal water rights.

With the municipal water rights codification change about ten years ago, there are many additional

statutory references to "municipal." It could be a statutory provision that volume is not required, although I'm not sure. I would have to look at that.

Q. Sure. And this statutory change took place approximately 1995, 1996; is that correct?

A. Yes. About ten years ago, yes.

Q. How could that statutory change be implemented for water rights that were created before 1995 or 1996?

A. Our understanding is that the statutory change reflects common law that we had been administering for a long time. You will find, in our memoranda, that we have addressed municipal water rights differently for a long time, at least back into the '70s. The statutory change did not initiate that, in my view.

Q. In terms of this different treatment for municipal water rights, can you tell me what the justification is, apart from this Great and Growing Cities Doctrine? I mean, just in terms of your view as the Director, why are they treated differently?

A. The treatment, in my view, dates back to court rulings that have found -- I believe Beuss vs. the City of Soda Springs is one where a municipal right was treated differently from an irrigation right.

As we look back at the case law, we see that the courts have treated municipal rights differently.

Municipalities have provided more protections against forfeiture, for example, in my view, and more ability to grow the water right within the bounds of the rate of flow to increased volumes over time than we would find with other water rights.

So in my experience, municipal rights have been treated differently for a long time. That was reflected in the statutes about ten years ago; but we have been doing that for a long time, based on our understanding of the case law regarding municipal rights.

Q. And is that understanding reflected in the memoranda you have described?

A. Yes.

MR. CAMPBELL: Well, given that area, I think it would be best if we recessed the deposition until I have those documents so that I can ask you further questions concerning those particular issues, because this is one of the core aspects to this case.

So with that, unless you have comments, Mr. Baxter, we will recess this, subject to a date that works on your schedule, Dave, for re-commencing.

THE WITNESS: That sounds fine. That will give me a chance to review those documents, as well.

(Deposition adjourned at 10:36 a.m.)

(Signature requested.)

CERTIFICATE

I, LORI A. PULSIFER, Certified Shorthand Reporter, do hereby certify that:

The foregoing proceedings were taken before me, at which time the witness was placed under oath;

The testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me;

The foregoing is a true and correct record to the best of my skill and ability; and

Pursuant to request, notification was provided that the deposition is available for review and signature; and

I am not a relative or an employee of any attorney, nor am I financially interested in the action.

I have hereunto set my hand and seal this 30th day of November 2007.

LORI A. PULSIFER, CSR, RMR, CRR
Certified Shorthand Reporter
Idaho Certificate 354

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COPY

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

In Re Snake River Basin Adjudication ("SRBA"),	Subcase No. 63-3174
Case No. 39576	**MEMORANDUM IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION.

On December 18, 2007, claimants and objectors JERRY L. and MARY LOU TLUCEK (the "Tluceks") sent the IDAHO DEPARTMENT OF WATER RESOURCES ("IDWR") notices of deposition for two of its attorneys of record, Garrick L. Baxter ("Baxter") and Andrea L. Courtney ("Courtney"). On January 4, 2008, the Tluceks sent IDWR two subpoenas for the depositions of Baxter and Courtney. On January 7, 2008, the Tluceks hand-served the subpoenas on Baxter and Courtney. Affidavit of Garrick L. Baxter in Support of State of Idaho's Motion for Protective Order ("Baxter Aff."), Exhs. A&B; Affidavit of Andrea L. Courtney in Support of State of Idaho's Motion for Protective Order ("Courtney Aff."), Exhs. C&D.

Pursuant to Rule 26(c) of the Idaho Rules of Civil Procedure, the STATE OF IDAHO, by and through undersigned counsel, seeks an order from the Court vacating the oral depositions of Baxter and Courtney for two separate and independent reasons. First, the requested discovery seeks matter irrelevant to the proceedings, serving solely to oppress IDWR, waste time and waste resources. Second, the deposition subpoenas call for disclosure of non-discoverable privileged communications.

II. ANALYSIS.

Rule 26(c) states in pertinent part:

> Upon motion ... by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending ... may make any order which justice requires to protect a ... person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery be not had; (2) that the discovery may be had only on specified terms and conditions... (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters....

I.R.C.P. 26(c). A motion for protective order made pursuant to Rule 26(c) is proper if made before the date set for the deposition. See U.S. v. Portland Cement Co., 338 F.2d 793, 803 (10th Cir. 1964). The date set for the depositions is January 24, 2008.

A. The Depositions are Unreasonable, Oppressive and Unnecessary

Through the depositions of Baxter and Courtney, the Tluceks are attempting to discover counsel's involvement with respect to IDWR's recommendation of an annual diversion volume descriptor on the Tluceks' water right in this subcase. Notably, Tluceks have received IDWR's Supplemental Director's Report Regarding Subcase No. 63-3174 ("Supplemental Director's Report") which explains its basis for the recommendation, and the Tluceks have already taken the depositions of three IDWR witnesses, inquiring of all three the basis for IDWR's recommendation for water right number 63-3174.

At the depositions of Donald V. Shaff, IDWR's Adjudication Bureau Chief, and David R. Tuthill, Jr., IDWR's Director, counsel for the Tluceks posed questions about IDWR's director's report for this subcase, the Supplemental Director's Report and IDWR policy related to

recommending volumes on water rights. Both Shaff and Tuthill testified during their depositions that they agree with the content of the Supplemental Director's Report, including the presentation of IDWR's position as to the basis of inclusion of the annual diversion volume descriptor. Courtney Aff., Exhs. A (Shaff Deposition, 33:8-11, 41:4-9, 104:17-24) & B (Tuthill Deposition, 7:21-8:17). By signing and filing the Supplement Director's Report with the Court, IDWR adopted all contents therein. Given this uncontested fact that IDWR agrees with the content of the Report, discovery of counsel's communication with clients is irrelevant as a matter of law.

Given the legal irrelevance of the requested discovery, the Tluceks lack reasons sufficient to justify the depositions. What constitutes good cause to prevent harassment and oppression pursuant to I.R.C.P. Rule 26 is determined on a case-by-case basis. As stated in conjunction with Rule 26(c) of the Federal Rules of Civil Procedure, which is identical to I.R.C.P. 26(c):

> The harassment or oppression should be unreasonable to justify restricting discovery, but "discovery has limits and ... these limits grow more formidable as the showing of need decreases." Thus even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it.

8 Wright & Miller, Federal Practice & Procedure, § 2036 at 490-92 (quoting United Air Lines, Inc. v. United States, 26 F.R.D. 213, 219 n.6 (D.C. Del. 1960) (other citations omitted)). Idaho follows the federal rule which requires that the party seeking the discovery bears the burden of demonstrating its merits. See Clark v. Universal Builders, Inc., 501 F.2d 324, 340 (7th Cir. 1974), cert. denied, 419 U.S. 1070, 95 S. Ct. 657 (1974).

Fatal to the Tluceks' desire to depose counsel is their motion for summary judgment in this subcase. The purposes of discovery, and depositions in general, are to narrow the issues for trial and otherwise prepare for dispositive motions and/or trial. 8 Wright & Miller, Federal Practice & Procedure, § 2001, at 40-41. In earlier proceedings before the Court in this subcase, counsel for the Tluceks admitted that there were no facts in dispute and agreed that summary judgment would obviate the need for trial in this matter. Baxter Aff. at ¶ 7; Courtney Aff. at ¶ 8. Thus, because the Tluceks acknowledge there are no facts in dispute in this subcase, the

depositions of counsel cannot benefit them in discovering relevant information in preparation. Given this lack of benefit and need, the depositions of counsel are per se unduly burdensome and oppressive.

As a matter of law, Idaho courts are well within their authority to limit discovery efforts. Cosgrove v. Merrell Dow Pharmaceuticals, Inc., 117 Idaho 470, 788 P.2d 1293 (1989). In Cosgrove, the trial court precluded the plaintiff from taking the depositions of various employees and officers of the defendant because the plaintiff failed to show a "need for the information." Id. at 474. Similarly, the Tluceks cannot show a need for the information considering that (1) the Tluceks have received the Supplemental Director's Report and thereafter deposed three IDWR employees about IDWR's recommendation, (2) IDWR stands by its Supplemental Director's Report as made clear in the depositions of IDWR's employees, (3) according to the Tluceks, there are no issues of fact to be determined, only a matter of law, and (4) the Tluceks have already filed a motion for summary judgment, placing counsel and the Court on notice that there are no facts in issue. Accordingly, the Court should order that this discovery should not be had pursuant to Rule 26(c).

B. The Tluceks Seek Information Protected by the Attorney-Client Privilege and Outside the Scope of Allowable Discovery.

At the deposition of IDWR's Shaff, counsel for the Tluceks requested specifically the production of privileged material.

> Q. Now, we have gone through the same exercise with regard to Jan Shurte. Can you tell me if you, yourself, prepared any of the verbiage in Exhibit No. 1 [Supplemental Director's Report]? Let me clarify that question. By "prepared," I am talking about actually creating sentences, modifying words, that sort of thing – not reviewing the document but actually crafting language in the document.
> A. I reviewed an electronic copy of this document. I did do edits on the draft document and returned the document to Ms. Courtney.
> MR. CAMPBELL: I would like to have copies of those emails. Can they be provided to me?

> MR. BAXTER: Because they constitute attorney-client privileged communications, those communications between the Department and the Department's legal staff are not going to be provided.

Courtney Aff., Exh. A (Shaff Deposition, 26:11-27:4). Depositions of counsel only serve to continue the quest.

Communications between IDWR and its attorneys, here, Baxter and Courtney, are entitled to protection from discovery pursuant to the attorney-client privilege. Rule 502 of the Idaho Rules of Evidence protects from disclosure confidential communications not intended to be disclosed to third parties and "made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." I.R.E. 502(a)(5). Rule 502 declares in pertinent part that:

> a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer or the lawyer's representative...

I.R.E. 502(b). The privilege afforded by Rule 502 is echoed in the Idaho Rules of Professional Conduct.[1] "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...." I.R.P.C. 1.6(a).

The Supplemental Director's Report was prepared under the direction of the Director and the Adjudication Bureau Chief, who are managing officers of IDWR and clients that counsel communicated with in the preparation of the Supplemental Director's Report. Further, as set forth in the Baxter and Courtney Affidavits, communications with these two IDWR officials and other IDWR employees occurred during the course of the Deputy Attorney Generals'

[1] These rules are repeated in the Office of the Attorney General's ("OAG") Handbook for its deputy attorney generals. "The Idaho Rules of Professional Conduct (IRPC) make it clear that the Attorney General has a traditional attorney-client relationship with his clients. ... Similar to a private law firm, the attorney-client relationship binds all OAG employees to abide by and respect all associated duties and privileges, including the traditional attorney-client privilege, attorney work product, and rules of confidentiality." Baxter Aff., Exh. C (§ 3.4). As further instructed, "[i]n daily practice, the term 'client' as it appears in these guidelines means a particular agency, the highest officer(s) in the agency, and other officials up the organizational chain of command, including the board, the Governor, or other constitutional officers as the case may be." Baxter Aff., Exh. C (§ 3.5).

employment, there was an expectation of confidentiality with respect to the communications, and there has been no waiver of the attorney-client privilege. Baxter Aff. at ¶ 3; Courtney Aff. at ¶ 3.

IDWR's non-party status in the SRBA does not affect this protection. The attorney-client relationship exists between IDWR and its attorneys regardless of the court before which an action proceeds. No exception to the attorney-client privilege rule applies. IDWR cannot be compelled to disclose any confidential communications and it has not waived its privilege. Therefore, this discovery should not be had.

III. CONCLUSION.

For the foregoing reasons, the State respectfully requests the Court vacate the depositions scheduled for January 24, 2008.

DATED this 17 day of January, 2008.

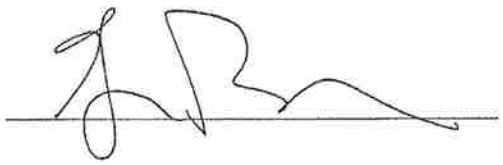
STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
JAMES D. CARLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the within and foregoing document was made this 17th day of January, 2008, by hand delivery to each of the parties listed below.

Scott L. Campbell
Dylan Lawrence
Moffatt Thomas
101 S. Capitol Blvd. 10th FL
Post Office Box 829
Boise, ID 83701-0829



1177

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
JAN 22 2007
By _____ Clerk
Deputy Clerk

Attorneys for Jerry L. Tlucek and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
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
22377.1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA

Case No. 39576

Subcase No. 63-03174

AFFIDAVIT OF TIFFINY HUDAK IN SUPPORT OF MOTION TO VACATE AND RESCHEDULE INITIAL HEARING

STATE OF IDAHO)
) ss.
County of Ada)

I, TIFFINY HUDAK, being first duly sworn upon oath, depose and say as follows:

1. I am a paralegal currently employed with the law firm of Moffatt, Thomas, Barrett, Rock & Fields, Chartered. I have personal knowledge of the matters stated herein and make this Affidavit based upon my personal knowledge.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB NO. 3586
Chief of Civil Litigation

JAMES D. CARLSON, ISB NO. 2970
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 332-3092
Fax No. (208) 334-2830

RECEIVED
JAN 22 2008
DEPARTMENT OF
WATER RESOURCES

COPY

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

In Re Snake River Basin Adjudication ("SRBA"),	Subcase No. 63-3174
Case No. 39576	**AFFIDAVIT OF GARRICK L. BAXTER IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER**

STATE OF IDAHO)
) ss.
County of Ada)

I, Garrick L. Baxter, being first duly sworn, depose and say:

1. I am counsel with the Attorney General's Office, state of Idaho, assigned to the Idaho Department of Water Resources (hereinafter "Department of Water Resources" or "Department"). My client in this matter is the Department of Water Resources and those officers and employees of the Department who request my legal assistance and advice.

2. The Director of the Department, as well as the Adjudication Bureau Chief, authorized me to act to protect the attorney-client privilege in this matter with respect to my

involvement in the preparation of the Supplemental Director's Report Regarding Subcase No. 63-3174 ("Supplemental Director's Report").

3. My communications with Department employees at issue here occurred during the course of my employment and revolved around the preparation of the Supplemental Director's Report in August and September of 2007. In preparing the Supplemental Director's Report, I had an expectation of confidentiality, and my communications with employees of the Department with respect to the Supplemental Director's Report also occurred in a confidential setting. I am not aware of any disclosure to third parties with respect to the preparation of the Supplemental Director's Report.

4. At the request of the Department, Andrea Courtney and I assisted the Department in the creation of the Supplemental Director's Report in this matter. During the creation of the Supplemental Director's Report, I made comments on the report and circulated those comments electronically via email.

5. The drafts demonstrate Ms. Courtney's and my thought processes as well as contain actual questions and comments by us and the Department's responses to those questions and comments. The attorney-client communication process was achieved largely via writings and is documented in the email drafts.

6. I have been advised in this matter by my client, individuals at the Department, not to waive any attorney-client privilege in this matter, and I have not done so to my knowledge.

7. During the Supplemental Scheduling Conference on September 25, 2007, and perhaps again during the hearing on the Tluceks' motion to amend the trial schedule held October 31, 2007, counsel for the Tluceks admitted that there were no facts in dispute and agreed that summary judgment would obviate the need for trial in this matter.

8. On December 18, 2007, the Tluceks sent the Department notices of deposition for Ms. Courtney and me. Attached hereto as Exhibit A is a true and correct copy of the Notice of Deposition of Garrick L. Baxter.

9. On January 4, 2008, the Tlucek sent the Department two subpoenas for the depositions of Ms. Courtney and me.

10. On January 7, 2008, the Tlucek hand-served me with a subpoena. Attached hereto as Exhibit B is a true and correct copy of the Subpoena for the Deposition of Garrick L. Baxter.

11. Attached hereto as Exhibit C is a true and correct copy of the relevant pages of Office of the Attorney General's ("OAG") Handbook.

12. Further your affiant sayeth not.

Garrick L. Baxter

SUBSCRIBED AND SWORN TO before me this 17 day of January, 2008.

Karen A Wood
Notary Public for Idaho
My Commission Expires: November 13, 2012

KAREN A. WOOD NOTARY PUBLIC STATE OF IDAHO

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
208 385 5384 Fax
208 385 5442 Direct

FACSIMILE

From: Lela L. Wood
Administrative Assistant to Dylan B. Lawrence

Date: December 18, 2007

Re: Subcase No. 63-03174

File No.: 22377.0001

Number of pages being transmitted including the cover page: 5
Please call fax operator at (208) 345-2000 if all pages are not received.

	Name	Organization	Fax No.	Voice No.
To:	Garrick Baxter	Idaho Department of Water Resources Attorney General State of Idaho	287-6700	287-4811
	Director	Idaho Department of Water Resources	287-6700	287-4800
	Lori Pulsifer	QNA Court Reporting	286-7426	484-6309

Message:

Please see following Notice of Deposition.

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.

EXHIBIT
A

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
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
slc@moffatt.com
dbl@moffatt.com
22377.1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **NOTICE OF DEPOSITION OF GARRICK L. BAXTER**

PLEASE TAKE NOTICE that Jerry L. Tlucek and Mary Lou Tlucek will take testimony upon oral examination of Garrick L. Baxter, before an officer authorized to administer oaths on Thursday, January 24, 2008, at 9:00 a.m., and continuing thereafter from day to day until completed, at the offices of MOFFATT THOMAS BARRETT ROCK & FIELDS, CHARTERED, located at 101 S. Capitol Boulevard, 10th Floor, Boise, Idaho 83702, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 18th day of December 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December 2007, I caused a true and correct copy of the foregoing NOTICE OF DEPOSITION OF GARRICK L. BAXTER to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Lori Pulsifer
QNA Court Reporting
PMB 219
111 Broadway, Suite 133
Boise, ID 83702
Fax: 208-286-7426

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

_____
Dylan B. Lawrence

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK &
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22377.1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **NOTICE OF SERVICE OF DEPOSITION** **NOTICE OF GARRICK L. BAXTER**

I HEREBY CERTIFY that on this 18th day of December 2007, I caused a true and correct copy of the NOTICE OF DEPOSITION OF GARRICK L. BAXTER and the foregoing NOTICE OF SERVICE to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
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( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Dylan B. Lawrence

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **SUBPOENA FOR THE DEPOSITION OF GARRICK L. BAXTER**

THE STATE OF IDAHO TO: **GARRICK L. BAXTER**
Office of the Attorney General
322 E. Front Street
Boise, ID 83720

YOU ARE HEREBY COMMANDED:

☒ to appear at the place and time specified below to testify in the above case.

☐ to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date, and time specified below.

See Exhibit A attached hereto.

EXHIBIT
B

☐ to permit inspection of the following premises at the date and time specified below.

PLACE: Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
Boise, Idaho 83701

DATE: Thursday, January 24, 2008

TIME: 9:00 a.m.

YOU ARE FURTHER NOTIFIED that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to comply with this subpoena.

DATED this 4th day of January 2008.

ISSUING OFFICER SIGNATURE AND TITLE

Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER

Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
U.S. Bank Plaza Building
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829
Phone: 208-345-2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January 2008, I caused a true and correct copy of the foregoing **SUBPOENA FOR THE DEPOSITION OF GARRICK L. BAXTER** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Dylan B. Lawrence

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE WASDEN

EMPLOYEE HANDBOOK

EXHIBIT

C

3.4 RELATIONSHIPS WITH CLIENTS

Most of the Attorney General's clients are set forth in the Idaho Code. Idaho Code §§ 67-1401 and 67-1406. As in any law firm, maintaining good client relationships is critical to the operation of the OAG. It is also essential to being successful as an attorney.

All deputies and staff of the OAG function as agents of the Attorney General, but the Attorney General is ultimately responsible for providing legal services to the clients. Any communication problems that might arise with clients are to be brought to the immediate attention of the Division Chief.

The Idaho Rules of Professional Conduct (IRPC) make it clear that the Attorney General has a traditional attorney-client relationship with his clients. Rule 1.6 of the IRPC reads in pertinent part: "The requirement of maintaining confidentiality of representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."

Similar to a private law firm, the attorney-client relationship binds all OAG employees to abide by and respect all associated duties and privileges, including the traditional attorney-client privilege, attorney work product, and rules of confidentiality.

To some extent, state laws, such as the Open Meeting Law and the Public Records Law, govern certain aspects of our client relationships in a manner different than private attorneys and law firms.

Questions involving these issues should always be directed to the Division Chief.

Last Change: March 11, 2005

3.5 LEGAL ETHICS

The observance of high ethical standards by the employees of the OAG is essential to the conduct of free and good government. Individuals hold their positions as a public trust and any effort to realize personal gain through official conduct is a violation of that trust. All OAG employees are bound by the Idaho Rules of Professional Conduct and by the rules and regulations of the Idaho State Bar.

As a general rule, ethical questions should always be brought to the immediate attention of the Division Chief.

INTRODUCTION

These guidelines do not replace the Idaho Rules of Professional Conduct, which control the conduct of all attorneys in the office. The Rules expressly recognize the fact that the Attorney General and his deputies have constitutional and statutory mandates that may dictate different conduct than that which is appropriate for private sector attorneys. Unfortunately, the Rules do not spell out these differences in detail. The guidelines set forth below attempt to fill in the gaps.

Each deputy attorney general should review these guidelines thoroughly. The guidelines themselves are but brief summaries of lengthy research that has been done in each problem area. If, after consulting these guidelines, you are still in doubt or you believe an exception should be made, consult with your Division Chief. It is the responsibility of the Division Chief to resolve the problem or to bring it to the attention of the Chief Deputy or the Attorney General.

WHO IS THE CLIENT?

The Attorney General represents the State of Idaho and the public interest, ultimately, the people of the State of Idaho. In daily practice, the term "client" as it appears in these guidelines, means a particular agency, the highest officer(s) in the agency, and other officials up the organizational chain of command, including the board, the governor or other constitutional officers as the case may be. By analogy, the Bar ethics rules assume that a corporate counsel's client is the corporate entity itself and, in daily practice, the company management officers and the CEO, but, also, when necessary, the board of directors and, ultimately, the shareholders of the corporation.

The Attorney General, not the individual deputy, determines what is in the interest of the state and the people. A deputy who perceives that there is a conflict between the wishes of the agency and the best interests of the state should bring the perceived conflict to his or her Division Chief.

Further guidance regarding the duties and clients of the Attorney General is found in Idaho Code § 67-1401. Every deputy within the office should be familiar with this code provision.

TWIN FALLS CO., IDAHO
FILED
2008 JAN 18 AM 10 07

LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB No. 3586
Chief of Civil Litigation

JAMES D. CARLSON, ISB No. 2970
Deputy Attorneys General
P.O. Box 83720
Boise, ID 83720-0010
Telephone: (208) 332-3092
Fax No. (208) 334-2830

RECEIVED
JAN 22 2008
DEPARTMENT OF
WATER RESOURCES

COPY

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

In Re Snake River Basin Adjudication ("SRBA"),	Subcase No. 63-3174
Case No. 39576	**STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER**

COMES NOW, the State of Idaho, by and through the undersigned counsel, and moves this Court pursuant to Rule 26(c) for a protective order vacating the oral depositions of Garrick L. Baxter and Andrea L. Courtney, scheduled for January 24, 2008. This Motion is supported by the Memorandum In Support of State of Idaho's Motion For Protective Order and the Affidavits of Garrick L. Baxter and Andrea L. Courtney, filed herewith.

DATED this 17 day of January, 2008.

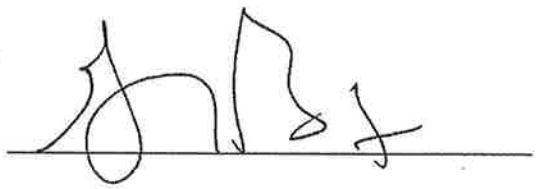
STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
JAMES D. CARLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the within and foregoing document was made this 17th day of January, 2008, by hand delivery to each of the parties listed below.

Scott L. Campbell
Dylan Lawrence
Moffatt Thomas
101 S. Capitol Blvd. 10th FL
Post Office Box 829
Boise, ID 83701-0829



LAWRENCE G. WASDEN
ATTORNEY GENERAL

STEVEN L. OLSEN, ISB NO. 3586
Chief of Civil Litigation

JAMES D. CARLSON, ISB NO. 2970
Deputy Attorneys General
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Fax No. (208) 334-2830

RECEIVED
JAN 22 2008
DEPARTMENT OF
WATER RESOURCES

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED
2008 JAN 18 PM 10 06

COPY

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

In Re Snake River Basin Adjudication ("SRBA"),	)	Subcase No. 63-3174
Case No. 39576	)	**AFFIDAVIT OF ANDREA L. COURTNEY IN SUPPORT OF STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER**

STATE OF IDAHO)
) ss.
County of Ada)

I, Andrea L. Courtney, being first duly sworn, depose and say:

1. I am counsel with the Attorney General's Office, state of Idaho, assigned to the Idaho Department of Water Resources (hereinafter "Department of Water Resources" or "Department"). My client in this matter is the Department of Water Resources and those officers and employees of the Department who request my legal assistance and advice.

2. The Director of the Department, as well as the Adjudication Bureau Chief, authorized me to act to protect the attorney-client privilege in this matter with respect to my

involvement in the preparation of the Supplemental Director's Report Regarding Subcase No. 63-3174 ("Supplemental Director's Report").

3. My communications with Department employees at issue here occurred during the course of my employment and revolved around the preparation of the Supplemental Director's Report in August and September of 2007. In preparing the Supplemental Director's Report, I had an expectation of confidentiality, and my communications with employees of the Department with respect to the Supplemental Director's Report also occurred in a confidential setting. I am not aware of any disclosure to third parties with respect to the preparation of the Supplemental Director's Report.

4. At the request of the Department, Garrick Baxter and I assisted the Department in the creation of the Supplemental Director's Report in this matter. During the creation of the Supplemental Director's Report, I met with Department employees and discussed the Department's basis for its recommendation in this case. Based upon the information given to me by Department employees, I prepared a draft report and circulated it to certain Department employees, including the Adjudication Bureau Chief, for their review. Subsequent drafts were circulated electronically via email.

5. The drafts demonstrate Mr. Baxter's and my thought processes as well as contain actual questions and comments by us and the Department's responses to those questions and comments. The attorney-client communication process was achieved largely via writings and is documented in the email drafts.

6. I have been advised in this matter by my client, individuals at the Department, not to waive any attorney-client privilege in this matter, and I have not done so to my knowledge.

7. On October 25, 2007, I attended the morning session of the deposition of Donald V. Shaff taken by counsel for claimants and objectors, Jerry L. and Mary Lou Tlucek (the "Tluceks"). Attached hereto as Exhibit A is a true and correct copy of the pertinent pages of Mr. Shaff's deposition testimony.

8. During the Supplemental Scheduling Conference on September 25, 2007, and perhaps again during the hearing on the Tluceks' motion to amend the trial schedule held October 31, 2007, counsel for the Tluceks admitted that there were no facts in dispute and agreed that summary judgment would obviate the need for trial in this matter.

9. On November 26, 2007, I attended the Tluceks' deposition of David R. Tuthill, Jr. Attached hereto as Exhibit B is a true and correct copy of the pertinent pages of Mr. Tuthill's November 26, 2007 deposition testimony.

10. On December 18, 2007, the Tluceks sent the Department notices of deposition for Mr. Baxter and me. Attached hereto as Exhibit C is a true and correct copy of the Notice of Deposition of Andrea L. Courtney.

11. On January 4, 2008, the Tluceks sent the Department two subpoenas for the depositions of Mr. Baxter and me.

12. On January 7, 2008, the Tluceks hand-served me with a subpoena. Attached hereto as Exhibit D is a true and correct copy of the Subpoena for the Deposition of Andrea L. Courtney.

13. Further your affiant sayeth not.

Andrea L Courtney
Andrea L. Courtney

SUBSCRIBED AND SWORN TO before me this 16 day of January, 2008.

KAREN A. WOOD NOTARY PUBLIC STATE OF IDAHO

Karen A. Wood
Notary Public for Idaho
My Commission Expires: November 13, 2012

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

In Re: SRBA,	)
	) Subcase No.
Case No. 39576.	) 63-03174
	)
	)

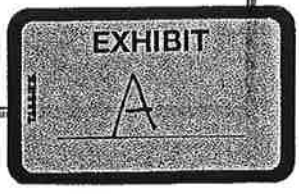
DEPOSITION OF DONALD V. SHAFF

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Thursday, October 25, 2007
Beginning at 9:00 o'clock a.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)



want to assume something that is not correct, was there anyone who worked on Exhibit No. 1, to your knowledge, besides Jan Shurte and yourself -- you reviewed it; correct?

A. Yes.

Q. Besides you and Jan Shurte, was there anyone else who was involved in preparing or finalizing Exhibit No. 1 who was not with the legal staff or the Attorney General's Office or the Department of Water Resources?

A. Not to my knowledge.

Q. Now, we have gone through the exercise with regard to Jan Shurte. Can you tell me if you, yourself, prepared any of the verbiage in Exhibit No. 1? Let me clarify that question.

By "prepared," I am talking about actually creating sentences, modifying words, that sort of thing -- not reviewing the document but actually crafting language in the document.

A. I received an electronic copy of this document. I did do edits on the draft document and returned the document to Ms. Courtney.

MR. CAMPBELL: I would like to have copies of those e-mails. Can they be provided to me?

MR. BAXTER: Because they constitute attorney-client-privileged communications, those

communications between the Department and the Department's legal staff are not going to be provided.

MR. CAMPBELL: Did you get that on the record?

THE COURT REPORTER: Yes, sir.

BY MR. CAMPBELL:

Q. Mr. Shaff, can you describe for me what the process was, in terms of your review of the electronic version of Exhibit No. 1 by you?

A. One, it allowed me to read the draft and to make edits in sentences -- add sentences or double-check numbers and facts presented in the document.

Q. You said, "One." I think I heard you say "one" at the beginning of your answer; is that correct?

A. I beg your pardon?

Q. I think I heard you say "one" at the beginning of your answer.

A. I'm not sure, now, what my reference to "one" was. I'm sorry.

Q. Did I mishear you?

A. I'm sorry.

MR. BAXTER: Perhaps it would be helpful to restate the question.

BY MR. CAMPBELL:

Q. I don't need to go through that. It is not that essential. How many e-mails did you receive from

Q. Mr. Shaff, have you read Exhibit No. 1?

A. I have read Exhibit No. 1. Yesterday was the last time I read Exhibit No. 1.

Q. So you read Exhibit No. 1 yesterday?

A. Yes.

Q. Okay.

A. Prior to today.

Q. Is there anything in Exhibit No. 1 which you, as the person with the Department who has responsibility for the SRBA, disagree with at this point?

A. No, sir.

Q. I would like to ask you some specific questions, then, about certain aspects of Exhibit No. 1. On page 3 of Exhibit No. 1, there is a reference on line -- the lines aren't numbered, but it is under subparagraph C. Do you see that caption?

A. Yes.

Q. If you could, count down for me so that I can --

MR. BAXTER: Actually, stop. Might I ask a favor? Could we get copies of Exhibit No. 1? Since we are just starting to get started here, I wanted to do that before we got any further. Thank you.

BY MR. CAMPBELL:

Q. Page 3, again, subsection C, counting down from

water rights, by limiting the water withdrawal to the diversion rate?

A. It's one component. Yes, sir.

Q. And I would like for you to turn to page 6 of Exhibit No. 1. Again, you said that you reviewed this document and that you reviewed prior drafts of the document, Exhibit No. 1. Do you agree with everything contained in Exhibit No. 1?

A. Yes, sir.

Q. Would you look at footnote 5 for me, please, on page 6?

A. Yes.

Q. Please go ahead and read that to yourself and tell me when you have finished reading it. Have you finished reading it?

A. I have read footnote 5 on page 6 to the word "supply," period. There is a reference, "See also Part III.D, infra." I have not referred to the reference.

Q. That's fine. Thank you. Now turn your attention, if you would, Mr. Shaff, to page 3, again.

A. I am at page 3.

Q. Thank you. And line 7, under caption C. Do you have line 7?

A. The first word is "directive"?

Q. That's correct.

A. I think -- well, the -- I will pick out of the first paragraph on page 6 of Exhibit 1. Reading, "Moreover, annual volume descriptors further define the right, helping to settle the matter for future administration," period, end of sentence.

Q. I am just going to take a second to review some of my notes here real quick.

A. In the same paragraph, if I can continue --

Q. Okay.

A. Reading, "Quantifying volume associated with each ground water right allows IDWR to consider and administer the impact of existing (and future) rights on an aquifer."

Q. So, Mr. Shaff, you did not type out all of this document?

A. No, I did not.

Q. But to your understanding, is this the position of the Department? Does this document fairly characterize the position of the Department with regards to whether or not an annual volume should be listed on a water right?

A. I communicated in the meetings I described earlier that these were concepts I wanted in this Supplemental Director's Report.

Q. And, you know, I realized, actually, in my

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

In Re: SRBA,	)
	) Subcase No.
Case No. 39576.	) 63-03174
	)
	)

DEPOSITION OF DAVID R. TUTHILL, JR.

Volume I

(Pages 1 through 34)

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702

Monday, November 26, 2007
Beginning at 9:43 o'clock a.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)

EXHIBIT
B

Shurte?

MR. CAMPBELL: Yes.

MR. BAXTER: Okay.

BY MR. CAMPBELL:

Q. Dave, if you would, look at Exhibit No. 1 and tell me if you can identify that document.

A. Yes. It is the Supplemental Director's Report to which you have referred.

Q. And can you tell me if you had any role in the preparation of this document?

A. Yes. I discussed with other staff the elements of this report.

Q. By "elements," what do you mean exactly?

A. The basic, fundamental premise that it is appropriate to include a quantity identifier for a ground water irrigation water right.

Q. By "quantity identifier," are you referring to the annual volume limitation?

A. Yes, on both the rate of flow and annual volume -- total annual volume diverted.

Q. Can you tell me what your comments were to the individuals that you spoke to with respect to that particular issue?

A. My recollection is that our discussion was that I was aware that there was an objection to the total

volume quantity, and I was aware that we were preparing a report to address that. I have read the report and agree fully with the statements in the report, based on our IDWR policy in this regard.

Q. This report was prepared and submitted to the court -- the final version -- on September 14, 2007; is that right? That is the date on page 9?

A. Yes. That's correct.

Q. And did you review the final version of this document before it was sent to the court?

A. I don't recall reviewing the final version. I was aware of what was happening, but I don't recall reviewing the final version.

Q. But it is your testimony that you agree with all of the material in this report, as far as a policy?

A. Yes, yes. That is correct. Yes.

~~Q. In terms of the date of submission of this~~ report to the Adjudication Court, what was your position with the Department of Water Resources?

A. I was the Director of the agency.

Q. And in terms of the recommendation that you said you prepared, which is, I believe, a part of this report, can you tell me what your position was at the ~~time the recommendation was prepared? It is Exhibit 2~~

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
208 385 5384 Fax
208 385 5442 Direct

FACSIMILE

From: Lela L. Wood
Administrative Assistant to Dylan B. Lawrence

Date: December 18, 2007

Re: Subcase No. 63-03174

File No.: 22377.0001

Number of pages being transmitted including the cover page: 5
Please call fax operator at (208) 345-2000 if all pages are not received.

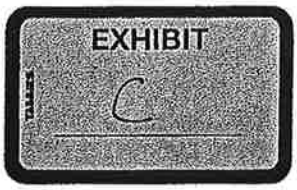
	Name	Organization	Fax No.	Voice No.
To:	Andrea L. Courtney	Office of the Attorney General	287-6700	287-4810
	Director	Idaho Department of Water Resources	287-6700	287-4800
	Lori Pulsifer	QNA Court Reporting	286-7426	484-6309

Message:

Please see following Notice of Deposition.

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.



Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
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slc@moffatt.com
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22377.1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,	Subcase No. 63-03174
Case No. 39576	**NOTICE OF DEPOSITION OF ANDREA L. COURTNEY**

PLEASE TAKE NOTICE that Jerry L. Tlucek and Mary Lou Tlucek will take testimony upon oral examination of Andrea L. Courtney, before an officer authorized to administer oaths on Thursday, January 24, 2008, at 1:30 p.m., and continuing thereafter from day to day until completed, at the offices of MOFFATT THOMAS BARRETT ROCK & FIELDS, CHARTERED, located at 101 S. Capitol Boulevard, 10th Floor, Boise, Idaho 83702, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 18th day of December 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December 2007, I caused a true and correct copy of the foregoing **NOTICE OF DEPOSITION OF ANDREA L. COURTNEY** to be served by the method indicated below, and addressed to the following:

Director IDAHO DEPARTMENT OF WATER RESOURCES P.O. Box 83720 Boise, ID 83720-0098 Fax: 208-287-6700	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile
Lori Pulsifer QNA Court Reporting PMB 219 111 Broadway, Suite 133 Boise, ID 83702 Fax: 208-286-7426	( ) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail (X) Facsimile

_____
Dylan B. Lawrence

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

Scott L. Campbell, ISB No. 2251
Dylan B. Lawrence, ISB No. 7136
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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **NOTICE OF SERVICE OF DEPOSITION** **NOTICE OF ANDREA L. COURTNEY**

I HEREBY CERTIFY that on this 18th day of December 2007, I caused a true and correct copy of the **NOTICE OF DEPOSITION OF ANDREA L. COURTNEY** and the foregoing **NOTICE OF SERVICE** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
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QNA Court Reporting
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Dylan B. Lawrence

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and Mary Lou Tlucek

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **SUBPOENA FOR THE DEPOSITION OF ANDREA L. COURTNEY**

THE STATE OF IDAHO TO: **ANDREA L. COURTNEY**
Office of the Attorney General
322 E. Front Street
Boise, ID 83720

YOU ARE HEREBY COMMANDED:

☒ to appear at the place and time specified below to testify in the above case.

☐ to produce or permit inspection and copying of the following documents or objects, including electronically stored information, at the place, date, and time specified below.

See Exhibit A attached hereto.

EXHIBIT
D

☐ to permit inspection of the following premises at the date and time specified below.

PLACE: Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
Boise, Idaho 83701

DATE: Thursday, January 24, 2008

TIME: 1:30 p.m.

YOU ARE FURTHER NOTIFIED that if you fail to appear at the place and time specified above, or to produce or permit copying or inspection as specified above, that you may be held in contempt of court and that the aggrieved party may recover from you the sum of $100 and all damages which the party may sustain by your failure to comply with this subpoena.

DATED this 4th day of January 2008.

ISSUING OFFICER SIGNATURE AND TITLE

Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER

Dylan B. Lawrence, ISB No. 7136
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
U.S. Bank Plaza Building
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701-0829
Phone: 208-345-2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of January 2008, I caused a true and correct copy of the foregoing **SUBPOENA FOR THE DEPOSITION OF ANDREA L. COURTNEY** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

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Dylan B. Lawrence

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

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22377.1

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **RESPONSE TO STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER**

COME NOW Jerry L. Tlucek and Mary Lou Tlucek, by and through their counsel of record, Scott L. Campbell of the firm Moffatt, Thomas, Barrett, Rock & Fields, Chartered, and hereby submit this Response to the State of Idaho's Motion for Protective Order, filed with this Court on Friday, January 18, 2008. The State seeks to prevent the Tlucks from deposing Garrick Baxter and Andrea Courtney, attorneys for IDWR.

I. I.R.E. 706 Specifically Allows the Tluceks to Depose Baxter and Courtney

The State arguments in support of its Motion for Protective Order are two-fold. First, the State argues that previous communications between the deponents and IDWR employees are privileged pursuant to I.R.E. 502 and therefore should not be the subject of deposition testimony. (Mem. in Supp. of State of Idaho's Mot. for Protective Order, pp. 4-6.) Second, the State argues that the depositions are "unreasonable, oppressive and unnecessary" pursuant to I.R.C.P. 26(c). (*Id.*, pp. 2-4.) The Tlucek deal with each of these arguments in subsequent sections of this Response.

However, as an initial matter, the State fails to appreciate that I.R.E. 706 is the applicable rule in this scenario. That rule specifically states in pertinent part:

> **Rule 706. Court appointed experts.**
>
> (a) **Appointment.** The court may . . . appoint expert witnesses of its own selection. . . . A witness so appointed shall advise the parties of the witness' findings, if any; a deposition of the witness may be taken by any party; and the witness may be called to testify by any party or by the court pursuant to Rule 614(a). The expert witness shall be subject to cross-examination by each party, including a party calling the expert as a witness.

I.R.E. 706(a) (emphasis added).

Rule 706 cannot state it more plainly: "a deposition of the witness may be taken by any party." The Supplemental Director's Report, or "706 Report," that is the subject of this dispute was prepared at the direction of this Court pursuant to Rule 706. (Order Requesting 706 Report from IDWR of April 25, 2007, at 1.) Prior deposition testimony of IDWR employees Donald Shaff (Exhibit A hereto) and Jan Shurte (Exhibit B hereto), as well as the Baxter and Courtney Affidavits that were filed in support of the State's Motion, all establish unequivocally

that the deponents assisted with the preparation of the Report. (Shaff Dep., 16:12-17:2; Shurte Dep., 10:3-10:4, 10:8-10:13, 12:8-12:12, 14:5-14:6, 14:14-14:18; Baxter Aff., p. 2, n.4; Courtney Aff., p. 2, n.4.) Therefore, they are "court appointed experts" pursuant to Rule 706 that may be deposed.

II. Previous Communications Between the Deponents and IDWR Employees Regarding the Preparation of the 706 Report Are Not Privileged Because They Were Not for Legal Representation

The State argues that the Tluceks are using the depositions to obtain information that is protected by the attorney-client privilege. (Mem. in Supp. of State of Idaho's Mot. for Protective Order, pp. 4-6.) In doing so, the State quotes from and discusses I.R.E. 502. (*Id.*, p. 5.) Again, that rule provides in pertinent part:

> **Rule 502. Lawyer-client privilege.**
>
> (b) **General rule of privilege.** A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client which were made (1) between the client or the client's representative and the client's lawyer. . . .

I.R.E. 502(b) (emphasis added).

It is also important to begin this analysis by noting that the State has the burden of demonstrating that privilege applies. *See, e.g., Kirk v. Ford Motor Co.*, 141 Idaho 697, 704, 116 P.3d 27, 34 (1005) ("[t]he burden of showing information is privileged, and therefore exempt from discovery, is on the party asserting the privilege").

The State seems to assume that any communication between a Department employee and one of its attorneys is privileged. This is not the case. To the contrary, pursuant to Rule 502, a communication is privileged only if it is made for the purposes of rendering legal

representation to the client. This does not characterize the Department's creation of the 706 Report. Again, Baxter, Courtney, and the Department employees were co-authors on an expert report; they were not in an attorney-client relationship. Communications between co-authors—regardless of the fact that some of them may be attorneys—are not privileged under Rule 502.

Idaho Code Section 42-1401B supports this conclusion. That statute states plainly that, "[t]he director [of the Department] shall not be a party to an adjudication." I.C. § 42-1401B(3). This make sense, since the Department's role is limited to being "an independent expert and technical assistant." I.C. § 42-1401B(1). This demonstrates that the Department has no legal rights that are at stake in this proceeding. The only party with any legal rights at stake are the Tluceks. Therefore, communications between the deponents and the Department employees were not privileged because they were not made for the specific purpose of providing the Department with legal representation.

The State argues that this "non-party status in the SRBA does not affect" the attorney-client privilege, because "[t]he attorney-client relationship exists between IDWR and its attorneys regardless of the court before which an action proceeds." (Mem. in Supp. of State of Idaho's Mot. for Protective Order, p. 6.) These arguments miss the point. The Tluceks do not argue that the venue of this action in the SRBA district court is determinative. Again, it is the nature of the communications that establishes privilege. The fact that the Department is a technical expert to, rather than a party in, this SRBA subcase supports the conclusion that the deponents' participation in the preparation of the 706 Report was as co-authors to an expert report, rather than as attorneys representing the legal interests of the Department.

III. The Depositions Are Not "Unreasonable, Oppressive and Unnecessary"

The State argues that the depositions should be vacated because they would be "unreasonable, oppressive and unnecessary" pursuant to I.R.C.P. 26(c). (Mem. in Supp. of State of Idaho's Mot. for Protective Order, pp. 2-4.) At the outset, it is important to note that the State is attempting to shift the burden to the Tluceks to "justify" the depositions. (*Id.*, p. 3.) There is simply no basis in the rules of procedure for requiring a party to "justify" its discovery requests. To, the contrary, the scope of discovery is quite liberal:

> **Rule 26(b)(1). Scope of discovery in general.**
>
> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

I.R.C.P. 26(b)(1) (emphasis added).

Privilege is a separate issue that has already been addressed and that is not relevant to the State's specific argument that the depositions will be "unreasonable, oppressive and unnecessary." So, that particular exception in the above-quoted rule is of no import in this context.

Instead, the operative language here is that discovery may be had regarding "any matter . . . relevant to the subject matter involved in the pending action." Far from requiring the Tluceks to "justify" their discovery requests, this language establishes a liberal rule for allowing discovery. *See, e.g., Kirk v. Ford Motor Co.*, 141 Idaho 697, 703, 116 P.3d 27, 33 (2005) ("I.R.C.P. 26(b)(1) permits broad discovery of any matter that is not privileged").

The State argues that, "[g]iven this uncontested fact that IDWR agrees with the content of the [706] Report, discovery of counsel's communication with clients is irrelevant as a matter of law." (Mem. in Supp. of State of Idaho's Mot. for Protective Order, p. 3.) However, the State does not explain its reasoning. And, the State certainly does not overcome the mandate of Rule 706 that "a deposition of the witness may be taken by any party." Simply put, there is no basis for concluding that discovery of the reasoning behind an expert report is "irrelevant" simply because all of its authors agreed on the ultimate work product.

The State next argues that "because the Tluceks acknowledge there are no facts in dispute in this subcase, the depositions of counsel cannot benefit them in discovering relevant information in preparation." (*Id.*, pp. 3-5.) This is not true. One of the Tluceks' primary arguments in this case, as is reflected in their summary judgment materials, is that the 706 Report does not comply with the rules of evidence. (Br. in Supp. of Mot. for Summ. J., pp. 4-8.) Because the deponents helped to prepare that document, the Tluceks should be permitted to inquire as to their participation in preparing that document, their qualifications for preparing an expert report, and related matters. This type of information would certainly "benefit" the Tluceks as this subcase moves forward, because it is directly relevant to one of their primary arguments. Again, the State is attempting to shift the burden to the Tluceks to "justify" their discovery requests, which is inappropriate as this Response has already explained.

Finally, the State relies upon *Cosgrove v. Merrell Dow Pharmaceuticals, Inc.* for the proposition that the Tluceks should not be allowed to take the requested depositions because they have "failed to show a 'need for the information.'" (Mem. in Supp. of State of Idaho's Mot. for Protective Order, p. 4.) However, an analysis of that case demonstrates the State's flawed reasoning.

In *Cosgrove*, the plaintiff sought to depose various employees, officers, past employees, and past officers of a large pharmaceutical company. 117 Idaho 470, 474, 788 P.2d 1293, 1297. Critically, those depositions had already been taken through discovery in related, federal multi-district litigation. *Id.* Therefore, the Idaho Supreme Court upheld the trial court's finding that the plaintiffs made no showing of need, because "[a]ll materials generated in the federal multi-district litigation were available to appellants for a reasonable charge." *Id.*

The fact that the requested depositions had already been taken in previous litigation is a critical distinction between *Cosgrove* and this case. Neither the Tluceks nor their counsel are aware that depositions have already been taken of Baxter and Courtney by another party that would provide the necessary information regarding their participation in the preparation of the 706 Report and their qualifications for doing so. Therefore, the *Cosgrove* case does not support the State's position.

IV. Conclusion

The 706 Report about which the Tluceks seek discovery was prepared at the request of this Court pursuant to I.R.E. 706. That rule specifically states that any party may depose the author of an expert report prepared pursuant to Rule 706. Here, previous deposition testimony establishes that Baxter and Courtney helped to prepare the 706 Report. Therefore, Rule 706 mandates the ability of the Tluceks to take their depositions.

The State's arguments regarding the attorney-client privilege and the "unnecessary" nature of the discovery requests are unpersuasive. The attorney-client privilege does not apply in this situation because the deponents were acting as expert witnesses pursuant to Rule 706, not as attorneys providing legal representation to the Department. Moreover,

information regarding the deponents' qualifications and participation in the preparation of the 706 Report is critical to the Tlucеks' arguments in this case.

Therefore, the Tluceks respectfully request that this Court order that the depositions scheduled for Thursday, January 24, 2008, proceed, and that the deponents must answer questions regarding their involvement in the preparation of the 706 Report.

DATED this 21st day of January, 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Dylan B. Lawrence – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of January, 2008, I caused a true and correct copy of the foregoing **RESPONSE TO STATE OF IDAHO'S MOTION FOR PROTECTIVE ORDER** to be served by the method indicated below, and addressed to the following:

James D. Carlson
Office of the Attorney General
P. O. Box 83720
Boise, ID 83720-0010
Fax: 208-334-2530

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile



Dylan B. Lawrence

EXHIBIT A

to

Response to State of Idaho's Motion for Protective Order

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

In Re: SRBA,	)	
	)	Subcase No.
Case No. 39576.	)	63-03174
	)	
	)	

DEPOSITION OF DONALD V. SHAFF

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702
Thursday, October 25, 2007
Beginning at 9:00 o'clock a.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)

Deposition of Donald V. Shaff

A. And, therefore, Exhibit No. 1 is a Supplemental Director's Report.

Q. Let me ask you this question, Mr. Shaff. Why was this document, Exhibit No. 1, prepared, as far as you understand it?

A. It's my understanding the Special Master in Subcase 63-3174 requested the Department to prepare Exhibit No. 1.

Q. And how did you come to that understanding?

A. One, I saw the order from the Special Master in Subcase 63-3174.

Q. Could you describe for me the procedure that you followed after you received the order from the Special Master to generate this document, Exhibit No. 1?

A. Exhibit No. 1 was prepared with the person, Jan Shurte, S-h-u-r-t-e, who had knowledge of Water Right Claim 63-3174 and with assistance from the Deputy Attorney General's staff.

Q. And who with the Deputy Attorney General's staff assisted her?

A. Ms. Andrea Courtney, who is a Deputy Attorney General, assisted in preparing Exhibit No. 1.

Q. Do you know if anyone else besides Ms. Andrea Courtney assisted in the preparation of Exhibit No. 1 with the Attorney General's staff?

A. I believe Mr. Garrick Baxter reviewed the document, as well -- Deputy Attorney General.

Q. Anyone else?

A. Not to my knowledge, other than Carter Fritschle who signed the document.

Q. Now, in terms of my question, I am asking for the assistants in preparing the document. Did Mr. Fritschle assist in the preparation of the document?

A. Not to my knowledge.

Q. So what was Mr. Fritschle's involvement, other than signing the document, so far as you know?

A. I can presume he read the document to be satisfied that it appeared complete, assembled properly, and signed it.

Q. Now, you said you can assume that he did those things. Does that mean that you do assume that he did those things?

A. That's correct. I was not in the office and did not ask him.

Q. I am just trying to clarify.

A. Sure.

Q. You said that you can assume it, but that does not mean you did assume it. So we have to be very specific in these questions. Did you have any conversations with Mr. Fritschle about his review of

CERTIFICATE OF WITNESS

I, DONALD V. SHAFF, depose and say the following:

That I am the witness in the foregoing deposition consisting of pages 1 through 120;

That I have read said deposition transcript and that I know the contents thereof;

That the questions contained therein were propounded to me; and

That the answers contained therein are true and correct except for any changes that I may have listed on the Change Sheet attached hereto.

DATED AND SIGNED this 26th day of November 2007.

DONALD V. SHAFF

SUBSCRIBED AND SWORN to before me this 26th day of November 2007.

S. SHERMAN NOTARY PUBLIC STATE OF IDAHO

S. Sherman

Notary Public in and for the
County of Ada

My commission expires:

11-14-2010

EXHIBIT B

to

Response to State of Idaho's Motion for Protective Order

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

In Re: SRBA,)
) Subcase No.
Case No. 39576.) 63-03174
)
_____)

DEPOSITION OF JAN GROVER SHURTE

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702
Monday, November 26, 2007
Beginning at 8:57 o'clock a.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)

Deposition of Jan Grover Shurte

is that correct?

A. Uh-huh. It is, yes.

Q. Can you tell me whether or not you had any role in the preparation of this document, Exhibit No. 1?

A. No. I did not make the recommendation on this one.

Q. No. I am talking about this document.

A. Oh, this document? Excuse me. Yes, I did.

Q. Can you describe that for me, please?

A. I, basically, spoke with the attorneys concerning how the recommendation was made, just the steps that were taken to go through the recommendation, and what was in the claim file. That was about it.

Q. Did you actually prepare any portion of Exhibit No. 1?

A. Let's see. I did -- I did -- I did write out some things about -- you know, in line. They were rephrased in here but let me -- yes. So I guess the answer is "yes."

Q. What portions of the report did you initially draft before they were redone, as you say?

A. Good question. I will have to read through it here.

Q. That's fine. Take your time.

A. Thank you. Part B and "Background."

you either drafted or provided information to the attorneys who drafted Exhibit No. 1?

A. No. I believe they already knew. No. We discussed it, but they already had known about that. So --

Q. About what?

A. About the other issues that are in here.

Q. And can you identify the attorneys that you worked with to produce Exhibit No. 1?

A. I worked with Andrea.

Q. Andrea Courtney?

A. Uh-huh. Andrea Courtney.

Q. Anyone else?

A. No.

Q. Did you work with any paralegals of the Department to produce --

A. No, I don't believe I did, on this one.

Q. Did you see any drafts of Exhibit No. 1 before it was finalized?

A. Yes, I did.

Q. How many?

MR. BAXTER: I am going to object to that question, based upon -- it is asking for information related to attorney-client-privileged communications. I gave you a little bit of leeway that, yes, there are

Department's employees in a deposition. It is proper to raise attorney-client-privileged objections within that deposition.

BY MR. CAMPBELL:

Q. Ms. Shurte, can you tell me how many drafts of Exhibit 1 you actually reviewed?

MR. BAXTER: Again, I just instructed the witness not to answer that question, Mr. Campbell.

MR. CAMPBELL: I asked her if she can tell me how many drafts she reviewed. That is not attorney-client privilege.

MR. BAXTER: Go ahead and answer the question, Jan.

THE WITNESS: Probably, two. I would say two, to the best of my recollection.

BY MR. CAMPBELL:

Q. Who generated those drafts?

A. Andrea.

Q. Did you see a final version of Exhibit No. 1?

A. Oh, yes.

Q. And did that final version appear to be very similar to the prior drafts?

MR. BAXTER: Excuse me, Mr. Campbell. Can you restate the question, please? I missed the question.

CERTIFICATE OF WITNESS

COPY

I, JAN GROVER SHURTE, depose and say the following:

That I am the witness in the foregoing deposition consisting of pages 1 through 18;

That I have read said deposition transcript and that I know the contents thereof;

That the questions contained therein were propounded to me; and

That the answers contained therein are true and correct except for any changes that I may have listed on the Change Sheet attached hereto.

DATED AND SIGNED this 19th day of December 2007.

JAN GROVER SHURTE

SUBSCRIBED AND SWORN to before me this 19th day of December 2007.

LORI HARRIS NOTARY PUBLIC STATE OF IDAHO

Lori Harris
Notary Public in and for the
County of Ada

My commission expires:

12-12-2012

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
208 385 5384 Fax
208 385 9442 Direct

FACSIMILE

From: Lela L. Wood
Administrative Assistant to Dylan B. Lawrence

Date: January 21, 2008

Re: Subcase No. 63-03174

File No.: 22377.0001

Number of pages being transmitted including the cover page: 20
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To:	James D. Carlson	Idaho Attorney General's Office	(208) 334-2830	(208) 332-3092
	Director	Idaho Department of Water Resources	287-6700	287-4800

Message:

Please see following response to State of Idaho's Motion for Protective Order.

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.

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DEPARTMENT OF
WATER RESOURCES

Scott L. Campbell, ISB No. 2251
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
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slc@moffatt.com
22377.1

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **AMENDED NOTICE OF DEPOSITION OF JAN SHURTE**

PLEASE TAKE NOTICE that Jerry L. Tlucek and Mary Lou Tlucek have rescheduled the testimony upon oral examination of Jan Shurte, before an officer authorized to administer oaths to take place on Monday, November 26, 2007, at 9:00 a.m., and continuing thereafter from day to day until completed, at the offices of MOFFATT THOMAS BARRETT ROCK & FIELDS, CHARTERED, located at 101 S. Capitol Boulevard, 10th Floor, Boise, Idaho 83702, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 5th day of November, 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2007, I caused a true and correct copy of the foregoing **AMENDED NOTICE OF DEPOSITION OF JAN SHURTE** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Lori Pulsifer
QNA Court Reporting
PMB 219
111 Broadway, Suite 133
Boise, ID 83702
Fax: 208-286-7426

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

_____
Scott L. Campbell

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

In Re: SRBA,

Case No. 39576.

) Subcase No. 63-03174

RECEIVED
JAN 07 2008
DEPARTMENT OF WATER RESOURCES

DEPOSITION OF DONALD V. SHAFF

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702
Thursday, October 25, 2007
Beginning at 9:00 o'clock a.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)

Deposition of Donald V. Shaff

APPEARANCES

FOR JERRY L. TLUCECK and MARY LOU TLUCECK:
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Attorney at-Law
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 South Capitol Boulevard
10th Floor
Boise, Idaho 83701
Phone: (208) 345-2000
Fax: (208) 385-5384
E-mail: slc@moffatt.com

FOR THE IDAHO DEPARTMENT OF WATER RESOURCES:
Mr. Garrick L. Baxter
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Natural Resources Division
Water Resources Section
322 East Front Street
Post Office Box 83720
Boise, Idaho 83720-0098
Phone: (208) 287-4810
Fax: (208) 287-6700
E-mail: garrick.baxter@idwr.idaho.gov

AND

Ms. Andrea L. Courtney
Deputy Attorney General
OFFICE OF THE ATTORNEY GENERAL
Natural Resources Division
Water Resources Section
322 East Front Street
Post Office Box 83720
Boise, Idaho 83720-0098
Phone: (208) 287-4810
Fax: (208) 287-6700
E-mail: andrea.courtney@idwr.idaho.gov
*PLEASE NOTE:
Ms. Courtney was not present for the afternoon session.

INDEX OF EXAMINATION

Deponent's Name	Page Number
DONALD V. SHAFF	
Examination by Mr. Campbell	4
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* * *

INDEX OF EXHIBITS

Exhibit No.	Description	Page Marked
Exhibit No. 1	Supplemental Director's Report Regarding Subcase No. 63-3174, dated September 14, 2007	4
Exhibit No. 2	IDAPA 37, Title 03, Chapter 01, 37.03.01, Adjudication Rules, 11 pages	4

* * *

THIS DEPOSITION was taken on behalf of Jerry L. Tlucek and Mary Lou Tlucek on Thursday, the 25th day of October 2007, at the offices of Moffatt, Thomas, Barrett, Rock & Fields, Chartered, 101 South Capitol Boulevard, 10th Floor, Boise, Idaho 83702, before Lori A. Pulsifer, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, said cause being Subcase No. 63-03174 in said court.

The following testimony was adduced, to wit:

* * *

DONALD V. SHAFF,

having been first duly sworn, testified as follows:

(Deposition Exhibit Nos. 1 and 2 were marked.)

EXAMINATION

BY MR. CAMPBELL:

Q. Good morning, Don. You know me; correct?
A. Yes, sir.
Q. Do you mind if I call you "Don"?
A. That's quite all right with me.
Q. All right. Good. Have you ever had your deposition taken before, Don?
A. I don't think so.

Q. Really?
A. I have appeared as a witness.
Q. But not a deposition?
A. No, sir.
Q. All right. Well, let me explain to you the procedures so that we have a common understanding of what we are doing here.

First of all, you have been sworn under oath. So your testimony is supposed to be your sworn testimony; that is, you are supposed to tell the truth to the extent that you know the answer.

You need to give me your answers verbally. Do you understand that?
A. Yes.
Q. If you do not understand what I am asking, then ask me to clarify it. Do you understand that?
A. Yes, I do.
Q. I am not trying to trick you. I am not trying to ask questions that are ambiguous. Because I am just not very good at asking questions sometimes, if you do not really understand what I am asking for or you need me to clarify what I am asking, just tell me so.
A. I will do that.
Q. Good. The other thing you need to know is that everything you say is being recorded by the court

reporter. Everything I say, also, is being recorded.
There will be a transcript prepared which will be a document that can be used by my clients in the court proceeding. So you need to be aware that this is going to be a formal document that can be used in the proceedings.
A. I understand that.
Q. From the standpoint of the process, I will be giving you certain documents and asking you questions about certain documents. I will be asking you certain questions about procedures that were followed with respect to the water right that we are dealing with in this proceeding. Do you understand that?
A. Yes, I do.
Q. Before we go into questions for you, Don, I just want to make a couple of statements for the record. First, I need to ask you a question. Don, it is my understanding that you are testifying as an employee of the Idaho Department of Water Resources; is that correct?
A. I am an employee of the Department of Water Resources. Yes, sir.
Q. You are here today in that capacity; is that correct?
A. Yes.

Q. And based upon information provided to me by Mr. Garrick Baxter, you have been identified as the individual that is responsible for the so-called Supplemental Director's Report Regarding Subcase 63-3174. In that regard, I will provide to you a copy of that document which has been labeled Deposition Exhibit No. 1.
MR. BAXTER: Scott, Don has been identified -- or requested by you to appear today --
BY MR. CAMPBELL:
Q. I am asking a question. If you are not the person, Mr. Shaff, then tell me so.
MR. BAXTER: Scott, I believe -- refresh my recollection of the Rule of Evidence which you are looking under at this point in time.
If you are requesting that the Department identify a witness to testify on behalf of the Department as to its policies, that -- the Department might have identified a different individual to testify as to that.
You requested that Don appear here today to testify -- excuse me -- to take his deposition. We complied with that request. I am trying to remember the Rule of Evidence.
You are requesting that the Department identify

a particular witness to provide statements as to the Department. That request was not made of the Department.
But I did comply with your request to depose Don. He signed -- or he reviewed the 706 Report as part of his duties and responsibilities with the Department.
MR. CAMPBELL: Are you finished?
MR. BAXTER: I am.
MR. CAMPBELL: First of all, I would move to strike everything that Mr. Baxter said. For purposes of the record, I want to note the following:
First of all, under Idaho Code Section 42-1401B, subsection 3, the statute states that the Director shall not be a party to an adjudication.
This deposition is being taken of Mr. Shaff as a representative of the Director of the Idaho Department of Water Resources which is not a party to the Snake River Basin Adjudication.
Consequently, under Idaho Code Section 42-1401B and pursuant to Idaho Rule of Evidence 706, Mr. Baxter and Ms. --
MS. COURTNEY: Courtney.
MR. CAMPBELL: -- Courtney, as attorneys for the Department of Water Resources, are not appropriate individuals to participate in this deposition. Since

the Director is not a party, they are not properly involved in this deposition.
While I am going to allow them to continue to participate because they are here and I do not want to recess the deposition, I am going to lodge a continuing objection to any participation by them.
MR. BAXTER: And, Scott, I would like the opportunity to respond to it.
MR. CAMPBELL: Sure.
MR. BAXTER: We are here. You are taking the deposition of an employee of the Department of Water Resources. We are attorneys for the Department of Water Resources. We have an attorney-client privilege with Mr. Shaff, and we have an opportunity to defend him in the deposition. That is the position of the Department.
MR. CAMPBELL: I understand. That's fine.
MR. BAXTER: Thank you.
BY MR. CAMPBELL:
Q. Mr. Shaff, I have given you what has been labeled as Deposition Exhibit No. 1. Have you had a chance to review that at all?
A. Yes, sir.
Q. Can you tell me if you can identify that document?
A. I can. Yes, sir.

Q. Please do so.
A. This is the Supplemental Director's Report Regarding Subcase 63-3174.
Q. And can you tell me what role you played, if any, in the preparation of that document?
A. I participated in preparing this report and reviewing it.
Q. Can you describe for me in more detail what your participation was?
A. I reviewed the parts prepared by Ms. Shurte, who is identified in the report.
Q. How do you spell "Shurte"?
A. S-h-u-r-t-e.
Q. And her first name?
A. Her first name is Jan.
Q. Thank you.
A. And I read the entire report the morning before it was signed.
Q. Now, your signature does not appear on the report; is that correct?
A. No, it does not.
Q. Whose signature is on the report?
A. The report is signed by Carter Fritschle, F-r-i-t-s-c-h-l-e.
Q. And why did Mr. Fritschle sign the report, as

opposed to you?
A. I was absent from the office when it was in final form in the afternoon.
Q. And did you authorize him to sign the report for you?
A. Yes.
Q. Turning back to some other basic questions, Mr. Shaff, can you please describe for me what your position with the Department of Water Resources is?
A. I'm currently the Adjudication Bureau Chief.
Q. All right. How long have you worked with the Department?
A. Thirty-plus years.
Q. What experience have you had with respect to the Snake River Basin Adjudication?
A. In 1987 I was what is referred to as the Technical Section Manager. I was in that role until December 2005.
Q. And at that point in time, what role did you assume with the Adjudication?
A. I became the Adjudication Bureau Chief.
Q. Can you describe for me what activities you performed for the Department during your Technical Services Director Position? I think that is what you described it as; is that correct?

A. As the Technical Section Manager, I dealt with data management issues and coordinated with the supervisors and staff in the regional offices.
Q. Were you involved, during that phase of your employment, in the development of policy positions for the Department with respect to the Snake River Basin Adjudication?
A. I participated in meetings and had input into the decisions that were made relative to those policies.
Q. So would it be fair to say that you were one of the employees of the Department who helped develop the policy positions of the Department for the Snake River Basin Adjudication?
A. I participated in many of those. Yes.
Q. Did you help develop the policies?
A. To the extent that I was able to offer input and perspective into those policies, I helped.
Q. Do you, from your standpoint, believe that your contributions in that regard were positive?
A. I think I contributed to the policies that were made.
Q. Thank you. Now, with regard to your assignment in 2005 as the Bureau Chief for the Adjudication -- I think that is how you described it; is that correct?

A. Yes.
Q. Can you tell me how your job duties changed when you assumed this new position -- or different position, I should say?
A. I would have more budgetary, personnel, and water right recommendation decisions, signatory authority over actions of the Adjudication Bureau.
Q. Now, when we refer to "Adjudication," are you referring exclusively to the Snake River Basin Adjudication – as of 2005, that is?
A. In 2005? Yes.
Q. And does the term "SRBA" mean anything to you?
A. It's an acronym for the Snake River Basin Adjudication.
Q. When I refer to "SRBA," you will understand it means the "Snake River Basin Adjudication;" is that correct?
A. Yes. It's fine to use the acronym.
Q. It is just easier to say. With respect to your duties as the Bureau Chief of the SRBA process with the Department, you mentioned you had signatory authority. What do you mean by that exactly?
A. Documents that are prepared for the court have to get my approval or delegated authority before they're filed -- pleadings, the Director's Report. I have to

have confidence and be satisfied that it meets the Department's standards for filing.
Q. Thank you. And you mentioned delegated authority. What do you mean by that?
A. There are documents prepared on a routine matter that the Bureau Chief has confidence and I have confidence that they are prepared in a satisfactory manner.
Q. Prepared by someone else? Is that what you are saying?
A. Yes, sir.
Q. And by "delegated authority," are you talking about the authority you delegate to someone else to prepare and sign or issue the document? Is that what you are saying?
A. Yes.
Q. And in terms of delegated authority, is any authority delegated to you by the Director, in terms of these documents?
A. Yes.
Q. Now, you mentioned the various documents that are presented to the court. I have shown you what has been marked as Exhibit No. 1. Is that one of the documents that was presented to the court in this case?
A. Yes, it was.

Q. Can you tell me what this document -- we know what the title is, but is there another reference to this document that is utilized by the Department?
A. Sometimes this document is loosely described as a 706 Report, relying, I think, on Idaho Rule of Civil Procedure 706.
Q. And you say "loosely described." What do you mean by "loosely described"?
A. I think, if this was the Department's report, as Rule 706, the document would say that it was a 706 Report.
Q. Now, when you say "this," what are you referring to?
A. This report, this supplemental report, Exhibit No. 1.
Q. Thank you. We have to be fairly specific for the record.
A. Yes, yes. I understand that. Pardon me.
Q. So are you suggesting that this document, Exhibit No. 1, is not an expert report from the Director of the Department of Water Resources to the court?
A. I would suggest that, given the statute, legal authority, the Department prepares Director's reports for the court.
Q. Okay.

A. And, therefore, Exhibit No. 1 is a Supplemental Director's Report.
Q. Let me ask you this question, Mr. Shaff. Why was this document, Exhibit No. 1, prepared, as far as you understand it?
A. It's my understanding the Special Master in Subcase 63-3174 requested the Department to prepare Exhibit No. 1.
Q. And how did you come to that understanding?
A. One, I saw the order from the Special Master in Subcase 63-3174.
Q. Could you describe for me the procedure that you followed after you received the order from the Special Master to generate this document, Exhibit No. 1?
A. Exhibit No. 1 was prepared with the person, Jan Shurte, S-h-u-r-t-e, who had knowledge of Water Right Claim 63-3174 and with assistance from the Deputy Attorney General's staff.
Q. And who with the Deputy Attorney General's staff assisted her?
A. Ms. Andrea Courtney, who is a Deputy Attorney General, assisted in preparing Exhibit No. 1.
Q. Do you know if anyone else besides Ms. Andrea Courtney assisted in the preparation of Exhibit No. 1 with the Attorney General's staff?

A. I believe Mr. Garrick Baxter reviewed the document, as well -- Deputy Attorney General.
Q. Anyone else?
A. Not to my knowledge, other than Carter Fritschle who signed the document.
Q. Now, in terms of my question, I am asking for the assistants in preparing the document. Did Mr. Fritschle assist in the preparation of the document?
A. Not to my knowledge.
Q. So what was Mr. Fritschle's involvement, other than signing the document, so far as you know?
A. I can presume he read the document to be satisfied that it appeared complete, assembled properly, and signed it.
Q. Now, you said you can assume that he did those things. Does that mean that you do assume that he did those things?
A. That's correct. I was not in the office and did not ask him.
Q. I am just trying to clarify.
A. Sure.
Q. You said that you can assume it, but that does not mean you did assume it. So we have to be very specific in these questions. Did you have any conversations with Mr. Fritschle about his review of

Exhibit No. 1?
A. No, I did not.
Q. Have you ever had Mr. Fritschle sign documents like Exhibit No. 1 previously, or since, where he has the authority to sign in your stead?
A. Mr. Fritschle signed other documents for filing with the court.
Q. Do you know if any of them have been documents such as Exhibit No. 1, Supplemental Director's Reports regarding subcases that have been specifically requested by a Special Master?
A. I don't recall.
Q. Mr. Shaff, can you tell me if there are any other individuals besides Andrea Courtney and, perhaps, Garrick Baxter and Jan Shurte who were involved in the preparation of Exhibit No. 1?
A. No one else that I recall.
Q. Do you know what involvement, if any, David R. Tuthill, Jr., had in the preparation of Exhibit No. 1?
A. I have no knowledge that he participated in preparing Exhibit No. 1.
Q. Do you have any knowledge about whether Mr. Tuthill reviewed Exhibit No. 1 at any point in time?
A. Not to my knowledge.

Q. Do you know if Mr. Tuthill had any involvement in the preparation of the initial Director's Report for the water right involved in Subcase No. 63-3174?
A. I'm aware that he prepared the recommendation for Water Right 63-3174.
Q. Now, by recommendation, is that the same as the initial Director's Report?
A. The recommendation he prepared was one-fifteen-hundredth-plus of the Director's Report filed with the court.
Q. You are going to have to clarify what you mean by that "one-fifteen-hundredth" clause.
A. It was contained in a Water Right Director's Report containing over 1,500 recommendations of water rights, and this was one of those.
Q. By "this," what do you mean?
A. I mean -- pardon me -- Water Right 63-1374 was in the Director's Report of 1,500-plus water right recommendations. The work of Mr. Tuthill relative to Water Right 63-1374 was in that compiled Director's Report.
Q. So let me paraphrase this to make sure that I understand what you said. The, quote, "recommendation" for Water Right No. 63-3174 was contained within a bigger document that was the Director's Report that was

filed with the court; is that correct?
A. Yes.
Q. And is the recommendation a part of that Director's Report?
A. Yes.
Q. So the recommendation for Water Right 63-3174 was part of the Director's Report that was filed with the court initially; correct?
A. Yes.
Q. We've got that straightened out. Now, can you tell me what position Mr. Tuthill had at the time that he worked on the recommendation for Water Right No. 63-3174?
A. I'm not certain.
Q. Do you have any understanding of what position he could have held during that period of time?
A. I believe he was the Division Administrator of the Water Management Division.
Q. Explain to me what the Division Administrator of the Water Management Division does, if you know.
A. The Adjudication Bureau is one unit within a larger division of what is described as the Water Management Division.
Q. So Mr. Tuthill was the supervisor over the entire division which included the SRBA Bureau; is that

correct?
A. Yes.
Q. And, Mr. Shaff, if you would, look at Exhibit No. 1. I am going to go through that document in some detail. I will turn to specific pages and ask you questions concerning it.
But before I do that, can you tell me, from your knowledge, whether or not Jan Shurte prepared specific sections of Exhibit No. 1?
A. I can tell you there are sections in Exhibit No. 1 that she prepared.
Q. Do you know which sections they are?
A. Not offhand. Would you like to identify sections?
Q. I can do that.
A. I can --
Q. If that --
A. -- respond that, not counting the signature pages, there are eight pages in the document. Her work could be on more than one page or successive pages.
Q. Sure. All right. Let's go through the pages then. Do you know if Jan Shurte prepared anything on page 1?
A. Largely, the first paragraph, under "Background" -- and "Background" is Roman Numeral II.

In the first paragraph, as to the timing of the claim, there's acres and elements relative to the initial claim and amended claim.

Q. Sure. What about --

MR. BAXTER: Now, I want to be clear. Mr. Shaff, are you testifying as to your exact knowledge of what Ms. Shurte prepared?

MR. CAMPBELL: Well, I am going to object right here. If you want to make an objection, go ahead and make an objection. You can't ask him questions now. This is my time for asking Mr. Shaff questions. So if you want to state an objection, Mr. Baxter, go ahead.

MR. BAXTER: I will state an objection as to form.

Mr. Shaff, again, are you testifying as to your personal knowledge?

MR. CAMPBELL: That is an improper objection. I am not going to go there.

Q. Mr. Shaff, as to the first paragraph on page 1, the introduction portion, did Jan Shurte have anything to do with that? Do you know?

A. Not to my knowledge.

Q. Do you know who prepared the introduction section of page 1?

A. I believe, Ms. Courtney or a paralegal. I'm

not sure which paralegal in the Department of Water -- assigned to the Department of Water Resources may have drafted that text.

Q. Can you give me the names of paralegals with the Department of Water Resources that may have been involved in the drafting of that text?

A. There are three paralegals assigned to the Department of Water Resources: Ms. Becky Harvey, Mr. Ray Williams, and Ms. Vicki Kelly.

Is it V-i-c-k-i? I'm not sure. I always have to look it up. There's more than one Vicki, and they spell them differently.

Q. That's fine. It could have been any one of those individuals?

A. I have no knowledge which one of the three may have assisted.

Q. With regard to the second page of Exhibit No. 1, do you know if Jan Shurte was involved in preparing any of the verbiage on that page?

A. Not to my knowledge.

Q. What about with regard to page 3? Was she involved in preparing any of the verbiage on that page?

A. Not to my knowledge.

Q. And with regard to page 4, was Jan Shurte involved in preparing any of the verbiage on page 4? By

"verbiage," I mean language.

A. Yes. I do not think she drafted parts of that page.

Q. Did she draft any of the portions of that page, so far as you know? Take your time to read it if you feel more comfortable in answering after you have read it.

A. I am aware Ms. Shurte has knowledge of the information contained on here. I doubt she typed any draft of the content on this page.

Q. On page 4?

A. On page 4.

Q. Thank you. And the same question with regard to page 5. Was Jan Shurte involved in preparing any of the language on that page, as far as you know?

A. No, sir.

Q. Same question with regard to page 6.

A. The same is true there. She would not have prepared -- would not have typed a draft of this information.

Q. And with regard to page 7? The same answer there?

A. She would not have typed a draft that appears on page 7.

Q. Well, now, let me clarify, Mr. Shaff. You say

she would not have typed a draft that appears on these pages. By that statement, are you suggesting that she would have handwritten a draft? Is that what you are saying?

A. No. I'm not trying to couch my response. I'm saying that she would not have --

Q. Prepared the language?

A. -- prepared the language that appears on the page.

Q. Thank you. And with regard to page 8, is that, also, your answer with regard to that page?

A. I'm not sure if she typed the first paragraph below section D on page 8.

Q. You are not sure?

A. I'm not sure if she typed those pages. I am confident she supplied the numbers that appear in that paragraph.

Q. So the paragraph under subsection D on page 8 -- the information, as far as the numeric information, you are saying, was supplied by Jan Shurte?

A. Yes.

Q. As far as you know, is there anything else that she supplied that is contained on page 8?

A. Not to my knowledge.

Q. Now, just so I understand, because I do not

want to assume something that is not correct, was there anyone who worked on Exhibit No. 1, to your knowledge, besides Jan Shurte and yourself -- you reviewed it; correct?

A. Yes.

Q. Besides you and Jan Shurte, was there anyone else who was involved in preparing or finalizing Exhibit No. 1 who was not with the legal staff or the Attorney General's Office or the Department of Water Resources?

A. Not to my knowledge.

Q. Now, we have gone through the exercise with regard to Jan Shurte. Can you tell me if you, yourself, prepared any of the verbiage in Exhibit No. 1? Let me clarify that question.

By "prepared," I am talking about actually creating sentences, modifying words, that sort of thing -- not reviewing the document but actually crafting language in the document.

A. I received an electronic copy of this document. I did do edits on the draft document and returned the document to Ms. Courtney.

MR. CAMPBELL: I would like to have copies of those e-mails. Can they be provided to me?

MR. BAXTER: Because they constitute attorney-client-privileged communications, those

communications between the Department and the Department's legal staff are not going to be provided.

MR. CAMPBELL: Did you get that on the record?

THE COURT REPORTER: Yes, sir.

BY MR. CAMPBELL:

Q. Mr. Shaff, can you describe for me what the process was, in terms of your review of the electronic version of Exhibit No. 1 by you?

A. One, it allowed me to read the draft and to make edits in sentences -- add sentences or double-check numbers and facts presented in the document.

Q. You said, "One." I think I heard you say "one" at the beginning of your answer; is that correct?

A. I beg your pardon?

Q. I think I heard you say "one" at the beginning of your answer.

A. I'm not sure, now, what my reference to "one" was. I'm sorry.

Q. Did I mishear you?

A. I'm sorry.

MR. BAXTER: Perhaps it would be helpful to restate the question.

BY MR. CAMPBELL:

Q. I don't need to go through that. It is not that essential. How many e-mails did you receive from

Ms. Courtney?

A. I cannot recall.

MR. BAXTER: Again, because we have attorney-client-privileged communications plus any other applicable -- I would like to take a step back and say there might be other applicable privileges here.

I am going to instruct the witness to not answer that particular question because you are inquiring specifically about communications between the Department and the Department's legal representatives.

MR. CAMPBELL: Well, that's fine. You know, we may have some problems with regard to that. I am not asking him -- I mean, this is beyond the scope of anything that I have encountered.

This document is supposed to be an expert report; and the Department is saying that the preparation of the document is, now, somehow privileged so that my client cannot discover how this document was prepared. Frankly, I find that to be highly irregular. We may take that up with the Special Master.

Having said that, I will proceed with some other questions so we can move forward.

MR. BAXTER: Now that you have had your statement on the record, I would like to say that we are not preventing you from inquiring as to how the 706

Report was created.

Mr. Shaff is here to do that today. Ms. Shurte is here to talk about that today. When you ask about specific communications, I feel obligated to raise this issue.

MR. CAMPBELL: That's fine. You have made your point on the record, and I have made my point on the record.

I think the record clearly indicates that this document was prepared by legal counsel; and, therefore, the privilege has been waived. Because legal counsel has become, quote, "an expert," I probably will be taking the depositions of you and Ms. Courtney as a consequence of what Mr. Shaff has already stated.

Let's move forward so we can complete this deposition.

Q. Mr. Shaff, can you tell me how many versions of the e-mails you reviewed, that you provided comments on?

MR. BAXTER: Again --

THE WITNESS: No, I can't.

MR. BAXTER: I am going to instruct --

MR. CAMPBELL: Look, Garrick.

MR. BAXTER: Mr. Campbell, are you asking about communications with Ms. Andrea Courtney or communications between him and Ms. Shurte?

MR. CAMPBELL: Let me clarify. I asked how many versions of the e-mail he provided information on. Now, if you are saying that is privileged, we have got a major problem; and I am going to have to go to the court right now. Because this witness produced information that is on that report, I am entitled to inquire about the information he produced.

MR. BAXTER: You are specifically asking for communications between him and legal staff.

MR. CAMPBELL: He is the expert. He is the expert. If I can't have information about him putting information in this report, then we don't have any basis for discovery.

MR. BAXTER: That is not your question.

MR. CAMPBELL: It is my question.

MR. BAXTER: You asked him about communications.

MR. CAMPBELL: No. Let me stop.

MR. BAXTER: Are you asking him what positions he put in here? You can ask him that.

MR. CAMPBELL: Let me stop right now. Let me stop right now. I am asking him how many e-mails he actually provided input on. That is what I am asking him.

MR. BAXTER: What I am going to say is maybe

the appropriate thing to do would be to go through the document, like you did with regards to Ms. Shurte, and ask him what in that document he had feedback on or what he had placed in there.

When you are asking about the document, that is not asking about the communication between him and his staff. You are asking him what is his specific personal knowledge of what went into the document. That is the way I am going to suggest that we can get past this.

MR. CAMPBELL: Thank you for your suggestion.

Q. Now, let me ask another question. Mr. Shaff, how many e-mails did you receive from Ms. Courtney?

A. Again --

MR. BAXTER: I am going to ask that the witness not answer the question because it goes to an attorney-client privilege.

MR. CAMPBELL: Are you instructing the witness not to answer?

MR. BAXTER: I am instructing the witness not to answer.

BY MR. CAMPBELL:

Q. Fine. Now, Mr. Shaff, with regard to Exhibit No. 1, I want you to identify the actual words that you provided in that document.

A. I'm unable to do that.

Q. Is there anything in Exhibit No. 1 that you actually drafted?

A. I indicated in an earlier answer there are items in Exhibit No. 1 that I wrote.

Q. Tell me which items are the ones you wrote.

A. At this point in time -- it was submitted on September 14, 2007 -- I can't recall those, sir.

Q. Would you be able to recall those if you had the copies of the e-mails that you exchanged with Ms. Courtney?

A. Perhaps I could.

Q. You did, however, review the final version of Exhibit No. 1 before it was signed by Mr. Fritschle; is that correct?

A. On the morning of the date it was signed, September 14, 2007, I reviewed a draft of Exhibit No. 1.

Q. Do you know if the draft that you reviewed was the document, unchanged, that was eventually signed by Mr. Fritschle?

A. No, I do not.

Q. Do you know if anyone in the Department ascertained whether or not the draft that you reviewed before signature by Mr. Fritschle was the same document that Mr. Fritschle signed?

A. No, I do not.

Q. Mr. Shaff, have you read Exhibit No. 1?

A. I have read Exhibit No. 1. Yesterday was the last time I read Exhibit No. 1.

Q. So you read Exhibit No. 1 yesterday?

A. Yes.

Q. Okay.

A. Prior to today.

Q. Is there anything in Exhibit No. 1 which you, as the person with the Department who has responsibility for the SRBA, disagree with at this point?

A. No, sir.

Q. I would like to ask you some specific questions, then, about certain aspects of Exhibit No. 1. On page 3 of Exhibit No. 1, there is a reference on line -- the lines aren't numbered, but it is under subparagraph C. Do you see that caption?

A. Yes.

Q. If you could, count down for me so that I can --

MR. BAXTER: Actually, stop. Might I ask a favor? Could we get copies of Exhibit No. 1? Since we are just starting to get started here, I wanted to do that before we got any further. Thank you.

BY MR. CAMPBELL:

Q. Page 3, again, subsection C, counting down from

the first line under C, five lines, the first word in the fifth line is "convention." Do you see that, Mr. Shaff?
A. Yes.
Q. And the preceding sentence begins at line 3, at the end of line 3, with the word "interwoven." Do you see that?
A. Yes.
Q. Could you please read that full sentence for the record?
A. Yes. "Interwoven with the statutory authority, annual diversion volumes have been a part of IDWR's ground water convention since before the SRBA was created."
Q. All right. And based upon your prior testimony, I am assuming that you agree with that statement; is that correct?
A. Yes sir.
Q. Now, can you tell me what the IDWR's ground water convention is?
A. With respect to irrigation water rights, specifically, annual volumes have -- diversion volumes have been described as an element of the water right in water right licenses and water right transfers, approval of application for transfer of water rights.

Q. But it says, ". . . since before the SRBA was created." That is what the sentence says?
A. Yes.
Q. So what you are talking about -- you are saying that, in actuality, this is not just the ground water rights that are subject to this annual diversion volume but all irrigation water rights; is that correct?
A. No. I'm sorry if I gave you that impression.
Q. Well, you stated "irrigation water rights."
A. From ground water sources.
Q. So only for ground water irrigation water rights has the Department included the annual diversion volumes in these licenses and transfer approvals that you have described in this sentence; is that correct?
A. I have seen diversion volumes on, if you will, surface water sources, as well, for water right licenses and water right transfers.
Q. Well, is it uniform, then, that ground water rights are treated with the annual diversion volume and surface water irrigation rights have that element, as well?
A. To my common, working knowledge, this convention has been a part of the Department of Water Resources before November 19, 1987.
Q. With respect to ground water rights or with

respect to surface water rights?
A. Surface water, as well.
Q. So you are saying that this particular convention imposing an annual diversion volume on water rights, prior to or, at least, since November of 1987, has been consistently applied by the Department for ground water and surface water irrigation rights?
A. Let me respond that the practice has been in place before November 19, 1987, when the SRBA was commenced.
Q. But my question is: That practice has been consistently applied to surface and ground water irrigation water rights; is that correct?
A. To my common knowledge.
Q. Well, that is different than what I thought I heard you say previously. So I want to make sure that that is your testimony. Is that your testimony?
A. Would you like to restate the question to make sure that we get it right?
Q. Certainly. Certainly. Prior to November of 1987, did the Department consistently apply the annual diversion volume requirement on water rights for surface water irrigation rights -- consistently?
A. Of the water right licenses and water right transfers I have seen, I have seen that convention

applied.
Q. To surface irrigation water rights?
A. To surface water and ground water. Water rights for irrigation purposes, particularly.
Q. Now, has that convention -- we will use "convention" because that is the word --
A. Yes.
Q. -- that has been applied to any other water rights besides surface, irrigation, or ground water irrigation water rights.
A. By "other," do you mean other uses?
Q. Other types of water rights.
A. I have to say I'm not certain we are on the same definition when you say "types of water rights."
Q. Tell me what you understand.
A. With respect to other water uses on other water rights, I have seen diversion volumes placed on water rights. One of the exceptions I can think of are municipal uses that may not have a diversion volume, whether it is from surface water or ground water.
Q. Can you tell me how this convention that you have described on page 3 -- excuse me -- that the report, Exhibit No. 1, describes, on page 3 -- how this convention was developed?
A. No, sir, I cannot.

Q. Can you tell me where this convention is documented in Department --
A. No, I cannot.
Q. Well, I hadn't finished the question, but thank you.
A. You paused, and I thought you were at the question mark.
Q. I was thinking. I think very slowly sometimes. Thank you, Mr. Shaff. With respect to this convention, can you tell me whether or not the Department has always used this convention with respect to ground water rights that have been licensed?
A. There are water right licenses issued from ground water sources for irrigation purposes that do not have a diversion volume described on them.
Q. Now, you say "diversion volume." This phrase says "annual diversion volume." Is there a difference between the two terms?
A. I did not intend to distinguish or make a different category. I was referring to annual diversion volume.
Q. Fine. Can you tell me, Mr. Shaff, if there is a difference in the amount of water that could be used by an individual who has a ground water irrigation right without an annual diversion volume restriction, as

opposed to one that does have an annual diversion volume restriction on the water right?
A. Restate the question, please.
Q. I will try to rephrase it. Would the Department of Water Resources be able to impose a use regulation that is greater upon a ground water right that has an annual diversion volume restriction, compared to one that does not have an annual diversion volume restriction, assuming all of the other elements were the same?
A. I apologize for being dense.
Q. It's all right.
A. Now that I know the contrast, what was the first part of the question?
Q. Let me try it one more time. Assuming an individual had a licensed water right with no annual volume diversion element or restriction, would that individual be subject to the same degree or amount of regulation as someone who had the same type of water right, same period of use, same diversion rate, but had an annual volume, diversion volume limitation? Would they be treated equally, in terms of enforcement by the Department? By "equally," I mean, in terms of how much water they could use.
A. In my opinion, the water right without the

annual diversion volume would present an administrative difficulty for the Department of Water Resources.
Q. Well, that really wasn't my question, whether or not the Department would have difficulty. What I am asking is: Would those two different water rights be regulated differently by the Department?
A. My response was because the regulatory activity would be difficult or compromised by the difference between the two water rights.
Q. Explain what you mean by that.
A. The water right with the annual diversion volume has a known volume or quantity that may be withdrawn from the ground water resource, the one without the limit.
Q. By "the limit" --
A. By the annual diversion volume -- pardon me -- there would not be the certainty of how much water under what irrigation activity might be withdrawn from the ground water resource. The Department would not have a fixed figure with which to regulate that water right or administer it in a transfer proceeding.
Q. Well, would you not have the diversion rate to administer?
A. Yes, sir.
Q. Is that not one way the Department restricted

water rights, by limiting the water withdrawal to the diversion rate?
A. It's one component. Yes, sir.
Q. And I would like for you to turn to page 6 of Exhibit No. 1. Again, you said that you reviewed this document and that you reviewed prior drafts of the document, Exhibit No. 1. Do you agree with everything contained in Exhibit No. 1?
A. Yes, sir.
Q. Would you look at footnote 5 for me, please, on page 6?
A. Yes.
Q. Please go ahead and read that to yourself and tell me when you have finished reading it. Have you finished reading it?
A. I have read footnote 5 on page 6 to the word "supply," period. There is a reference, "See also Part III.D, infra." I have not referred to the reference.
Q. That's fine. Thank you. Now turn your attention, if you would, Mr. Shaff, to page 3, again.
A. I am at page 3.
Q. Thank you. And line 7, under caption C. Do you have line 7?
A. The first word is "directive"?
Q. That's correct.

A. We are on the same line.
Q. Thank you. That line says, ". . . directive to regulate the extent of diversions, and the policy behind annual volume diversions, provide the framework for IDWR's recommendation." Is that the correct reading?
A. You have read it as I do.
Q. Can you tell me what the policy of the Department of Water Resources is, with respect to that statement?
A. Earlier, you referred to "convention."
Q. Yes.
A. "Convention" and "policy" are equal.
Q. Okay.
A. You could, in some respect, replace the word "policy" with the word "convention" behind "annual volume diversions."
Q. And I think you testified earlier that you are not aware of any place where the Department has this policy or convention written down; is that correct?
A. I'm not aware of a policy prior to the SRBA that directs the staff to apply annual diversion volumes to ground water rights.
Q. Well, that is new information. So since the beginning of the SRBA, I assume that there is a written description of this convention or policy?

A. I believe that policy is one of the labeled exhibit numbers in Exhibit No. 1.
Q. Why don't you go ahead and find that for me, if you would, please. Take your time. Mr. Shaff, if you need a break at any point in time, just tell us.
A. Thank you. I'm good. Without some assistance, the specific policy that I had in mind is not among -- is not specifically in Exhibit No. 1.
Reference to the policy is a part of – let me make sure I get the numbers correct -- what are labeled Exhibit 5 and Exhibit 6 of Deposition Exhibit No. 1.
Q. Well, why don't we jump ahead to page 3? There is some reference on -- excuse me -- I misstated -- page 4. On page 4 there are some references in Exhibit No. 1 to the documents that you described.
Before I go to those specific documents, Exhibit 5 to Deposition Exhibit No. 1 that you have identified, I would like to ask some questions before that about page 4.
So if you would, follow me with me, Mr. Shaff. I am going to read a portion of page 4 into the record and ask you a couple of questions. Starting at the first full paragraph that starts with the word "while," do you see that?
A. Yes. I am at that point in Exhibit No. 1.

Q. Thank you. This is a quote. "While the volume of diversion was not always included in older decrees and licenses, as was the case with other elements, it has become an IDWR standard since before the inception of the SRBA," end quote.
Now, is the reference to "IDWR standard" the same as the reference to "policy" and "convention"?
A. Yes, sir.
Q. And the next sentence on page 4, from where I stopped, says, quote, "Since the mid 1970's, it has been the Department's policy to include a volume limitation on all licensed ground water rights," period, end quote.
Again, the term "policy" in that sentence is the same as "standard" in the preceding sentence?
A. I would apply that.
Q. Okay.
A. Same --
Q. Same term?
A. Same general definition, yes.
Q. Good. I want to understand because there are different terms used. Now, are you aware of -- well, let me ask you this question. Mr. Shaff, you said that you have been working for the Department for approximately thirty years; is that correct?
A. Yes.

Q. When did you start to work for the Department?
A. August 1976.
Q. Now, at the time you started working for the Department, were you aware of this policy that is described here as being in place since the mid '70s, the mid 1970s?
A. I am going to help you a little bit. I received training after I was employed. To understand, this was the policy, convention, standard of the Idaho Department of Water Resources.
The reason I qualified it -- you said, did I come to Water Resources? I interpreted that to mean, did I come to Water Resources with that knowledge? No, I did not. The first day I worked, I didn't know that. It's something I learned in the period of my employment.
Q. All right. And can you tell me, from your recollection, when you came into that knowledge or became aware of that policy or convention or standard of the Department of Water Resources? I am not asking for a specific day. I am just asking for a general time frame after you started work there.
A. Prior to 1979.
Q. So you were aware of this convention or policy or standard of the Department before 1979?
A. Yes, sir.

Q. Now, was this policy -- I am just going to use "policy" instead of using all three words. Okay?
A. Sure.
Q. Was this policy, as far as you knew in 1979, reflected in any rule or regulation of the Department of Water Resources?
A. I cannot recall seeing it.
Q. Have you seen this policy reflected in a rule of the Department of Water Resources since 1979?
A. Yes, sir.
Q. And do you know what rule that would be?
A. The only place I know for certain is in the reference in Exhibit No. 5 of Exhibit No. 1 and Exhibit 6 of Exhibit No. 1 that refers to Adjudication -- or Memorandum 34.
Q. Turn your attention to Exhibit No. 5 on Exhibit No. 1 to the deposition, if you would, Mr. Shaff.
A. I'm at Exhibit No. 5.
Q. Now, the text on page 4 of Exhibit No. 1 makes a specific reference to page 67 on Exhibit No. 5. Do you have that page before you?
A. Yes, sir.
Q. Turning your attention to subparagraph Roman Numeral V, A, to Exhibit No. 5 to Exhibit No. 1, do you see the reference that says "Amount"?

A. Yes, sir.
Q. Would you read the first paragraph under the reference that says "Amount" on page 67? Read the whole paragraph, if you would.
A. "Amount includes the rate and volume of diversion for each nature of use, and the total rate and volume of diversion and total consumptive use. See Adjudication Memo #31 as to measurement of flow for ground water claims that require field exam; see Adjudication Memo #34 as to which rights require determination of diversion volume. See Application Processing Memo 14 as to determination of amount for rights that include storage purposes." End of paragraph.
Q. Thank you, Mr. Shaff. Can you tell me what the term -- well, first, let me ask you this: Are you familiar with this page from the document identified as Revised Claims -- no -- excuse me -- the document referred to on page 4 of Exhibit No. 1 as the "Claim Investigation Handbook"?
A. Yes.
Q. So you have seen this page before in the course of your work for the Department?
A. Yes.
Q. Can you explain to me or provide me with your

understanding of what the term "each nature of use" means?
A. "Nature of use" refers to the beneficial use, or uses, to which the appropriated water is placed.
Q. And are the terms "nature of use" or "purpose of use" co-equal?
A. I would define them synonymously.
Q. Now turn to the document which is described as Exhibit 2 to Exhibit No. 1. If you would, find that document, please.
A. Yes, sir. I have it.
Q. Can you --
A. I have the document for Exhibit 2 of Exhibit No. 1.
Q. Thank you. Can you describe that document? Well, first, can you identify that document? Have you seen it before?
A. I identified this document as the Recommendation -- or Director's Report for Water Right No. 63-3174.
Q. And there is a lot of language on that document and some numbers, but I would like to turn your attention to the phrase "purpose of use." Do you see where that phrase is used on the document?
A. Yes. It's about the middle of the text.

Q. And there is a line under the phrase "purpose of use." And then, below that line, it says, "irrigation." Do you see that?
A. Yes.
Q. Now, is that description of "purpose of use" the same as the reference in the Claims Investigation Manual on page 67 that says "nature of use"?
A. Yes, sir. I would apply the same meaning to both.
Q. So given that, would it be correct to understand that -- well, strike that. Describe for me, if you would, the function of the language which you described -- not "described" -- which you read from page 67 into the record -- what function that language played with respect to review of water right claims and, particularly, review of the claim that is involved in this proceeding.
In other words, did the Department -- or did the people that were involved in reviewing this particular water right utilize that language and apply it?
A. The staff assigned in the Department for adjudication work are directed to use the instruction or information from page 67 in reviewing the purpose of use of the water right.

Q. Well, are the individuals working on water right recommendations in the Adjudication instructed to use anything else with respect to that language on page 67, other than "purpose of use"? There is more language in the paragraph you read, other than that.
A. That's true. The question was to "purpose of use" and "nature of use," up to this point.
Q. Actually, my question -- let me ask another question so we can clarify that. Okay?
A. Okay.
Q. Was the language on page 67 used by individuals working on the recommendation for Water Right 63-3174, as far as you would assume?
A. Yes. I would assume they did.
Q. And would the language that we have identified from page 67 be utilized by individuals working on other water rights, applying all of the admonitions or requirements contained in that language?
MR. BAXTER: I am going to object as to --
THE WITNESS: May I qualify the statement?
MR. BAXTER: I object as to form because it calls for speculation on behalf of the witness.
Go ahead and answer the question, Mr. Shaff.
THE WITNESS: I want to correct your prior question.

BY MR. CAMPBELL:
Q. Sure. Go ahead.
A. At the time the recommendation was prepared for 63-3174, they did not use page 67 of Exhibit No. 1. They would have used the information in Exhibit 6 that is from the latest reading from page 4, in the same paragraph you read.
Q. Page 4 to Exhibit No. 1?
A. Yes. I'm sorry. At any rate, the Revised Claims Manual -- they wouldn't -- the Revised Claims Manual replaced page 67 from Exhibit No. 1 that we have discussed.
Q. I appreciate that clarification. So can you tell me when the Revised Claims Manual replaced page 67 that we have been talking about?
A. Not specifically.
Q. Can you give me a year?
A. Not even a year. No, sir.
Q. Well, can you give me a five-year stretch, since the Adjudication has been going on for twenty years?
A. I can only recall during the tenure of David Tuthill as Adjudication Bureau Chief, and I can't tell you when that started.
Q. So the change to the Revised Claims Manual took

place during Dave Tuthill's tenure? Is that what you are saying?
A. That's my memory.
Q. Fine. Thank you. And based upon your memory, again, Mr. Shaff -- and I am just asking for your best recollection -- do you recall that page 67 of the Claims Investigation Manual -- not the revised version but the original version -- was ever used in the preparation of recommendations in the Director's Reports for water rights?
A. I would presume no.
Q. But why is that?
A. The training of the staff said to no longer follow page 67 but to follow the Revised Claims Investigation.
Q. Perhaps you misunderstood my question. My question was: During the course of the Adjudication, was page 67 of the original Claims Investigation Manual ever used by individuals at the Department for preparation of the recommendations for water rights? Ever?
A. Yes, sir.
Q. So your prior answer was that -- well, strike that. Would it be correct to say -- or is it true that page 67 of the Claims Investigation Manual, as reflected

in Exhibit 5 to Exhibit No. 1, was used by Department employees for preparation of recommendations in the Snake River Basin Adjudication before the Revised Claims Manual was implemented?
A. Yes, it was.
Q. Mr. Shaff, while the original Claims Investigation Manual was being utilized by Department employees in the Adjudication, the SRBA, did those individuals apply the language in subparagraph 3 on page 67 to all water rights? And by "all water rights," I mean all natures of use of water rights, if that helps to clarify it.
A. For the time page 67 was the document the staff was directed to use, page 67 was used for making recommendations in the SRBA.
Q. Was it used for all types of water rights -- that is, municipal water rights, irrigation water, hydropower water rights, all of the different purposes of use or natures of use of water rights? That's my question.
A. Page 67 was part of the entire Claims Investigation Manual that was used for making all of the recommendations in the SRBA by the Department of Water Resources at that time.
Q. Well, I understand that. That wasn't my

question, though. My question was: Was this portion of the Claims Investigation Manual that is specifically referred to in Exhibit 1, this 706 Report or the Supplemental Director's Report -- being very important was this page, this rule that the Department -- I use that term loosely --

A. Yes.

Q. Was the rule that the Department used applied uniformly to all types of water rights?

A. Yes, sir.

Q. So every water right, every nature of use of water right in the Adjudication, while this document, page 67, was in effect, included a volume of diversion in each recommendation?

A. To my knowledge, the Claims Investigation Handbook does not direct the staff to apply diversion volume to all water right recommendations.

Q. Well, I am talking about page 67 that you read into the record. I would like you to look at that page, if you would, while I read the following. I will quote under paragraph Roman Numeral V, A, 3.

Quote, "Amount includes the rate and volume of diversion for each nature of use, and the total rate and volume of diversion and total consumptive use." Did I read that correctly?

A. Yes, sir, you did.

Q. Now, turn your attention to Exhibit 6 to Exhibit No. 1, Mr. Shaff, if you would, please. Are you okay? Do you want to take a break?

A. No. Let's proceed.

Q. That document, the attachment to Exhibit No. 1, is described at the top as "Chapter 6, Purpose of Use, Quantity for Each Purpose, and Total Quantity;" Is that correct?

A. Yes. You have characterized it correctly.

Q. Can you tell me what this three pages of the document is, Mr. Shaff? It is described as pages from the Revised Claims Manual; is that correct?

A. Yes.

Q. And can you tell me what the purpose of these pages is as it relates to the process of preparing recommendations by the SRBA staff of the Department?

A. If I may, in Roman Numeral I, "Introduction," it says, "The purpose of quantity elements of a water right lie at the heart of the description of water use under a water right. The agent must be familiar with how to describe the various uses of water the investigation uncovers.

"Further, the method by which the water right was established determines to a large extent what

evidence is relevant to the purpose of use and quantity to be recommended."

I believe that answers your question.

Q. Well, let me inquire a little bit further. So are you suggesting that this introductory paragraph is a requirement that the agent utilize all of the terms or admonitions contained in the following portions of the three pages in Exhibit 6?

A. Yes.

Q. So is it fair to describe these three pages as the rule book for the claims agent that is evaluating a water right claim in the SRBA?

A. Yes, sir.

Q. Turn your attention to the second full paragraph under Roman Numeral II, "Purposes of Use and Quantity," if you would. By that, I am referring to the paragraph that starts with the words, "The agent's recommendation . . ."

A. Yes. I'm in the middle of that page.

Q. What does "the agent's recommendation . . ." refer to?

A. The staff of the Adjudication Bureau are assigned to specific water right claims to review and prepare a recommendation to go in the Director's Report, or a Director's Report, of that water right.

They are to prepare the Director's Report recommendation for purpose of use, quantity for each purpose, and total quantity by, using your word, the rules that are set out in Chapter 6, Revised Claims Manual.

Q. So the agents that -- correct me if I am wrong. Is it correct that Agent David Tuthill -- I think you said that is who worked on the water right recommendation for 63-3174; is that correct?

A. To my knowledge, yes.

Q. Mr. Tuthill then would have followed the requirements or the instructions of the second full paragraph under Roman Numeral II of Chapter 6, Exhibit 6 to Exhibit No. 1; is that correct?

A. I would expect him to do so. Yes, sir.

Q. So just turn to Exhibit 2 to Exhibit No. 1, which you described previously as the recommendation for Water Right 63-3174.

A. Yes.

Q. Would it be your understanding that Mr. Tuthill produced the numbers under "Quantity" on the Recommendation, based upon the language on page 1 of Chapter 6, Exhibit 6 to Exhibit 1? Do you understand?

A. Yes.

Q. Can you tell me what the term "volume of

diversion" means?
A. Pardon me. Would you help me find where you are?
Q. I'm sorry. On page 1 under Chapter 6 to Exhibit 6, the second line in that paragraph we were talking about, it says, ". . . diversion for each use, and the total rate and volume of diversion." Do you see that?
A. The second-to-the-last full line of that paragraph?
Q. No, no, no, no.
A. Okay.
Q. Under Chapter 6 -- are you on that page?
A. Yes.
Q. Roman Numeral II, the second full paragraph.
A. Okay.
Q. It starts, "The agent's recommendation . . ."
A. Yes.
Q. And I will just read it. "The agent's recommendation on quantity must include the rate and volume of diversion for each use, and the total rate and volume of diversion." Okay. Now, the phrase is used twice there?
A. Yes.
Q. Is that phrase, "volume of diversion," the same

as "annual diversion volume"?
A. I would interpret them the same.
Q. And is that the same -- strike that. Is that volume of diversion reflected on Exhibit 2 to Exhibit 1?
A. Yes.
Q. Where is it reflected? What is the number that reflects that volume of diversion?
A. The number from Exhibit 2 of Exhibit 1 that I would interpret as the annual diversion volume is in two locations on Exhibit 2. The left-hand label "Quantity" has "513.00 AFY," meaning annual -- pardon me -- acre feet per year.
Secondly, where we were previously, "Purpose of Use" and "Period of Use," lists "Irrigation Purpose of Use" and "Period of Use" as "03/15" and "11/15."
Under "Quantity," then, on the right-hand side, it is, again, "513.00 AFY." They are both the same number on Exhibit 2. It refers, in my mind, to the annual diversion volume.
Q. Do you have a pen with you, Mr. Shaff?
A. Yes.
Q. Would you take your pen and would you circle those two references that you just described? It is in blue ink, I think?
A. It is. I am circling with a slight tremor.

Pardon me.
Q. That's fine.
A. At any rate, Exhibit 2 of Exhibit 1 now shows a circle around "513.00 AFY" in two locations that I've made in this deposition exhibit.
Q. Thank you very much. Now, on the recommendation, Exhibit 2 to Exhibit No. 1, again, it says "Purpose of Use" in at least one location on the document.
Does that phrase, "Purpose of Use," coincide with the description of each use on page 1 of Chapter 6 of Exhibit 6 that we have been talking about?
A. Yes.
Q. So when the document says, "The agent's recommendation on quantity must include the rate and volume of diversion for each use . . ." the term "each use" means "purpose of use" on the recommendation?
A. Yes, sir.
Q. And based upon your knowledge of the application of the Revised Claims Manual and Chapter 6, has the quantity of the water right in each recommendation prepared pursuant to Chapter 6 and the Revised Claim Manual included the rate and volume of diversion? And volume of diversion is annual volume of diversion; correct?

A. Yes.
Q. Has that been done with regard to each type of use under water rights, as far as you know?
A. That has been done as the total of Chapter 6 directs the staff to do.
Q. Well, you, obviously, have some qualification. What are you talking about in terms of "the total of Chapter 6"?
A. The full direction for the staff, under Roman Numeral II, "Purpose of Use" and "Quantity," goes to applying the elements you have described and on the sentence that has been read into the record to each water right and each nature of use for those water rights.
Q. So based upon what I understood you to say, the volume of diversion is listed under each water right that is recommended in the adjudication since Chapter 6 was adopted; is that correct?
A. No.
Q. That's not correct?
A. That's not correct.
Q. Well, explain to me how I am misunderstanding what your testimony was.
A. Chapter 6, depending on the nature of use, may not have a diversion volume. For instance, hydropower

is unlikely to have a diversion volume.
Q. Okay.
A. Municipal use -- Chapter 6, in general -- pardon me -- would not have a recommendation for a diversion volume unless the water right license that was issued had a diversion volume on it.
Q. And for a municipal right, as you have described, that had a license with a diversion volume, why would that be part of the recommendation?
A. Purely as an example, a water right that was initiated under a water use other than a municipal use and the claimant asserts, without reciting the specific statute, an accomplished transfer allowed by the statute -- to have a municipal use, the diversion volume, as a part of the license, would still apply to the recommendation made to the SRBA court.
Q. I appreciate your answer. I am just trying to understand. So from what I heard you say, if a municipal water right was based upon a license in the adjudication that an agent was evaluating and that license did not have an annual volume of diversion or a volume of diversion -- the two terms are synonymous -- then the Department would not impose or would not add that number to the recommendation for that municipal water right?

A. Yes.
Q. But if the Department, agent, reviewing a water right claim for a municipal water right that was based upon a license that did have a volumetric -- excuse me -- a diversion volume quantity, then that agent would recommend that municipal water right with a volume of diversion; is that correct?
A. Yes, sir.
Q. Are there any other instances where the Department would have that discrepancy and treatment of water rights where a license contained something, an element, and the Department would agree with that but, otherwise, would not impose an additional element on the recommendation, as far as you know?
A. Without being exclusive, the State's minimum stream flows do not have a diversion volume on them. The Department would not impose a diversion volume on the description of the minimum stream flow water right.
Q. And those minimum stream flow water rights are pursuant to licenses; is that correct?
A. Yes.
Q. Turn your attention to Exhibit No. 6, Mr. Shaff. Actually, it starts on page 2 where it says "Annual Volume" in the caption. That does not really have anything on there except the caption. Turn to page

3, if you would, of Exhibit 6.
A. Page 3?
Q. Yes. Could you read for the record the first two sentences on page 3 of Exhibit 6 to Exhibit 1?
A. Yes. This is from the first paragraph of page 3 of Exhibit 6. "The agent should recommend an annual volume for all ground water irrigation rights. Use the 'Field Headgate Requirement" map for this determination if the information is not otherwise determined in a license, transfer or reasonable decree."
Q. Thank you, Mr. Shaff. Now, first, I need to clarify another apparent inconsistency in phraseology. That sentence -- those two sentences -- the first sentence says, quote, "The agent should recommend an annual volume . . ." The term "annual volume" is what I want you to focus on.
A. Yes.
Q. Does the term "annual volume" correspond with the term on page 1 under Chapter 6 as "volume of diversion"?
A. My interpretation for the definition of the term "annual volume" on page 3 is "annual diversion volume."
Q. Go ahead.
A. Exhibit No. 1 indicates that a given diversion

rate for 24 hours, 365 days per year, in a non-leap year, would produce a given annual volume.
That is, the annual volume, in the full extent of the diversion sense, is greater than what is meant by the annual diversion volume or the -- I apply the sentence of number 1 on page 3 where it says "annual volume."
Q. You sort of lost me.
A. Okay.
Q. I'm sorry. Let me ask a couple of questions to clarify. So what you are saying is that if a water right diverted 24 hours a day, 365 days a year -- except for a leap year, I think you said?
A. Yes.
Q. That quantity of water that would be diverted over that period of time would be the annual volume; is that correct?
A. Yes. It is possible to apply annual volume to the full number.
Q. My question is: Is that definition of "annual volume" the same definition that you would apply to the sentence that you read on page 3 of Exhibit 6?
A. No.
Q. So what definition would you give to the phrase "annual volume" on Exhibit 6, page 3, that you read?

A. The annual volume from page 3 of Exhibit 6 is a function of the -- it says, "For irrigation rights, a function of the irrigated land and the annual volume of water necessary in an irrigation season to irrigate the land, in a volume sense."
Q. Well, okay. So let me ask you this question, then. The reference to "volume of diversion" on page 1, Chapter 6 of Exhibit 6 that we talked about, says, "volume of diversion." It says that a couple of times.
We previously examined that phrase and I think you stated -- correct me if I misstate this -- that, in your view, "annual volume of diversion" is the same as "volume of diversion," in that document; is that correct?
I am just trying to clarify. I am not trying to, you know, confuse you. I am trying to clarify.
A. Right. Yes. I understand.
Q. These distinctions are important.
A. Chapter 6, with respect to irrigation uses, is a function of the number of acres irrigated in and the water applied to it, presuming a full supply can be applied, rather than how much the well will produce over that period of time.
Q. I understand that. Okay. So I just -- go ahead.

A. The understanding I just explained is what I interpreted and instructed staff to use for annual volume.
Q. Perhaps we can short-circuit this. Is it correct, in your mind, that the term "annual volume" on page 3, in the first sentence on page 3, is incorrect and should read, "diversion volume" or "annual diversion volume"?
A. The sentence could be corrected and not lose the meaning I applied to it.
Q. Well, not to belabor the point, my understanding of your testimony was that, in your mind, annual volume is the total maximum that a well could produce over a 24-hour, 365-day, except for leap year, period; is that correct? That is what I understood.
A. Yes.
Q. And in Exhibit 6, page 3, the phrase "annual volume" in the first sentence on that page really is not the same as 24 hours a day, 365 days a year, except for leap year, production of a well?
A. Correct.
Q. All right. So to be more accurate, as far as your interpretation of the phrase "annual volume," it should read "annual diversion volume" or "volume of diversion;" is that correct?

A. "Annual diversion volume" --
Q. All right.
A. -- would be consistent with how other Department documents refer to it. The quantity, for instance, that is applied for Water Right 63-3174 is 513 acre feet per year.
Q. Thank you very much. That made it clear. Now, turn your attention, again, to the same sentence. The sentence states, quote, "The agent should recommend an annual volume for all ground water irrigation rights." Did I read that correctly?
A. Yes.
Q. Can you tell me why this sentence only pertains to ground water irrigation rights?
A. This sentence -- applying ground water irrigation rights is consistent with Adjudication Memo 34 that is described on page 1 of Chapter 6.
Q. The language, though, does not refer to Adjudication Memo 34, does it?
A. This sentence does not. The sentence that you have read on page 3 is a paragraph under heading A, "Irrigation," meaning irrigation use. There are several paragraphs there.
From page 1 of Chapter 6, I am not so certain that I didn't read the second sentence. "See

Adjudication Memo #31 as to measurement of flow for ground water claims that require field exam; see Adjudication Memo #34 as to which rights require determination of diversion volume," period.
Q. Where were you reading from, sir?
A. It would be the third paragraph on page 1 of Chapter 6.
Q. And you said --
A. It's where it reads -- it begins, "The agent's recommendation . . ."
Q. I see that. But you made reference to --
A. I read the second sentence beginning, "See Adjudication Memo #31 . . ."
Q. Okay.
A. You will see, below, within that sentence, "Adjudication Memo #34," as to which rights required determination of diversion volume.
Now, then, the parallel comes back in the first sentence on page 3, "The agent should recommend an annual volume for all ground water irrigation rights." The sentence I just read is tied to Adjudication Memo 34 off of page 1 of Chapter 6.
Q. So you are saying that Adjudication Memo No. 34 applies, also, to the first sentence on page 3 of Chapter 6?

A. Yes. They must be read in context and taken as a whole, rather than isolated.
Q. I understand. I appreciate that clarification. Now, getting back to my question, does the sentence on page 3 of Exhibit 6 that says, quote, "The agent should recommend an annual volume for all ground water irrigation rights," end quote, mean that this directive only applies to ground water irrigation rights; or does it mean something else?
A. The sentence is used within the heading "Irrigation Use." The word "all" refers to, in my mind and my direction, all -- well, all ground water irrigation rights -- not all ground water rights -- all ground water rights with purpose of use as irrigation.
Q. And my question is: Does that sentence apply at all to surface water rights?
A. This sentence does not.
Q. Does it apply at all to irrigation water rights from surface water supplies?
A. No, it does not.
Q. Turn your attention to the next -- well, not the next but the portion of page 3 of Exhibit 6 that is described as "Municipal," capital letter B, "Municipal." Do you see that reference?
A. Yes. I'm at the same location.

Q. And then, below that, under "B," there is a subsection 1 and subsection 2. Subsection 2 reads, "annual volume." Do you see that?
A. Yes.
Q. Could you read the sentence under "Annual Volume," please?
A. "Municipal water rights should not be recommended with an annual volume unless contained in a license, transfer or reasonable decree," period, end of sentence.
Q. Thank you, Mr. Shaff. Now, again, we went through a fairly complicated, lengthy description of the phrase "annual volume;" and you provided your clarification of the use of that term. It crops up again here.
Is the interpretation that you provided with respect to the first sentence on page 3 of Exhibit 6 applicable to the use of annual volume at this location?
A. Yes.
Q. And it is the same term that produced the result of 513 acre feet per year on Water Right 63-3174; is that correct? "Volume of diversion" or "annual diversion volume" is really what "annual volume" means here, on page 3; is that correct?
A. Under the "Municipal" heading, yes.

Q. Thank you, Mr. Shaff. We have talked about the Claims Investigation Manual and the Revised Claims Investigation Manual.
Can you tell me if either one of those documents were ever adopted by the Idaho Department of Water Resources as a rule pursuant to the Administrative Procedures Act?
A. Not to my knowledge, no, sir.
Q. And would you be in a position to know that, given your position with the Department?
A. Yes, sir.
Q. Now, you mentioned in the document, the Claims Investigation Manual document, Exhibits 5 and 6 -- or at least Exhibit 6 referred to Adjudication Memos. You identified Adjudication Memo No. 34. Do you recall that testimony?
A. Yes.
Q. Now, can you describe to me whether or not any of the Adjudication Memos -- I guess there are quite a few of them since 34 is the one that was mentioned -- have been adopted as rules by the Department of Water Resources, pursuant to the Administrative Procedures Act?
A. None of those memos, in their state, have been adopted as rules under the Administrative Procedures

Act.
Q. Can you describe for me how these Adjudication Memos are produced?
A. Those memos are produced under the authority of the Director, if you will, and, perhaps, I will say, driven by the Bureau Chief. Typically --
Q. The Bureau --
A. -- it passes if the Adjudication Bureau Chief prepares or reviews, endorses, if you will, the memo. It is correspondingly approved, accepted, perhaps not signed by the Division Administrator; and, correspondingly, the Director of the agency is aware the document has been produced.
Q. I am not sure I understand what you mean by, ". . . the Director of the agency is aware the document has been produced." Do you mean that the Director reviews the memos before they are formally adopted by the Department?
A. I can't answer that the Director reads every word in every one of the Adjudication Memos.
Q. Okay.
A. The Director was briefed on the contents of the memos.
Q. So is it fair to say that the Director does not sign the Adjudication Memos?

A. I would answer that I would find it a rare instance.
Q. And how are these Adjudication Memos changed or revised if they -- well, are they ever changed or revised?
A. Yes.
Q. And how is that done?
A. Much the same procedure. The Bureau Chief identifies deficiencies in the phrasing of the -- the requirements set out by the memo. In other words, if there's a misunderstanding within the staff of the meaning therefor, the Bureau Chief determines that we can make this written communication clearer by revising it.
Q. And can you tell me -- I think you already described this -- what an Adjudication Claims Agent would use these Adjudication Memos for and the Claims or the Revised Claims Investigation Manual? What is the purpose of these things for the average -- not just the average but every agent that works on preparing recommendations in the Snake River Basin Adjudication?
A. The memorandums are either guidelines that are expanded in the Claims Investigation Manual, or some aspect of the Claims Investigation Manual is clarified in an Adjudication Memo.

Not all of the Adjudication Memos are integrated with the Claims Investigation Handbook, revised or original.
Case in point: There is an Adjudication Memo about not accepting gratuities, payments, for assisting claimants in preparing -- assisting in preparing adjudication claims. That memo is nowhere in the Claims Investigation Handbook.
Q. Are you finished with your answer?
A. Yes.
Q. So the Claims Investigation Handbook, either the original or the revised version, has references to the Adjudication Memos in them; right?
A. Yes.
Q. And then if there is a reference to an Adjudication Memorandum, or Adjudication Memo -- actually, it says, "Memo."
A. Yes. It's short.
Q. Then the agent, unless he knows the Memo by heart, would refer to the Memo and incorporate that directive in concert with what the revised or the original Claims Investigation Handbook says; is that correct?
A. Yes.
Q. Is that correct?

A. Yes, sir.
Q. All right. Now, in terms of the agents, how do they keep an accurate, up-to-date version of all of the Adjudication Memos? How is that done?
A. The Memorandums initially, in 1987 and 1992 -- the first Director's Report was in 1992 -- were distributed in hard copy form. Currently, the Department has an Intranet site; and those scanned documents are available through a link as a scanned document. They are informed that there is a new Memo.
In addition, direct training occurs to make sure people are understanding what it says and where they have the references. They work until they become intimately familiar with the contents in their work. Their efficiency and effectiveness, as a result of that, increases -- referring to the electronic, scanned copy of that memorandum.
Q. Are you involved in any of the training of these people?
A. I have been.
Q. Over what period of time?
A. In terms of the SRBA, from roughly July 1, 1987, through -- I don't think I've done any training in the last two to three months.
Q. A fairly long period of time. Mr. Shaff, we

did not start with this because of some other issues. Can you give me a brief description of your education past high school?
A. Bachelor's Degree in Wildlife Biology, Bachelor's Degree in Journalism, Master's Degree in Public Administration.
Q. And where did you obtain those degrees?
A. Wildlife Biology, Humboldt State University, Arcata, California; journalism, Pocatello, Idaho State University; and Boise State University for the Master's in Public Administration, as well as Associate's Degrees from junior college.
Q. And in terms of your education, when was the last degree obtained by you?
A. December 2005.
Q. Was that the --
A. Pardon me. May 2005.
Q. Was that --
A. My Master's in Public Administration.
MR. CAMPBELL: Thank you.
MR. BAXTER: Scott, if you are going to jump into something new, why don't we take this opportunity to take a break?
MR. CAMPBELL: Let's go off the record.
(Recess.)

BY MR. CAMPBELL:
Q. We are back on the record with Mr. Shaff. Thank you, Mr. Shaff, for your patience. Turn to Exhibit No. 1, page 6, again, if you would, please.
A. Page 6 of Exhibit 1?
Q. Exhibit 1, yes. There is a reference in the second full paragraph that starts with the language, quote, "The Revised Claims Manual . . ."
A. Yes.
Q. Do you see that?
A. I'm at that point.
Q. Since it is an exhibit, I won't have you read the whole paragraph. To yourself, would you read that paragraph that starts with "The Revised Claims Manual . . ." so I can ask you a couple of questions? Tell me when you have finished.
A. Yes. I'm at the end of the paragraph you referenced on page 6.
Q. Thank you. Now, in that paragraph, it describes a portion of the Revised Claims Manual. At the end of the paragraph, it states, quote, "Here, an annual volume limit is critical because of the need to protect junior priority rights in the Treasure Valley where ground water supplies are limited," end quote. Did I read that correctly?

A. Yes.
Q. Did you prepare that sentence, Mr. Shaff?
A. I did not write the sentence.
Q. Did you have some role in the preparation of that sentence?
A. Yes. I referenced the Department's understanding that areas of the Treasure Valley have limited ground water supplies -- "limited" in the context of the supply versus the demand.
Q. And when you said, ". . . the Department's understanding . . ." what did you mean by that?
A. There has been a hydrologic study of the ground water; and I know the Director held a public meeting recently in the Eagle area, over ground water supplies, with the public in that vicinity.
Q. By "recently," what period are you talking about?
A. Within the last -- certainly, within the last six months. I want to say three, but I can't give you a specific date.
Q. And do you know where Water Right 63-3174 is located in proximity to the Eagle area?
A. With my knowledge of the general description from the Public Lands Survey description on Water Right 63-3174, I would place it south and west of Eagle but in

the Treasure Valley -- "Treasure Valley" being the Boise River Valley.
Q. Would this water right be south of the Boise River?
A. I think so.
Q. So in the preparation of this sentence that we have been talking about, did you undertake any investigation of the number of junior priority rights in the Treasure Valley?
A. No, I did not.
Q. Do you know if anyone did?
A. No one, to my knowledge, did an accounting of how many water rights are junior to Water Right 63-3174.
Q. And you talked about the question of availability or supply of water in the Treasure Valley contrasted with need or -- that is not the term you used -- future supply or something? Is that what you said?
A. I was --
Q. We can read back your testimony.
A. The idea is the -- it's estimated because we don't know precisely. The quantity of ground water available in the Treasure Valley is near the demand of the existing water rights in the Treasure Valley.
In some places, in some years, the demand may

exceed the supply. In other years, because of variability year to year of the supply, it may exceed the existing water rights.
Certainly, from a responsibility for administering water resources in the state, the Department has an eye on further appropriations of water or the possibility of further appropriations of water, in the interest of knowing what the existing water rights are in the Treasure Valley -- the Treasure Valley specifically but it's certainly larger. It's throughout the State, for that matter.
Q. And just so I understand and clarify your comment, by the term "demand," are you talking in terms of the quantity that water right holders are desiring to divert; or are you talking about a generalized demand for more water by the community or by the cities or by developers?
A. In the balance context, it's the existing water rights.
Q. So that is the demand?
A. You need, as an administrator of the water resources, to know what exists before you can consider further appropriations and the demand, in that respect, for further withdrawals of water.
Q. So is it fair to characterize your testimony as

being that the demand under existing rights is the desire to divert the full quantity that existing water rights allow? Is that correct?
A. Yes.
Q. All right. Now, turn to the portion of page 6, if you would, that is above the portion that we were reading.
A. Yes.
Q. There is a phrase -- I will try to find the line. If you will, go to the bottom of the first paragraph and count up four lines.
A. Yes.
Q. There is the word "enlargement" there. Do you see that word?
A. Yes.
Q. Now, let's go to the beginning of that sentence where it says, quote, "The absence of a volume descriptor, and reliance on mere rate of flow, makes water rights vulnerable to injurious enlargement," end quote. Did I read that correctly?
A. Yes, with the exception -- well, to the period, yes. There is --
Q. A footnote?
A. Footnote 5.
Q. And we talked about footnote 5 before?

A. Yes.
Q. All right. So I am asking you to describe, Mr. Shaff, or to clarify for me what water rights are vulnerable to injurious enlargement. What water rights are referred to in that phrase?
A. A junior water right relying on -- relies on historical practices of the diversion of senior water rights. A change in diversion volume of a senior water right could change the conditions and then, therefore, the available water for the junior water right.
Q. And is that what you mean by "injurious enlargement"?
A. The senior water right expanding the volume of water they had historically diverted on an annual basis, yes. The enlargement is using more water than had historically been used, and the result could be injurious to junior appropriators.
Q. So, basically, it is the historical practices? So if they expand the use of the water under a senior right, that could injure a junior water right holder?
A. Yes.
Q. So if the historical practice of the senior, before the junior water right was ever granted, was to divert a certain volume of water, then there would be no injury if the historical practice continued; correct?

A. Correct.
MR. CAMPBELL: Let me stop here. It is ten to 12:00.
(Recess taken from 11:50 a.m. to 1:30 p.m.)
BY MR. CAMPBELL:
Q. Mr. Shaff, I would like to remind you that you are still under oath for purposes of this deposition. Do you understand that?
A. Yes.
Q. We are reconvening now after the lunch break. I would like to have you turn your attention to page 7 of Exhibit No. 1, if you would, please.
A. Page 7?
Q. Right. I would like you to read the last paragraph on that page. I would like you to read that to yourself. It actually continues on to the next page, as well. So tell me when you have finished reading that full paragraph, if you would, please.
A. Just to make sure, it begins, "In sum . . ."
Q. Yes.
A. Thank you. Okay. I have concluded with, ". . . which is silent as to the same."
Q. Fine.
A. Just to make sure it's the same paragraph.
Q. Right. Mr. Shaff, did you have any role in the

preparation of that paragraph?
A. Yes.
Q. Describe that role, if you would, please.
A. I communicated to the person putting the words to the paper that the long-established practice -- if I can, I will loosely characterize 42-1427 as the ambiguity statute -- gave the Department authority to act.
Q. So you communicated those points to an individual? Was it Ms. Courtney?
A. I can't recall whether she was the only one or if the paralegal was in the same meeting.
Q. So there was a meeting where this communication occurred?
A. Exhibit 1 was prepared over a period of time and there were -- Ms. Courtney -- or there may have been others. For instance, Jan Shurte was in on a meeting. She wasn't in some other meetings.
Q. And that information was communicated to the participants at that meeting --
A. Yes.
Q. -- or meetings; is that right?
A. Yes, from me.
Q. Was there any other function that you performed with regard to the preparation of this paragraph that we

have been talking about?
A. Reviewing it, saying that the language was acceptable to me.
Q. And that is it?
A. Well, as -- yes. I didn't --
Q. In addition --
A. -- write the words.
Q. I am just trying to clarify.
A. Yes.
Q. In terms of the first sentence of the paragraph, it states, quote, "In sum, for longer than the SRBA has existed, IDWR has included a diversion volume to ground water recommendations, including those based on old licenses and decrees," end quote. Did I read that somewhat correctly, except for my stumbling?
A. Yes. That's what I read.
Q. Now, I would ask you to explain for me what this sentence means, by the term "diversion volume to ground water recommendations."
A. What I intended there is in concert with earlier testimony about the Claims Investigation Handbook related to specific water uses and applying diversion -- annual diversion volumes to those recommendations.
Q. And that would apply with respect to the 513

acre feet per year that is recommended on the water right that is subject to this subcase?
A. Specifically to 63-3174, yes.
Q. All right. Now, the sentence then goes on to say, ". . . including those based on old licenses and decrees." Can you explain to me what is meant by "old licenses and decrees" in the context of that sentence? First of all, how old?
A. In another part of Exhibit 1, it is indicated that the mid 1970s was the change in practice by the Department. So licenses issued in the 1960s, 1950s for ground water for irrigation purposes, specifically, did not have volumes, as I have found any, on the face of them -- diversion -- annual diversion volumes on the face of the water right license or decree.
Q. And you are restricting your comment just to ground water irrigation rights; is that correct?
A. I'm more confident of that area. Going outside of it for other water uses, I suspect not but I don't -- I hesitate to -- I don't know.
Q. So if I understand the sentence correctly, it is saying that, before the SRBA existed, the Department of Water Resources has included diversion volume on ground water recommendations, even for old licenses and old decrees; is that correct?

A. Yes.
Q. So before the SRBA existed -- what time period are you describing in that sentence?
A. I know for certain, in what I will call the Payette Adjudication, this practice was followed of putting diversion volumes on water rights from ground water sources.
Q. For irrigation purposes?
A. For irrigation purposes, for domestic purposes, and for commercial water use.
Q. How about for municipal purposes?
A. I would be surprised. I don't know in the -- I don't recall, in the Payette Adjudication, if municipal purposes had a diversion volume.
Q. What about surface water rights? Did they have diversion volumes?
A. Not unless, through a prior administrative proceeding, those water rights had volumes on them -- diversion volumes.
Q. And when did the Payette Adjudication take place?
A. The analogous commencement order -- pardon me me if I'm -- I wasn't here in 1969. At any rate, the Payette Adjudication was commenced by order of the court in 1969; and the report was submitted in 1979 to the

court as a proposed finding of water rights.
Q. So at least in 1979, the Department of Water Resources did what you have described with respect to the annual diversion volume for those rights in the Payette Adjudication?
A. Yes.
Q. Any other adjudications where this was the procedure that the Department used?
A. There were other adjudications. I couldn't say, today, which ones.
Q. Well, you said there were other adjudications; and my question was where this procedure was used by the Department. So is your response to that question that this procedure was used by the Department in other adjudications? Is that your answer?
A. My answer is that I do not know if it was used in the other adjudications.
Q. Thank you for that clarification. The next sentence in that paragraph starts with, quote, "To belatedly challenge this long-established practice . . ." Do you see where I am reading?
A. Yes.
Q. First of all, can you tell me what is meant by "belatedly challenged"?
A. To my knowledge, the practice the Department

has executed in the Snake River Basin Adjudication for older licenses and decrees has not been challenged in the way that this subcase is challenging the practice.

Q. But with regard to Mr. Tlucek's water right, the challenge to this practice was presented in a timely fashion; is that correct?

A. Oh, yes. But what is meant by challenging the long-established practice -- there are many other recommendations similar in nature -- irrigation, ground water resource, no diversion volume on the license or the decree -- and the Department recommending a diversion volume.

Q. So --

A. No objections and hundreds of partial decrees issued.

Q. What you are saying is that no one, to date, in the adjudication process has objected to this element on a water right of this nature previously?

A. Correct.

Q. All right. And would you explain to me how this challenge could affect hundreds of recommendations, some of which have already been partially decreed? That is what the statement says, does it not?

A. Yes.

Q. How could that be?

A. You are asking for speculation on how other subcases might proceed.

Q. No. I am asking you to explain what you mean by this sentence. I mean, you said you agree with everything in this report.

A. There could be motions to set aside partial decrees to have the element diversion volume removed and motions for late objections for those that are still pending, the 6,000 or so still in the objection period yet, and follow suit with the precedence, if you will.

Q. Mr. Shaff, you are not an attorney, are you?

A. No.

Q. And in terms of the adjudication process, are you aware of other issues that have been raised by parties in the adjudication that have prompted motions for late objections?

A. I don't recall any.

Q. You do not recall any other circumstance in the Snake River Basin Adjudication where other parties have filed motions for late objections?

A. I could not -- I cannot recall others. I believe there were. I do not know the nature or the subcases in which it occurred.

Q. All right. Is that something you follow? Do you follow how many late objection motions are filed?

A. No, no.

Q. All right. Turn to page 8, if you would, Mr. Shaff. In the fourth line from the bottom of that paragraph we have been talking about, it says, quote, "Annual volume is part of the quantity element," end quote. Do you see that?

A. Yes.

Q. Then it says, "See I.C. Sections 42-1409(c)(i), 1411(2)(c);" and then it has an IDAPA reference which I won't read because it is too long and is not relevant for my question.

In terms of the citations, except for the IDAPA reference, Mr. Shaff, did you play any role in the preparation of the citations to the Idaho Code Sections with regard to that sentence?

A. I am familiar, in general, with those Code Sections. I have a section of that Code in my office.

Q. Okay.

A. I read it from time to time, as it's necessary.

Q. And did you assist in the drafting of this portion of the Exhibit 1 report that contains that sentence and those Code Section references?

A. Yes.

Q. Idaho Code Section 42-1409 deals with the notice of claim?

A. Yes.

Q. And Idaho Code Section 42-1411 deals with the report of the Director; is that correct?

A. May I see your Code, please, to make sure?

Q. I will show it to you. I will show it to you. It is right there.

A. Thank you.

Q. Yes.

A. I'm never sure of the Code Section, one --

Q. Is that correct?

A. -- part from another.

Q. Sure. Is that correct?

A. Yes.

Q. In terms of the reference in Exhibit 1, page 8, to 42-1411(2)(c) -- you can review this. I will hand it to you in a minute. Is there anything in (2)(c) that requires the Department to describe the quantity of a ground water right for irrigation purposes with an annual volume of diversion?

A. Yes. I believe it does.

Q. Would you read the portion that says that annual volume of diversion is required for ground water irrigation water rights? That was my question. Just read it.

A. In paragraph (c)?

Q. Yes.
A. The pertinent part is: ". . . or annual volume of diversion of water for use . . . in acre feet per year . . ." I left out the words "for use or storage."
Q. Does it say anything about --
A. I read that it's one or the other in acre feet per year.
Q. Does it say anything about ground water irrigation rights there?
A. No.
Q. Does it say anything about surface water irrigation rights in that subsection?
A. No.
Q. Does it say anything about municipal water rights in that subsection?
A. No, it does not.
Q. Does it say anything about hydropower water rights in that section?
A. No, it does not.
Q. Thank you. I would like to hand you what has been marked as Exhibit 2, Mr. Shaff. Mr. Shaff, I would like you to look at that document that has been marked Exhibit No. 2, if you would, please. Tell me if you can identify it.
A. Yes. These are -- Exhibit No. 2 is the

Department of Water Resources Proposed Rules -- Adjudication Rules.
Q. Did you say "Proposed Rules"?
A. Yes. "Proposed" in the context that it's been submitted to the Department of Administration but it has not been provided to the Idaho Legislature for final adoption.
The Director has adopted them on a temporary basis. I may not have the Administrative Practices Act verbatim and precise, but the next step is adopting them by the Idaho Legislature.
Q. So that is your understanding?
A. These Adjudication Rules are in effect.
Q. Your understanding is that they are in effect, as far as the Department is concerned; is that right?
A. Yes.
Q. But your understanding is they have not been adopted by the Idaho Legislature?
A. This set of rules. There is an existing set of rules, same number, existing, adopted by the Legislature.
Q. But you are talking about --
A. This replaces those rules.
Q. Fine. Now, there are certain section references in that document which have dates by them?

A. Yes.
Q. For example, on page 10, I believe -- let me double-check here -- no. It is not on page 10. I'm sorry. Let me find it here. It is on page 8 on the document you have.
A. I'm on page 8.
Q. It is item (g). It says, "Amount of Water Claimed"?
A. Yes.
Q. Can you tell me, based upon your review of that particular section, whether or not that is one of the rules that has been adopted by the Idaho Legislature?
A. Given the date I see, on (g), page 8, I'm confident that rule had previously existed and was adopted by the Legislature.
Q. By that, I would assume that any other reference to sections of the rules that have "(7-1-93)," that parenthetical, would have the same status; that is, they have been adopted by the Legislature?
A. Yes.
Q. Would you read the language of paragraph (g) on page 8 of Exhibit 2?
A. I will begin with (g). "Amount of Water Claimed. The total amount of water claimed shall be listed at item seven (7) of the form. The total amount

of water claimed shall not exceed the total of the amounts listed at item six (6) of the form, or the total diversion capacity of the diversion system, whichever is less," period. End of item (g).
Q. Then it has, at the end of the line, "(7-1-93)"?
A. Yes, sir.
Q. Now, can you tell me what the reference to item seven of the form describes?
A. The elements on the claim form are numbered. And seven is the total quantity claimed for the water uses claimed.
Q. And look at Exhibit No. 1, again, if you would, please. Turn to the document that is attached as Exhibit 1 to Exhibit 1. If you could, turn to that.
A. Yes.
Q. Would you tell me if you can identify that document?
A. This document appears as the water right -- the amended water right claim for 63-03174.
Q. Is this a form that is generated by the Department of Water Resources -- not as filled out but the blank form?
A. This form is similar to the Department's blank form. The numbers on the claim form to Exhibit 1 of

Exhibit 1 are the same as on the blank claim form. The information or element submitted in this claim, I'm concluding, was done in the Agency, in data -- data entry into a database and then a report or claim form was generated from that activity.

Q. How do you conclude that, sir?

A. The appearance of the paper.

Q. Okay.

A. There are -- if I could expand?

Q. Sure.

A. There are other service providers who have duplicated or, nearly so, a similar appearance in the documents that are submitted by claimants. I'm confident this form was generated in the Agency's office.

Q. By "this form," do you mean Exhibit 1?

A. Exhibit 1 of Exhibit 1.

Q. All right. And the item seven on the first page of Exhibit 1 to Exhibit 1, is that the same item seven that is identified in item (g) on page 8 of Exhibit 2?

A. Yes, it is.

Q. So the reference, "The total amount of water claimed shall be listed at item seven (7) of the form," is the same seven that is on Exhibit 1 to Exhibit 1;

correct?

A. Yes.

Q. Can you tell me on Exhibit 1 to Exhibit 1 where it says that annual diversion volume has to be listed on the claim?

A. The form does not instruct as to the information to place on the form.

Q. So are you saying there is nothing on the form to require that annual diversion volume be listed?

A. There is space on the form to put -- to write or otherwise put the annual diversion volume.

Q. Well, that is true of lots of information, as well?

A. Yes.

Q. There is no information on the form, itself, though, that says "annual diversion volume" under "total quality appropriated," under item seven, though, is there?

A. You are correct.

Q. Turn to page 8 of Exhibit 2, if you would, Mr. Shaff. Do you have that document?

A. Page 8?

Q. Yes.

A. Yes.

Q. Thank you. Item (f)(iii), do you see that,

starting with, "The amount of water claimed . . ."?

A. Yes.

Q. Can you read that to me? Quote it exactly into the record, please.

A. Beginning at (f)(iii): "The amount of water claimed for each purpose for which water is claimed shall not exceed the amount of water beneficially used for the purpose claimed, and the period of use for each purpose claimed shall not exceed the period in which water is beneficially used for the purpose claimed," period. "(7-1-93)."

Q. Thank you. Would you read item (f)(iv), please?

A. Item (f)(iv): "The amount of water diverted shall be listed in cfs, and the amount of water stored shall be listed in af per annum," period. Again, "(7-1-93)."

Q. In those two items, (f)(iii) and (f)(iv), the reference to "(7-1-93)," as you indicated before, confirms that these two portions of the Adjudication Rules were adopted in 1993; is that correct -- or were in effect and adopted by the Legislature instead? That's what you testified about?

A. Yes. Characterizing it in the latter phrase is consistent with my knowledge.

Q. Exactly. Exactly. Is there anything in either one of those two sections that specifies that the amount of water claimed has to be claimed, including an annual diversion volume, unless it is a storage water right?

A. Annual diversion volume is not a part of either one of those rules --

Q. Thank you. Now, Mr. Shaff --

A. -- as written.

Q. Well, that is what we have to pay attention to, what is in writing. With regard to Exhibit 2, are you aware of any other rules adopted by the Department of Water Resources with respect to adjudication procedures? By "rules," I mean rules adopted pursuant to the Administrative Procedures Act.

A. No.

MR. CAMPBELL: Thank you. That is all I have.

THE WITNESS: Are we off the record?

MR. BAXTER: We aren't quite yet.

THE WITNESS: Oh, okay.

MR. BAXTER: I wanted to ask a couple of follow-up questions with regards to that, Mr. Shaff.

MR. CAMPBELL: To which I will lodge my continuing objection, based upon my objection at the beginning of this proceeding.

MR. BAXTER: Excellent.

EXAMINATION

MR. BAXTER:

Q. Mr. Shaff, I am going to hand you -- or, Mr. Shaff, earlier, you were asked to read into the record a little bit from -- I think it was Idaho Code 42-1411.

If my recollection is correct, it was subsection (2) of that section and, in particular, sub (c) under there. I am going to hand you -- could you take a look back at subsection (c) under 42-1411? So that is 42-1411(2)(c).

A. I'm there.

Q. Particularly, at the end of that, you read into the record the part -- if I am correct, it says -- I can't remember exactly what part you started with. Just for the sake of this, let's start back at the beginning. I will read it here.

"The quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use . . ."

I believe you indicated that you were leaving out the term -- or you jumped over "or storage."

And then it starts again -- or you started again with, ". . . in acre feet per year . . ." That is

where you stopped. Is there any remaining language of that Code Section?

A. Yes.

Q. And, Mr. Shaff, could you please read that into the record?

A. If I may, for clarity, I am going to begin at mid sentence. ". . . or annual volume of diversion of water for use or storage in acre feet per year as necessary for the proper administration of the water right;" end of paragraph (c).

Q. Now, Mr. Shaff, jump back to Deposition Exhibit No. 1. If you could, go back there. I believe it was on page 6. This page talks about the policy reasons behind putting a volume limit on the water right; is that correct?

A. Scanning through it, yes, sir.

Q. So would it be fair to characterize the Department's position as it is necessary for proper administration for ground water rights to have volumes listed on them?

MR. CAMPBELL: I will object. The question is leading. It puts, you know, the answer before the witness.

BY MR. BAXTER:

Q. Go ahead and answer, Mr. Shaff.

A. I think -- well, the -- I will pick out of the first paragraph on page 6 of Exhibit 1. Reading, "Moreover, annual volume descriptors further define the right, helping to settle the matter for future administration," period, end of sentence.

Q. I am just going to take a second to review some of my notes here real quick.

A. In the same paragraph, if I can continue --

Q. Okay.

A. Reading, "Quantifying volume associated with each ground water right allows IDWR to consider and administer the impact of existing (and future) rights on an aquifer."

Q. So, Mr. Shaff, you did not type out all of this document?

A. No, I did not.

Q. But to your understanding, is this the position of the Department? Does this document fairly characterize the position of the Department with regards to whether or not an annual volume should be listed on a water right?

A. I communicated in the meetings I described earlier that these were concepts I wanted in this Supplemental Director's Report.

Q. And, you know, I realized, actually, in my

speaking there, I used the word "annual volume." What would be the more appropriate --

A. "Annual diversion volume" is more typically used to describe the annual maximum, the annual diversion volume a water right has for use.

Q. And that does not change the answer to your previous question about -- I apologize for my misuse of the term. This is the Department's understanding --

A. No.

MR. CAMPBELL: I will object to the question as leading.

THE WITNESS: Mr. Campbell and I did an interchange earlier today relative to the use of "annual volume" and "annual diversion volume." I interpreted your use of the words in the same parallel fashion.

MR. BAXTER: Thank you. No further questions.

FURTHER EXAMINATION

BY MR. CAMPBELL:

Q. I just have some follow-up on those areas. Mr. Shaff, going back to the sentence that you identified on page 6 of Exhibit 1, it says, quote, "Quantifying volume associated with each ground water right allows IDWR to consider and administer the impact of existing (and future) rights on an aquifer;" is that correct? Is that

what that says?
A. You read it as I do.
Q. Now, what is the rationale for the Department to consider and administer the impact of future rights on an aquifer, based upon an annual diversion volume imposed upon this water right, 63-3174?
A. The annual diversion volume would describe the maximum diversion of water that could be exercised under this water right.
Considering the application for a new withdrawal would be factoring the -- the Department has knowledge of the probable extent of the water supply available and whether there is, then, unappropriated water available for a new appropriation. Without a diversion volume, the extent of the existing water rights becomes uncertain.
Q. Say that last statement again.
A. I said, the extent of the existing water rights and the diversion volume of those water rights becomes uncertain.
Q. Why does it become uncertain?
A. Because, without a diversion volume on a consumptive water right, irrigation is deemed consumptive water lost to the water system.
Then the argument by the holder of a water

right could argue that it was some other number, that it's greater than, perhaps, in this case, the 513 acre feet we have recommended.
Q. Well, in fact, under footnote 5 on page 6, it can be 903 acre feet per year, in terms of a calculation of a quantity?
A. Yes.
Q. So the Department of Water Resources would be able to calculate the maximum quantity that could be diverted if there were no annual diversion volume limitation placed upon the water right; correct?
A. The Department would know, at a maximum, that the water right could be 903 acre feet per year.
Q. If the water right were one that could be exercised every day of the year; correct? Oh, I am sorry. This is based upon 246 days?
A. Yes.
Q. All right. So in reality, the Department would know the maximum amount of water that could be exercised, even if the Department did not impose an annual volume diversion limit; correct?
A. At the time the administrative action was taking in the future, that may be the presumption the Agency staff would take.
Q. My question, though, is the Department could

calculate the maximum annual volume -- I am not talking about annual diversion volume now. I am talking about the maximum annual volume which could be diverted under this water right, as reflected in footnote 5; correct?
A. The facts as I know them -- the 903 acre feet per year would be what I would call an enlargement of this water right.
Q. But I am not asking you whether or not you think it is an enlargement or not. I am asking you: Is the calculation contained in footnote 5 accurate or not?
A. Yes. It's accurate.
Q. So the Department can calculate the annual volume of water that could be generated under this water right without the annual diversion volume limitation that has been imposed in the recommendation; correct -- because you did it right there in footnote 5?
A. I stand by what is written in footnote 5.
Q. Thank you. Now, turn to the other portion of page 6 of Exhibit 1 that you described to Mr. Baxter, the sentence that says, "Moreover, annual volume descriptors further define the right, helping to settle the matter for future administration." Do you see that portion?
A. Yes.
Q. Now, what do you mean by "annual volume

descriptors"? Is that the term "acre feet per annum" or "per year"?
A. Yes. Annual diversion volume.
Q. Is there another type of descriptor for "annual diversion volume"?
A. I have heard them described as field, headgate volumes.
Q. Well, I am asking what this phrase means. Is this phrase --
A. I intended, by that phrase, to mean annual diversion volume.
Q. So acre feet per year?
A. Acre feet per year.
Q. And you are saying that that further defines the right. What do you mean, exactly, by "further defines the right"?
A. I would contrast footnote 5, the 903 acre feet per year, with the 513 acre feet per year we have recommended. The 513 acre feet per year further defines the water right.
Q. Well, it could mean, in actuality, that it further limits the exercise of the water right? Is that not correct?
A. No.
Q. No? Is that your testimony?

A. Would you -- the 513 acre feet per year, in my opinion, defines the extent of beneficial use that Water Right 63-3174 has been put to beneficial use.
Q. And what do you base that upon, Mr. Shaff?
A. The extent of number of acres irrigated, the location that it's irrigated, the temperature, the freeze periods, and the temperature and wind factors, the weather factors in the area where the crops are grown.
Q. And have you conducted an evaluation of all of those factors for this particular water right?
MR. BAXTER: I am just going to object here to the relevancy. Mr. Campbell, I believe you have withdrawn your objection in this matter as to the actual calculation of the volume.
MR. CAMPBELL: I am not worried about the calculation. I am worried about what he is saying here that this does not further restrict the water right. Now, he said this does not --
MR. BAXTER: I think you mischaracterized his testimony there.
MR. CAMPBELL: This does not -- I did not mischaracterize it. If you had been listening, Mr. Baxter, you would have heard it. He said that the limitation of 513 acre feet per annum, per year, does

not further restrict the water right.
Now, I am entitled to inquire as to why he has made that conclusion. He has said it is based upon climate, type of land, et cetera.
THE WITNESS: Type of land doesn't have anything to do with it.
BY MR. CAMPBELL:
Q. Well, fine. Whatever you said. What I am asking you is: Did you make any of those calculations for this water right?
A. I did not.
Q. Now, can you tell me whether or not a water right with a 513 acre feet per annum annual diversion volume descriptor, to use your term, would be able to withdraw or divert the same quantity of water as compared to an annual volume description of 903 acre feet per year?
A. Were 903 acre feet per year diverted on the -- referring to Exhibit 2 of Exhibit 1 for the Director's Report of 63-3174 for the 114 acres shown in the recommendation, the 903 acre feet per annum diverted would exceed what has been placed to beneficial use and would, therefore, be a wasting of the ground water resource.
Q. Well, let me try to ask the question in a more

simple fashion. This particular water right, 63-3174, was approved by the Department of Water Resources with a license in 1967. When that license was issued by the Department of Water Resources, it did not have an annual volume limitation. Okay?
A. Do you have a copy of that license?
Q. I think there is a copy of the license, actually, in this document.
A. I think you're -- it's at Exhibit 4 of Exhibit 1. Thank you. It was issued in 1967. Previously, I said I did not see annual diversion of water on the water right license.
Q. And is it on that document? Is an annual diversion volume on this license?
A. No, sir. It is not.
Q. So as far as the Department was concerned, when it issued this license -- annual diversion volume was not a valid descriptor of the use of the water right; is that correct?
A. I don't know that.
Q. Let me ask it this way then. Does the Department of Water Resources put all of the elements of water rights on licenses it issues?
A. Where those elements are consistent with the beneficial use occurring in 1987, the same elements are

carried forward in the Department's recommendation.
Q. Well, that is not my question, Mr. Shaff.
I would move to strike his answer because it is non-responsive.
Mr. Shaff, my question is: When the Department issues licenses for water rights, does it list all of the elements of the water right when it issues the license? Yes or no?
A. The licenses issued -- you are asking me to respond to a practice and the law existing in 1967 that I don't have any knowledge of.
Q. No. I didn't ask about 1967. I said: When the Department issues licenses, right now, today, does it issue all of the elements of a water right on the license?
A. Yes, it does.
Q. And has that practice been in place for some time, as far as you know?
A. Yes, sir.
Q. Has it been in place as the practice of the Department since you started working for the Department in 1976?
A. Yes, it has.
Q. Is there anything for you to think or assume that that would not have been the practice in 1967 when

the License and Certificate of Water Right for this water right was issued?
A. Mr. Jack Bennett, at the time this license was issued in 1967, issued this license, as it says on the document, as provided by the laws of Idaho at that time.
Q. So your answer is, no, there is nothing to suggest to you that the Department did not list all of the elements of the water rights on this license?
MR. BAXTER: I am going to object. I don't think -- you just restated his answer, and I don't think that was exactly what he said.
MR. CAMPBELL: It was a question. I am asking if that is his testimony.
THE WITNESS: Rephrase the question or restate it.
BY MR. CAMPBELL:
Q. Is your testimony that in 1967 --
A. Would you mind asking a question?
Q. I am trying to ask a question.
A. Okay.
Q. All right. In 1967 when this License and Certificate of Water Right was issued, is there anything that you know, based upon your thirty years of experience working with the Department of Water Resources, that, when this license was issued, Exhibit

4, the Department did not list all of the elements of the water right when it issued the license?
A. The Agency issued the license according to the laws existing in 1967, listing all of the elements that it was required to show on a license issued in 1967.
Q. Thank you. Turn to page 6, again, that same sentence that says, quote, "Moreover, annual volume descriptors further define the right, helping to settle the matter for future administration," end quote. What do you mean by the term "settle the matter"?
A. Again, the Agency would have precise knowledge of the maximum annual diversion volumes for the most presently consumptive water rights in this State.
Q. Well, I am confused by that answer. You indicated that municipal water rights do not have an annual diversion volume in the recommendations unless they had that element in licenses; is that correct?
A. Correct.
Q. And municipal water rights include irrigation; correct?
A. They may.
Q. Do you know of any municipal water right that does not include irrigation as an authorized purpose under the right?
A. I believe the statutes provide a description of

municipal water uses. The definition may include irrigation.
I am convinced there are some water rights for municipal use within the Snake River Basin Adjudication that, at this time, do not use the municipal potable water supply to irrigate parks and ball fields with that water supply. May somebody irrigate their lawn with the potable water? Yes, they may. I do.
Q. So that is irrigation; right?
A. It is irrigation. Yes, sir.
Q. And that is the same type of irrigation that is used under a ground water right for irrigation purposes; correct?
A. Right.
Q. Mr. Shaff, Exhibit 1 to Exhibit No. 1 is a document that has a line item which is one of the Department's forms that you indicated was generated through your process. It has Item 8, total consumptive use.
MR. BAXTER: Now, Scott, I don't think I addressed this issue on my previous questioning.
MR. CAMPBELL: It doesn't matter. He just talked about the most consumptive type of water right, and I want to explore that issue.
MR. BAXTER: Well, I think that talking about

what is a consumptive water right --
MR. CAMPBELL: Look, are you going to instruct him not to answer? If you are going to do that, go ahead. I am going to ask the question.
MR. BAXTER: I am just wondering how long I am going to be here today. Are we going to keep jumping back and forth?
MR. CAMPBELL: No. We are not going to keep jumping back and forth. The longer we argue about this, the longer it is going to take. I am going to ask a question. If you want to object, you can object. If you want to instruct him not to answer, then do that.
Q. Mr. Shaff, with respect to the document I just identified, Item 8 says, "Total Consumptive Use." Is that one of the elements of a water right, today, in the State of Idaho?
A. Consumptive use is not one of the elements we recommend in the Snake River Basin Adjudication.
Q. Why is it on that form then? This is a claim; is that not correct?
A. I believe the notice of claim rules, in 1989, said that a claimant will indicate the total consumptive use of the water right.
Q. Now, by "rules," do you mean the statutes? Do you mean the Adjudication?

A. No. The Adjudication Rules existing.
Q. And now they do not require that? Is that what you are suggesting?
A. I would have to look at the rules to see that. I am testifying we do not recommend the element consumptive use in the Snake River Basin Adjudication.
Q. And that is for any water rights; is that correct?
A. Correct.
Q. Did the Department at any time recommend the annual total consumptive use for recommendations of water rights in the Adjudication?
A. The first three reports in the Snake River Basin Adjudication may have had consumptive use. I don't specifically recall.
Q. So things changed as the Adjudication proceeded?
A. Yes, sir.
MR. CAMPBELL: That is all I have.
MR. BAXTER: Nothing further from me.
(Off-the-record discussion.)
MR. CAMPBELL: We are back on the record with Mr. Shaff. We were discussing the possibility of taking Mr. Carter Fritschle's deposition. The question was raised as to whether or not that was necessary. Mr.

Shaff suggested we go back on the record.
Do you have some clarification you can provide, Mr. Shaff, as to Mr. Fritschle's involvement?
THE WITNESS: Mr. Fritschle did not participate in the meeting I described to prepare Exhibit No. 1. He was – he read it and signed it. That is the extent of his involvement, if you will, in preparing Exhibit 1.
MR. BAXTER: I am just questioning the value of having Carter come in and talk about his limited participation. If you insist upon it, we are more than happy to provide Carter. I am just indicating to you that it might be a waste of your time, as well as ours.
MR. CAMPBELL: Well, since we are discussing it on the record, I will ask Mr. Shaff.
Do you know, Mr. Shaff, if Carter Fritschle had any conversations with any of the individuals who were preparing this report at or before the time you signed the report that is Exhibit No. 1?
THE WITNESS: No. I couldn't swear he did not.
MR. CAMPBELL: You don't know?
THE WITNESS: No.
MR. CAMPBELL: Well, I will want to take his deposition then. Thanks.
(Deposition adjourned at 2:42 p.m.)
(Signature requested.)

CERTIFICATE

I, LORI A. PULSIFER, Certified Shorthand Reporter, do hereby certify that:
The foregoing proceedings were taken before me, at which time the witness was placed under oath;
The testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me;
The foregoing is a true and correct record to the best of my skill and ability; and
Pursuant to request, notification was provided that the deposition is available for review and signature; and
I am not a relative or an employee of any attorney, nor am I financially interested in the action.
I have hereunto set my hand and seal this 1st day of November 2007.

LORI A. PULSIFER, CSR, RMR, CRR
Certified Shorthand Reporter
Idaho Certificate 354

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SUPPLEMENTAL DIRECTOR'S REPORT REGARDING SUBCASE NO. 63-3174

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
David R. Tuthill Jr., Director
Donald V. Shaff, Adjudication Bureau Chief

September 14, 2007



FILE

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

In Re: SRBA,	)	
	)	Subcase No.
Case No. 39576.	)	63-03174
	)	
	)	

DEPOSITION OF JAN GROVER SHURTE

Law Offices of
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, 10th Floor
Boise, Idaho 83702
Monday, November 26, 2007
Beginning at 8:57 o'clock a.m.

QnA COURT REPORTING
Lori A. Pulsifer, CSR, RMR, CRR
Idaho Certificate No. 354
PMB 219, 111 Broadway, Suite 133
Boise, Idaho 83702-7200
E-mail: realtimeqna@msn.com
Telephone: (208) 484-6309

(ELECTRONIC COPY)

Campbell Aff In Support of MSJ
Exhibit C
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APPEARANCES

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* * *

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* * *

THIS DEPOSITION was taken on behalf of JerryL. Tlucek and Mary Lou Tlucek on Monday, the 26th day of November 2007, at the offices of Moffatt, Thomas, Barrett, Rock & Fields, Chartered, 101 South Capitol Boulevard, 10th Floor, Boise, Idaho 83702, before LoriA. Pulsifer, Court Reporter and Notary Public within andfor the State of Idaho, to be used in an action pending in the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls,said cause being Subcase No. 63-03174 in saidcourt.

The following testimony was adduced, to wit:

* * *

JAN GROVER SHURTE,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. CAMPBELL:

Q. Good morning, Jan.
A. Good morning.
Q. We have met before; right?
A. Yeah.
Q. So you know that I am Scott Campbell; right?
A. Yes, I do.
Q. Have you ever had your deposition taken before, Jan?

A. No, I have not.
Q. Let me go through some procedures and rules so that we are all on the same page. Okay?
A. Okay.
Q. First, I get to ask you questions and you get to give me answers. Okay?
A. Okay.
Q. And your answers have to be audible; in other words, you can't just shake your head "no" or "yes" or shrug your shoulders. You have to actually respond audibly. Do you understand?
A. Yes, I do.
Q. Sometimes people forget that. I will just say, "You have to answer the question." Okay?
A. Okay.
Q. The other thing you need to keep in mind is that I am not trying to trick you with my questions. Sometimes I ask questions that are really confusing because my brain doesn't work the right way or my words don't come out right.

So if you do not understand the question or it is confusing to you, just ask me to rephrase it; and I will be glad to do that. Okay?

A. Okay. Sounds good.
Q. The other thing is Garrick or Andrea may object

to certain questions that I ask. If they do, they are entitled to present the objection; but unless they instruct you not to answer the question, you have to go ahead and answer the question. Okay?

A. Okay.

Q. All right. And sometimes I won't agree with their objections and Garrick and I will go back and forth and make each other, you know, excited and things will get a little bit heated and then everything will go back to normal eventually. Okay?

A. Okay.

Q. The other thing you need to keep in mind is that everything you say is under oath. Do you understand?

A. Yes, I do understand that very much.

Q. So we want you to tell the truth.

A. I will.

Q. If you do not know the answer, just tell me that. I don't want you to speculate. I don't want you to guess. I want you to tell me what you actually know. All right?

A. Okay.

Q. So with those ground rules, there is one other thing I will add. If you need to take a break, use the restroom, if you get faint or if you want to do

something like just stretch your legs, just tell us and we will break.

We will go off the record, and we will let you go run around the block or whatever your desire is. This shouldn't take too long, but it depends upon how much you know. Okay?

A. Okay.

Q. All right. So first off, can you tell me your full name?

A. My full name is Jan Grover Shurte.

Q. And you spell your last name how?

A. S-h-u-r-t-e.

Q. And, Jan, would you tell me what your employment is currently?

A. I'm the Water Rights Supervisor in the Adjudication Bureau for the Western Regional Office.

Q. How long have you held that position?

A. Let's see. Since -- for about nineteen years. For nineteen years. It's not "about."

Q. So you started the position in --

A. When the Adjudication started in '88.

Q. November of 19 --

A. Actually, it was April of '88. A little ahead of time.

Q. Right. And can you give me a general

description of what your duties are currently?

A. My duties, as I see them, are to supervise the resource agents that actually put out the recommendations. I do recommendations, myself. I supervise issues that come up with how to make a recommendation.

I supervise the clerical staff that works there, how claims are filed -- just generally how the Adjudication office is ran.

Q. And have those been your duties from the time you started working in the Adjudication nineteen years ago?

A. Yeah. In the Adjudication, they have been, yes.

Q. Can you tell me what your employment experience was before you were hired by the Department?

A. I've worked for the Department for 33 years. I've worked in doing new applications. I've worked in licensing. I was a field examiner for proof of beneficial use exams which are on new systems, for eight years, before I started the Adjudication.

Q. Okay.

A. So I have had several different jobs.

Q. And what was your educational background before you became an employee of the Department?

A. Graduating high school.

Q. And where did you go to high school?

A. Meridian.

Q. In terms of the case that has produced this deposition, are you familiar with the water right for the Tlucek Farm with the reference number of 63-3174?

A. Yes, I am.

MR. CAMPBELL: I would like to mark a document here as Exhibit No. 1.

(Deposition Exhibit No. 1 was marked for identification.)

BY MR. CAMPBELL:

Q. I would like you to review that document, Jan, and tell me when you have finished reviewing it.

A. Oh, okay.

Q. You do not have to read every word. Just familiarize yourself with it, to the extent you can tell me what it is.

A. It's a Supplemental Director's Report on the Subcase, based on your objection, that the Department put out.

Q. And this relates to Subcase No. 63-3174; is that correct?

A. Yes, it does.

Q. And that is a water right owned by the Tluceks;

is that correct?
A. Uh-huh. It is, yes.
Q. Can you tell me whether or not you had any role in the preparation of this document, Exhibit No. 1?
A. No. I did not make the recommendation on this one.
Q. No. I am talking about this document.
A. Oh, this document? Excuse me. Yes, I did.
Q. Can you describe that for me, please?
A. I, basically, spoke with the attorneys concerning how the recommendation was made, just the steps that were taken to go through the recommendation, and what was in the claim file. That was about it.
Q. Did you actually prepare any portion of Exhibit No. 1?
A. Let's see. I did -- I did -- I did write out some things about -- you know, in line. They were rephrased in here but let me -- yes. So I guess the answer is "yes."
Q. What portions of the report did you initially draft before they were redone, as you say?
A. Good question. I will have to read through it here.
Q. That's fine. Take your time.
A. Thank you. Part B and "Background."

Q. On page 3?
A. On page 1, "Background" and part B on page 3.
Q. So Roman Numeral II?
A. Roman Numeral II on page 1.
Q. II, which says "Background"? You drafted that initially?
A. Yeah, initially.
Q. And then page 3?
A. By "drafting," I mean just by talking to them about it and going through exactly what happened, you know, just, you know, what it was based upon and what the recommendation was based upon.
Q. So is it correct in saying, then, that you actually did not create any of the words in the document, Exhibit No. 1?
A. I think you could say I created some of the words, yeah.
Q. And that would be the words in Roman Numeral II?
A. Roman Numeral II.
Q. And B on page 3; is that correct?
A. I am just trying to make sure. I just want to make sure that I don't miss something. Yes, I believe so.
Q. Is there anything else in Exhibit No. 1 which

you either drafted or provided information to the attorneys who drafted Exhibit No. 1?
A. No. I believe they already knew. No. We discussed it, but they already had known about that. So --
Q. About what?
A. About the other issues that are in here.
Q. And can you identify the attorneys that you worked with to produce Exhibit No. 1?
A. I worked with Andrea.
Q. Andrea Courtney?
A. Uh-huh. Andrea Courtney.
Q. Anyone else?
A. No.
Q. Did you work with any paralegals of the Department to produce --
A. No, I don't believe I did, on this one.
Q. Did you see any drafts of Exhibit No. 1 before it was finalized?
A. Yes, I did.
Q. How many?
MR. BAXTER: I am going to object to that question, based upon -- it is asking for information related to attorney-client-privileged communications. I gave you a little bit of leeway that, yes, there are

some drafts out there.
Getting into the number of drafts and, specifically -- at this point in time, I am going to instruct the witness not to answer the question.
MR. CAMPBELL: Well, at this point, I will lodge a continuing objection to the participation of Mr. Baxter and Ms. Courtney in this deposition, inasmuch as the Department is not a party to the Snake River Basin Adjudication.
Under the Rules of Evidence and the statutes concerning the Adjudication, the Department is not entitled to representation by legal counsel in this process. So with that --
MR. BAXTER: Mr. Campbell, may I please just make a statement for the record?
MR. CAMPBELL: Go ahead.
MR. BAXTER: Once again, the ability of the Department to participate in a deposition or in raising attorney-client-privileged communication is not based upon -- or they do not rely upon a party -- a person -- or a party status, I should say.
As previously stated, the Department is well within its right to defend one of its -- one of the Department's employees or the Department is well within its rights to have one of their attorneys defend the

Department's employees in a deposition. It is proper to raise attorney-client-privileged objections within that deposition.

BY MR. CAMPBELL:

Q. Ms. Shurte, can you tell me how many drafts of Exhibit 1 you actually reviewed?

MR. BAXTER: Again, I just instructed the witness not to answer that question, Mr. Campbell.

MR. CAMPBELL: I asked her if she can tell me how many drafts she reviewed. That is not attorney-client privilege.

MR. BAXTER: Go ahead and answer the question, Jan.

THE WITNESS: Probably, two. I would say two, to the best of my recollection.

BY MR. CAMPBELL:

Q. Who generated those drafts?

A. Andrea.

Q. Did you see a final version of Exhibit No. 1?

A. Oh, yes.

Q. And did that final version appear to be very similar to the prior drafts?

MR. BAXTER: Excuse me, Mr. Campbell. Can you restate the question, please? I missed the question.

BY MR. CAMPBELL:

Q. Did you miss the question, Jan?

A. Well, now I'm confused because I got --

Q. Because he said something? Was the final version of Exhibit No. 1 similar to any of the drafts?

A. It was similar, yes.

Q. All right. Did you have any input into any of the changes from the drafts to the final version of Exhibit No. 1?

A. No, I didn't.

Q. Do you know if anyone else had any input, besides Ms. Courtney, as to the final version of Exhibit No. 1?

MR. BAXTER: I am going to object to that one because it is going to specifically ask for information related to communications back and forth, as to the draft.

BY MR. CAMPBELL:

Q. It doesn't ask that at all. Let me rephrase the question. Do you know if anyone else participated in the preparation of Exhibit No. 1, besides you and Ms. Courtney?

A. Yes, I do.

Q. Who is that?

A. Don Shaff.

Q. Anyone else?

A. No. I don't know of anybody else.

Q. Do you know why Carter Fritschle signed the Supplemental Director's Report, as opposed to Mr. Shaff?

A. I believe that Don wasn't there at the time that they needed it signed to get it to the court.

Q. Did you have any communications with Mr. Fritschle concerning that?

A. No, I didn't.

Q. Can you tell me who requested that you participate in the preparation of selected portions of Exhibit No. 1?

A. Andrea Courtney. I don't know if -- I think Nick Spencer had said something to me about it, too, before. We had discussed the case because Nick was involved in the beginning.

Q. And do you recall what they said to you on that occasion?

MR. BAXTER: I am going to object to that because it's asking about specific attorney-client communications.

MR. CAMPBELL: I asked her if she recalled it. I didn't ask her what it was, Garrick.

THE WITNESS: You know, I really don't recall what they said to me.

BY MR. CAMPBELL:

Q. Do you have any understanding of the reason for the Department of Water Resources treating ground water rights differently than surface water rights, as it relates to the annual volume element in a recommendation?

A. Well, I do know they are two separate entities, the diversion rate versus the volume. I was -- when I first started doing licensing in the 1970s is when we -- I had never not put the acre foot amount on ground water.

So that's, basically -- we are instructed to do so, and that's why I've done it and have instructed people I supervise to do it.

Q. What about with regard to surface water rights?

A. Surface water rights -- we have not been -- we did not put the acre foot amount on during the Adjudication.

Q. You don't know the reason for that?

A. No.

MR. CAMPBELL: That's all I have. Thank you.

MR. BAXTER: No questions.

(Deposition adjourned at 9:17 a.m.)

(Signature requested.)

CERTIFICATE

I, LORI A. PULSIFER, Certified Shorthand Reporter, do hereby certify that:

The foregoing proceedings were taken before me, at which time the witness was placed under oath;

The testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me;

The foregoing is a true and correct record to the best of my skill and ability; and

Pursuant to request, notification was provided that the deposition is available for review and signature; and

I am not a relative or an employee of any attorney, nor am I financially interested in the action.

I have hereunto set my hand and seal this 30th day of November 2007.

LORI A. PULSIFER, CSR, RMR, CRR
Certified Shorthand Reporter
Idaho Certificate 354

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,	Subcase No. 63-03174
Case No. 39576	**MOTION FOR SUMMARY JUDGMENT**

COMES NOW Jerry L. Tlucek and Mary Lou Tlucek (hereafter "Tluceks"), by and through their counsel of record, Scott L. Campbell of the firm Moffatt, Thomas, Barrett, Rock & Fields, Chartered, in accordance with the Amended Trial Scheduling Order, entered by this Court on November 1, 2007, and pursuant to Rule 56, Idaho Rules of Civil Procedure, and hereby respectfully move this Court for summary judgment in their favor. Specifically, the

Tluceks request this Court reject the inclusion of an annual diversion volume limitation in the recommendation of the Director of the Idaho Department of Water Resources.

Pursuant to Rule 56, Idaho Rules of Civil Procedure, this Motion is made on the grounds and for the reasons that there is no genuine issue of material fact in dispute and the Tluceks are entitled to summary judgment, as a matter of law.

This Motion is made and based on the record herein, specifically including the Tlucek's Brief in Support of Motion for Summary Judgment, and the Affidavit of Scott L. Campbell, filed contemporaneously herewith.

Oral argument has already been scheduled for Friday, February 1, 2008, in the offices of Moffatt, Thomas, Barrett, Rock & Fields, Chartered.

DATED this 3rd day of January, 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of January, 2008, I caused a true and correct copy of the foregoing **MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Scott L. Campbell

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Water right claimants Jerry Tlucek and Mary Lou Tlucek hereby file this Brief in Support of Motion for Summary Judgment, pursuant to Idaho Rule of Civil Procedure 56. The Tluceks have filed the Motion for Summary Judgment and an Affidavit of Scott L. Campbell in Support of Motion for Summary Judgment contemporaneously herewith.

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I. STATEMENT OF THE CASE

A. Nature of the Case

This subcase arises in the context of the Snake River Basin Adjudication (the "SRBA"). Water right claimants Jerry Tlucek and Mary Lou Tlucek object to the inclusion of an annual diversion volume limitation on their water right 63-3174 (the "Water Right") by the Idaho Department of Water Resources (the "Department" or "IDWR").

B. Course of Previous Proceedings

The Tluceks filed a claim to the Water Right in the SRBA on September 13, 1989, which they amended on August 8, 1990. The Department issued its Director's Report recommendation for the Water Right on December 16, 2005, and the Tluceks timely objected to the inclusion of the annual diversion volume limitation therein on April 18, 2006. No other parties objected to the recommendation of the Water Right.

Based on the Tluceks' objection, on April 25, 2007, this Court requested that the Department prepare a Supplemental Director's Report explaining the basis for including the annual diversion volume limitation, pursuant to Administrative Order 1 ("AO1") Section 10(g)(3), Idaho Rule of Evidence 706, and Idaho Code Section 42-1401B. The Department issued its Supplemental Director's Report on September 14, 2007. (*See* Exhibit F to the Campbell Aff.)

C. Statement of Facts

The Tluceks base their claim upon a water right license issued by the state of Idaho on June 26, 1967. (*See* Exhibit D to the Campbell Aff.) When the state issued the license, it included no annual diversion volume limitation. *Id.* Instead, the state defined the quantity element of the Water Right as 1.85 cubic feet per second (cfs). *Id.*

However, when it issued its Director's Report recommendation for the Water Right, the Department included an annual diversion volume limitation of 513.00 acre feet ("AFY" or "AFA"). (*See* Exhibit E to the Campbell Aff.) The Tluceks object to the Department's imposition of this new limitation on their Water Right, when this limitation was not included in the previous license.

II. ISSUES PRESENTED

The Tluceks request that this Court invalidate the annual diversion volume limitation imposed by the Department on their Water Right. This requires this Court to address the following broad issues:

1. Whether the Supplemental Director's Report complies with the Idaho Rules of Evidence;

2. Whether the Department has the legal authority to impose an annual diversion volume limitation on a previously-licensed water right, even though Idaho Code Section 42-220 states that such licenses are "binding upon the state" and "prima facie evidence as to such right";

3. If the Department has such general legal authority, whether the Department has sufficiently investigated and demonstrated the factual basis for its imposition of the new, restrictive annual diversion volume limitation; and

4. Whether the Department may file any responsive briefing in this matter in contravention of Idaho Code Section 42-1401B and related rules of procedure.

III. STANDARD OF REVIEW

The Tluceks file this Motion pursuant to Rule 56 of the Idaho Rules of Civil Procedure. As this Court has stated, summary judgment is appropriate when the pleadings, depositions, admissions and affidavits on file show there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See In Re SRBA*, Case No. 39576, Consd. Subcase No. 91-63, Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 10-11 (5th Dist. Sept. 2, 2004) (Melanson, J.) (citing IDAHO R. CIV. P.

56(c); *City of Idaho Falls v. Home Indem. Co.*, 126 Idaho 604, 606, 888 P.2d 383 (1995)); *see also United States v. Pioneer Irrigation Dist.*, 144 Idaho 106, 109, 157 P.3d 600, 603 (2007).

In addition, summary judgment is appropriate to dismiss a claim when a party fails to submit evidence to establish an essential element of their claim. *Ambrose ex. rel. Ambrose v. Buhl Joint Sch. Dist. No. 412*, 126 Idaho 581, 584, 887 P.2d 1088, 1091 (Ct. App. 1994); *Nelson ex. rel. Nelson v. City of Rupert*, 128 Idaho 199, 202, 911 P.2d 1111, 1113 (1996). Facts in dispute cease to be material facts when a claimant fails to establish a *prima facie* case; in such a situation, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Garzee v. Barkley*, 121 Idaho 771, 774, 828 P.2d 334, 337 (Ct. App. 1992); *Ambrose ex. rel. Ambrose, supra.*

Typically, the nonmoving party is entitled to the benefit of all inferences which might reasonably be drawn from the evidence. *G&M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Kline v. Clinton*, 103 Idaho 116, 120, 645 P.2d 350, 354 (1982). However, the nonmoving party may not rest on mere allegations or denials of that party's pleadings to avoid summary judgment. *Theriault v. A.H. Robbins Co.*, 108 Idaho 303, 698 P.2d 365 (1985). The nonmoving party's case must not rest on mere speculation, because a "scintilla of evidence" is not enough to create a genuine issue of material fact. *G&M Farms, supra; Kline, supra.*

In addition, in the Snake River Basin Adjudication proceedings, cases are tried without a jury. IDAHO CODE § 42-1412(5). In such circumstances:

> When an action is to be tried without a jury, however, the court is not compelled to draw inferences in favor of the party opposing the motion; rather, the court is "free to arrive at the most probable

inferences to be drawn from uncontroverted evidentiary facts." [Citations omitted].

Land O' Lakes, Inc. v. Bray, 138 Idaho 817, 819, 69 P.3d 1078, 1080 (Ct. App. 2003).

This case may be resolved as a matter of law and may be properly decided on summary judgment. The Tluceks' argument will show that the Department's inclusion of an annual diversion volume limitation in the Director's Report recommendation for the Tluceks' Water Right lacks any factual support and is contrary to Idaho water law, including statutes which state that a water right license is binding on the State.

IV. ARGUMENT

A. The Supplemental Director's Report Should Not Be Considered Because It Violates the Rules of Evidence for Expert Testimony

The Department's Supplemental Director's Report violates the Idaho Rules of Evidence regarding expert testimony. First, the Report is a legal brief, lacking any discussion of "facts" or "evidence," as required by Idaho Rule of Evidence 702. Second, Department attorneys wrote the Report, not qualified experts with specialized scientific or technical expertise. Therefore, this Court should totally disregard the Supplemental Director's Report.

When this Court requested the Department's assistance in this subcase, it did so pursuant to AO1, the Idaho Rules of Evidence, and Idaho statute. (*See* Order Requesting 706 Report from IDWR of April 25, 2007.) More specifically, AO1 § 10(g)(3) provides that, "[n]othing herein shall prevent the Presiding Judge or Special Master from calling a representative of IDWR as its own witness consistent with I.R.E. 706 or 614 for Class One or Class Two subcases." Idaho Rule of Evidence 706, in turn, states that "[t]he court . . . may appoint expert witnesses of its own selection." And, Idaho Code Section 42-1401B provides that the Director is "not a party to an adjudication." Instead, he serves as "an independent expert and technical assistant" within the context of the SRBA. *Id.*

Despite this statutory designation, however, the Idaho Supreme Court has specifically held that in the context of the SRBA, Idaho Rule of Evidence 702 governs:

> [T]he means by which a witness may be qualified as an expert, and the determination of whether a witness has been so qualified is left with the district court.

State v. Higginson, 128 Idaho 246, 258, 912 P.2d 614, 626 (1995) (citing *State v. Raudenbaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993)) (emphasis added).

More specifically, in *Higginson*, the Idaho Supreme Court ruled that Idaho Code Section 42-1401B "is of no effect . . . to the extent [it] constitutes a legislative determination as to the Director's status as an expert." *State v. Higginson,* 128 Idaho at 258, 912 P.2d at 626 (1995). Consequently, despite Section 42-1401B, this Court must independently determine that the Director qualifies as a reliable expert pursuant to Idaho Rule of Evidence 702. And, Rule 702 speaks clearly:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

(Emphasis added.)

After the Court decides a given situation warrants expert testimony, it must determine admissibility by applying the following four (4) part test:

1. the witness is a qualified expert in the field;
2. the evidence will be of assistance to the trier of fact;
3. experts in the particular field would reasonably rely upon the same type of facts relied upon by the expert in forming his opinion; and
4. the probative value of the opinion testimony would not be substantially outweighed by its prejudicial effect.

Ryan v. Beisner, 123 Idaho 42, 47, 844 P.2d 24, 29 (Ct. App. 1992); *see also* IDAHO R. EVID. 703.

"A qualified expert is one who possesses 'knowledge, skill, experience, training, or education.' I.R.E. 702. Formal training is not necessary, but practical experience or special knowledge must be shown to bring a witness within the category of an expert." *Weeks v. E. Idaho Health Servs.*, 143 Idaho 834, 836, 153 P.3d 1180, 1182 (2007) (citing *Warren v. Sharp*, 139 Idaho 599, 605, 83 P.3d 773, 779 (2003)); *see also West v. Sonke*, 132 Idaho 133, 138-39, 968 P.2d 228, 233-34 (1998).

Also, admissibility of expert testimony "depends on the expert's ability to explain pertinent scientific principles and to apply those principles to the formulation of his or her opinion." *Ryan v. Beisner*, 123 Idaho at 46, 844 P.2d at 28. Therefore, "the key to admission of the [expert] opinion is the validity of the experts' reasoning and methodology." *Id.* As a result, any "expert opinion [testimony] which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rending its verdict, and therefore is inadmissible as evidence." *Id.* (citing IDAHO R. EVID. 702).

In this case, deposition testimony from Department employees Donald Shaff and Jan Shurte establishes attorneys Andrea Courtney and Garrick Baxter prepared the Supplemental Director's Report requested by this Court. Mr. Shaff's testimony illustrates this fact:

> Q. Could you describe for me the procedure that you followed after you received the order from the Special Master to generate this document, Exhibit No. 1 [the Supplemental Director's Report]?
>
> A. Exhibit No. 1 was prepared with the person, Jan Shurte, S-h-u-r-t-e, who had knowledge of Water Right Claim 63-3174 and with assistance from the Deputy Attorney General's staff.

Q. And who with the Deputy Attorney General's staff assisted her?

A. Ms. Andrea Courtney, who is a Deputy Attorney General, assisted in preparing Exhibit No. 1.

Q. Do you know if anyone else besides Ms. Andrea Courtney assisted in the preparation of Exhibit No. 1 with the Attorney General's staff?

A. I believe Mr. Garrick Baxter reviewed the document, as well -- Deputy Attorney General.

(Shaff Dep., 16:12-17:2 (emphasis added).)

And, Ms. Shurte testified:

Q. Can you tell me whether or not you had any role in the preparation of this document, Exhibit No. 1 [the Supplemental Director's Report]?

* * *

A. . . . Yes, I did.

Q. Can you describe that for me, please?

A. I, basically, spoke with the attorneys concerning how the recommendation was made, just the steps that were taken to go through the recommendation, and what was in the claim file. That was about it.

(Shurte Dep., 10:3-10:4, 10:8-10:13 (emphasis added).)

Q. And can you identify the attorneys that you worked with to produce Exhibit No. 1?

A. I worked with Andrea.

Q. Andrea Courtney?

A. Uh-huh. Andrea Courtney.

(Shurte Dep., 12:8-12:12.)

Q. Ms. Shurte, can you tell me how many drafts of Exhibit 1 you actually reviewed?

* * *

THE WITNESS: Probably, two. I would say two, to the best of my recollection.

BY MR. CAMPBELL:

Q. Who generated those drafts?

A. Andrea [Courtney].

(Shurte Dep., 14:5-14:6, 14:14-14:18 (emphasis added).)

This testimony demonstrates that attorneys, not the technical qualified experts mandated by Rule 702, prepared the Supplemental Director's Report. Indeed, the Report reads like a legal brief, lacking any substantive factual discussion of the Tluceks' historical water use practices or the scientific basis for including the annual diversion volume limitation.

Pursuant to Rule 702 and the judicial cases implementing it, a Supplemental Director's Report should serve as an expert opinion that will "assist the trier of fact to understand the evidence or to determine a fact issue." It cannot consist of a legal brief on whether the Department has general authority to impose new annual diversion limitations in the SRBA. Simply put, the Supplemental Director's Report fails to meet the Rule 702 standard because it consists of legal argument and does not provide expert evaluation of "facts" or "evidence."

Moreover, the Department provides no facts which demonstrate the attorneys who prepared the Supplemental Director's Report qualify as reliable experts, pursuant to the four-part test mandated by the Idaho appellate courts. Therefore, because no qualified experts prepared the Report, this Court should completely ignore its findings and recommendations.

B. Idaho Code Section 42-220 Prohibits the Inclusion of the New Annual Diversion Volume Limitation Because It States that Water Right Licenses Are Binding Upon the State

1. The Plain Language of Section 42-220 Demonstrates that the Department Cannot Use the SRBA to Impose a New Restrictive Annual Diversion Volume Limitation

The Department cannot use the SRBA process to add a new restrictive condition onto a water right license, because doing so is specifically prohibited by Idaho Code Section 42-220. That statute provides in its entirety:

> 42-220. EFFECT OF LICENSE. Such license shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right; and all rights to water confirmed under the provisions of this chapter, or by any decree of court, shall become appurtenant to, and shall pass with a conveyance of, the land for which the right of use is granted. The right to continue the beneficial use of such waters shall never be denied nor prevented for any cause other than the failure, on the part of the user or holder of such right, to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water, or for other reasons set forth in this title: provided, that when water is used for irrigation, no such license or decree of the court allotting such water shall be issued confirming the right to the use of more than one second foot of water for each fifty (50) acres of land so irrigated, unless it can be shown to the satisfaction of the department of water resources in granting such license, and to the court in making such decree, that a greater amount is necessary, and neither such licensee nor any one claiming a right under such decree, shall at any time be entitled to the use of more water than can be beneficially applied on the lands for the benefit of which such right may have been confirmed, and the right to the use of such water confirmed by such license shall always be held subject to the local or community customs, rules and regulations which may be adopted from time to time by a majority of the users from a common source of supply, canal or lateral from which such water may be taken, when such rules or regulations have for their object the economical use of such water.

IDAHO CODE § 42-220 (emphasis added).

Of critical importance is the first clause of this statute, which provides that a water right license "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein . . . ." *Id.* (emphasis added). This statutory language unambiguously provides that a water right license is binding upon the state, except in a few limited circumstances.

More specifically, "[t]he right to continue the beneficial use of such waters shall never be denied," except in certain limited circumstances. *Id.* (emphasis added) These are: (1) when there has been a failure "to pay the ordinary charges or assessments which may be made or levied to cover the expenses for the delivery or distribution of such water;" (2) when the use of water exceeds the beneficial use of water; (3) when the license provides for the irrigation of "more than one second foot of water for each fifty (50) acres of land;" or (4) "for other reasons set forth in this title." *Id.* There has been no allegation that the Tluceks have failed to pay any applicable water right assessments, so the remainder of this section will discuss the remaining three potential bases for restricting a water right license.

At the outset, it is helpful to note that Section 42-220 states that a water right license is "prima facie evidence as to such right," implying that such evidence can be rebutted. However, as Section IV.A of this Brief has already explained, the Supplemental Director's Report does not effectively rebut the license because it is strictly legal in nature. The Department has produced no factual evidence to rebut the terms of the original license for the Water Right.

a. "Beneficial Use" Is Not a Proper Basis for Imposing the Limitation Because the Department Has Not Investigated the Tluceks' Historical Use of Water

Simply put, there has been no allegation or demonstration that the Tluceks' full use of their Water Right for irrigation purposes has not been a "beneficial use" of that Right.

Both the transcript of the Tuthill deposition and the Supplemental Director's Report demonstrate that the Department engaged in little if any factual investigation into the Tluceks' historical water use practices. For example, in describing his likely actions in preparing the initial recommendation for the Water Right, Mr. Tuthill stated:

> So while I don't remember my actions on this particular water right at the time, my actions at the time would have been to review the license and the claim and the maps and the other information available and to make a recommendation for this water right.

(Tuthill Dep., 10:6-10:10.)

Importantly, while the examination of aerial photos may reveal which acres are being irrigated, it would not necessarily reveal how much water is applied to those particular acres. Therefore, when it prepared its initial recommendation, the Department failed to establish a factual basis for including the new annual diversion volume limitation.

And, the previously-quoted portions of the Shaff and Shurte depositions demonstrate that the process for preparing the Supplemental Director's Report was entirely a legal exercise, not a factual one. Particularly important in this regard is the following exchange during the Shaff deposition regarding the need for including an annual diversion limitation on the Tluceks' Water Right:

> Q. Thank you. Now, in that paragraph, it describes a portion of the Revised Claims Manual. At the end of the paragraph, it states, quote, "Here, an annual volume limit is critical because of the need to protect junior priority rights in the Treasure Valley where ground water supplies are limited," end quote. Did I read that correctly?
>
> A. Yes.
>
> * * *
>
> Q. And do you know where Water Right 63-3174 is located in proximity to the Eagle area?

A. With my knowledge of the general description from the Public Lands Survey description on Water Right 63-3174, I would place it south and west of Eagle but in the Treasure Valley -- "Treasure Valley" being the Boise River Valley.

Q. Would this water right be south of the Boise River?

A. I think so.

Q. So in the preparation of this sentence that we have been talking about, did you undertake any investigation of the number of junior priority rights in the Treasure Valley?

A. No, I did not.

Q. Do you know if anyone did?

A. No one, to my knowledge, did an accounting of how many water rights are junior to Water Right 63-3174.

(Shaff Dep., 78:19-79:1, 79:21-80:13 (emphasis added).)

In other words, the Department asserts that inclusion of an annual diversion volume limitation is necessary to protect junior priority water rights, but admits that it never investigated the extent to which the Tluceks' Water Right may impact those rights. This oversight illustrates that the Department's inclusion of the annual diversion volume limitation is an arbitrary one, lacking any factual support.

Similarly, the following exchange also took place during the deposition of Mr. Shaff:

A. Would you -- the 513 acre feet per year, in my opinion, defines the extent of beneficial use that Water Right 63-3174 has been put to beneficial use.

Q. And what do you base that upon, Mr. Shaff?

A. The extent of number of acres irrigated, the location that it's irrigated, the temperature, the freeze periods, and the temperature and wind factors, the weather factors in the area where the crops are grown.

Q. And have you conducted an evaluation of all of those factors for this particular water right?

* * *

What I am asking you is: Did you make any of those calculations for this water right?

A. I did not.

(Shaff Dep., 110:1-110:11, 111:8-111:11 (emphasis added).)

Here, the Department asserts that inclusion of the annual diversion volume limitation is necessary to quantify the beneficial use of the Water Right. However, this testimony demonstrates that the annual diversion volume limitation was imposed on the Tluceks' Water Right as a matter of routine and not based upon any actual investigation into the Tluceks' historical beneficial use of water in accordance with their license. Therefore, beneficial use is not a legitimate basis for restricting their Water Right.

Section 42-220 was originally enacted in 1903, and amended in 1905. S.L. 1903, p. 223, § 9; S.L. 1905, ch. 166, § 1. Therefore, the Department had the authority to impose a volumetric limitation upon the Water Right when it issued the license in 1979, if it believed that doing so was necessary in order to ensure that water would not be used in excess of the beneficial use requirement. It did not do so. Accordingly, the Department cannot use the SRBA to impose a new, restrictive annual diversion volume limitation on the Water Right after the fact.

And, importantly, even if annual diversion volume is not specifically delineated in the Water Right, the Tluceks do not have the authority to use water in excess of beneficial use requirements—no water user has this authority, regardless of the specific terms of the water right. *See* IDAHO CONST. art. XV, § 3 ("[t]he right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. . . ."); IDAHO CODE § 42-104 ("[t]he appropriation must be for some useful or beneficial purpose, and when the

appropriator or his successor in interest ceases to use it for such purpose, the right ceases"). Therefore, inclusion of the annual diversion volume limitation is unnecessary, because beneficial use requirements apply to every water right in Idaho.

b. The Water Right as Licensed Complies With the Duty of Water Requirements of Section 42-220

As licensed, the Water Right allows for the irrigation of up to 114 acres of land. (*See* Exhibit D to the Campbell Aff.) Section 42-220 provides for a duty of water limitation of "one second foot of water for each fifty (50) acres of land so irrigated," *i.e.*, 0.02 cfs per acre of irrigation. At 114 acres of irrigation, Section 42-220 would allow for a diversion rate of up to 2.28 cfs. Therefore, the Water Right's licensed diversion rate of 1.85 cfs is well within the duty of water requirements established by Section 42-220. And, notably, there is no reference in Section 42-220 to limitations based on acre-feet per year.

c. There Are No "Other Reasons Set Forth in this Title" Authorizing the Department to Impose the Limitation

As Section IV.C of this Brief will explain, the adjudication statutes in Idaho Code Title 42, Chapter 14 do not provide the Department with authority to impose the volumetric limitation on the Tluceks' Water Right. The only remaining basis in "this Title" for imposing this restrictive condition would be Section 42-222(2), which authorizes the Department to find that a water right represented by a license has been forfeited in whole or in part, and, accordingly, to recommend a reduced water right in the SRBA. However, as has been explained, the Supplemental Director's Report and the Department's testimony demonstrate that there was no fact-based inquiry into the use of water by the Tluceks after the license was issued during the SRBA claim investigation process.

2. This Court Has Already Held that Section 42-220 Prohibits the Department from Using the SRBA to "Redefine the Use of a Previously Issued License"

This Court has already addressed a similar issue and held, based upon the language of Section 42-220, that the Department cannot use the SRBA to impose a new condition that would "redefine the use of a previously issued license. . . ." *In Re SRBA*, Case No. 39576, Subcase No. 36-02708, *et al.*, Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue, pp. 14-18 (5th Dist. Dec. 29, 1999) (Wood, J.) (hereinafter, the "Facility Volume Order").

In the Facility Volume case, one of the issues to be decided by this Court was whether the Department could use the SRBA to impose a facility volume limitation on a previously issued water right. Facility Volume Order, pp. 6-8, 14-18. In some cases, the licenses on which the recommendations were based had already included a facility volume limitation; in others, the licenses did not include such limitations. *Id.* at 14. In addressing when the inclusion of such a limitation was permissible, then-Special Master Haemmerle stated:

> As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director's Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.
>
> The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right." I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the "state" as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use of a

licensed water right. Under these circumstances, the question is which statute controls.

The inquiry involves principles of statutory construction. "It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). "[T]o the extent that two statutes conflict, the more specific governs over the more general." *Id.* Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state [footnote 4 cited].

Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license. A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), [131] Idaho [12], 951 P.2d 943 (1998). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property." *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be "tantamount" to altering a real property right. In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued.

Id. at 14-15 (quoting *In Re SRBA*, Case No. 39576, Subcase No. 36-02708, *et al.*, Supplemental Findings of Fact and Conclusions of Law (Facility Volume) (5th Dist. July 31, 1998) (Haemmerle, S.M.)) (footnotes omitted) (emphasis added).

Then-Presiding Judge Wood upheld and adopted Special Master Haemmerle's analysis. Facility Volume Order, p. 18. In summary, this Court relied upon Section 42-220 in holding that water rights licenses are binding upon the Department in the SRBA. The Department can impose a new condition that was not previously included in the original license if it is necessary to "define, clarify, or administer" the water right. *Id.* at 14. The Department cannot, however, impose a new condition that would "alter or restrict the use of the license." *Id.* at 15.

As the Department readily admits, any diversion rate expressed in cubic feet per second is easily converted into an annual diversion volume expressed in acre-feet per year. (Supplemental Director's Report, p. 6, n.5; Shaff Dep., 106:14-107:13.) In the case of the Water Right, that annual diversion volume would be 903 AFY, given its 246-day period of use. Accordingly, it cannot be disputed that the imposition of the new limitation of 513 AFY impermissibly "restrict[s] the use of the license" pursuant to the Facility Volume Order.

The Department's treatment of the Facility Volume Order in the Supplemental Director's Report is vague and ineffective because it ignores the express language quoted above. (Supp. Dir. Rep. pp. 6-7.) The Department points out that the Facility Volume Order explains that facility volume is not a "third parameter" to the quantity element and does not discuss Section 42-1427, in an apparent attempt to distinguish that case from this one. *Id.* at 7. Unfortunately for the Department, those distinctions do not change the fundamental point of that case: that the Department cannot use the SRBA to impose a new limitation on a water right that would "alter or restrict the use of the license." Facility Volume Order, p. 15.

C. None of the Adjudication Statutes Relied Upon by the Department Provide a Basis For Imposing the Annual Diversion Volume Limitation

The Supplemental Director's Report relies upon several of the water rights adjudication statutes in Idaho Code Title 42, Chapter 14 to support its inclusion of the annual diversion volume limitation in the Tluceks' Water Right. For the reasons explained below, none of those statutes authorize the Department to impose such a restriction on the Water Right.

a. Sections 42-1209 and 42-1427 Simply Require the Department to Define the Quantity Element, Not Annual Diversion Volume

In the Supplemental Director's Report, the Department asserts that paragraphs (1)(a) and (1)(b) of Section 42-1427 provide it with authority to impose the restrictive annual diversion volume limitation at issue in this case. (Supp. Dir. Rep., pp. 3-5.) Unfortunately, the Department neglected to explain that those two provisions are simply the legislative findings explaining the purpose of subsection (2), which is the only provision in Section 42-1427 containing an actual legal requirement. It provides:

> If a licensed or decreed water right does not describe all of the elements of a water right required in section 42-1409, Idaho Code, the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication.

IDAHO CODE § 42-1427(2) (emphasis added).

In other words, because some old water rights licenses and decrees lacked some elements that are now required to be described in a water right, the Idaho Legislature enacted Section 42-1427 to ensure that the Department would include recommendations for any previously undefined elements. Accordingly, Section 42-1427(2) incorporates Section 42-1209 as the list of elements that are required to be included in the Director's Report. With respect to the quantity element, Section 42-1209 provides:

> The director shall prepare and furnish on request a standard notice of claim form. The notice of claim form shall include the following: . . . (c) the quantity of water claimed: (i) the quantity of water claimed to be used for water rights acquired under state law shall describe the rate of diversion . . . in cubic feet per second or the annual volume of diversion of water for use or storage in acre-feet per year, or both . . . .

IDAHO CODE § 42-1209(1)(c)(i) (emphasis added).

In other words, an annual diversion volume is not a required element under Section 42-1409. From the Idaho Legislature's perspective, it is perfectly acceptable for a water right to be recommended with a diversion rate expressed only in cubic feet per second. Therefore, the relevant "element[] of a water right required in section 42-1409" referred to in Section 42-1427(2) is simply the quantity element—not the annual diversion volume.

Here, the license for the Water Right already included a quantity element: 1.85 cfs. (*See* Exhibit D to the Campbell Aff.) Because quantity was already specified, Section 42-1427's requirement that the Director recommend previously undefined elements is inapplicable.

b. Section 42-1411 Simply Requires the Department to Define the Quantity Element, Not Annual Diversion Volume

Next, the Department argues that under Section 42-1411(2)(c), "the director's report recommendation must include a quantity element." (Supp. Dir. Rep., p. 5 (emphasis added).) That provision provides:

> The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law: . . . (c) the quantity of water used describing the rate of water diversion . . . in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right . . . .

IDAHO CODE § 42-1411(2)(c) (emphasis added).

Again, as has been discussed with regard to Sections 42-1409 and 42-1427, this provision does not require the Department to impose an annual diversion volume limitation on the Water Right because it states that the quantity element shall be expressed in terms of cubic feet per second "or" acre-feet per year. *Id.* The license on which the Water Right is based already had the quantity element expressed in cubic feet per second.

And, as Mr. Shaff admits in his deposition transcript, the licensed diversion rate of 1.85 cfs is easily converted into an annual volume limitation of 903 acre-feet per year. (Shaff Dep. 107:4-107:13.) Accordingly, the Department cannot rely upon the authority under Section 42-1411(2)(c) to define quantity "as necessary for the proper administration of the water right," because the Water Right has always been limited to the withdrawal of no more than 903 acre-feet per year.

c. Section 42-1401B Cannot Be Applied Retroactively, and Does Not Apply Because the Department Does Not Use "Uniform Parameters" for Quantifying Beneficial Use

The Department also notes that pursuant to Section 42-1401B(1), "[t]he Director is charged with making recommendations to the extent of beneficial use and is specifically authorized to 'use uniform parameters for quantification of beneficial use.'" (Supp. Dir. Rep., p. 5.) As an initial matter, it should be noted that Section 42-1401B was enacted in 1994, S.L. 1994, ch. 454, § 3, and was therefore not in effect when the Tluceks filed their amended claim to the Water Right on August 8, 1990. (*See* Supp. Dir. Rep., p. 1.) Therefore, reliance upon that statute constitutes the retroactive application of the statute to the Water Right in violation of the Idaho Code and the Idaho Constitution.

Under Idaho law, "[n]o part of [Idaho's statutory code] is retroactive unless expressly so declared." IDAHO CODE § 73-101; *see also City of Garden City v. City of Boise*, 104 Idaho 512, 515, 660 P.2d 1355, 1358 (1983). Simply put, there is nothing in the legislation

enacting Section 42-1401B indicating that it should be applied retroactively to a previously filed claim. *See* IDAHO CODE § 42-1401B; S.L. 1994, ch. 454. In addition, in Idaho, the retroactive application of a statute is impermissible when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past." *Ohlinger v. U. S.*, 135 F. Supp. 40, 42 (D.C. Idaho 1955) (citation omitted). *See also I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001); *Hidden Springs Trout Ranch, Inc. v. Allred*, 102 Idaho 623, 624, 636 P.2d 745, 746 (1981). Use of Section 42-1401B to impose the new annual diversion volume on the Tluceks' Water Right certainly "impairs vested rights" because it is a new restriction upon the Tluceks' use of that right. Again, the state issued the license to the Water Right in 1967, and the Tluceks filed their amended claim to the Water Right in 1990—both well before the enactment of Section 42-1401B. That statute cannot, therefore, be used to impose a new, restrictive condition on that right.

The Department's reliance upon Section 42-1401B is also ineffective because it most certainly has not used "uniform parameters" for quantifying beneficial use as the statute itself requires. For example, it is the Department's policy to impose annual diversion volume limits on irrigation water rights from groundwater, even if the original license did not have any such limitation. *See* Claims Investigation Manual, ch. 6, pp. 2-3 (attached as Exhibit 3 to the Tuthill Dep., which is attached as Exhibit B to the Campbell Aff.) ("[t]he agent should recommend an annual volume for all groundwater irrigation rights"). By contrast, it is the Department's policy not to impose annual diversion volume limits on municipal water rights from groundwater, unless such a limit was included in the previous license. *Id* at ch. 6, p. 3

("[m]unicipal water rights should not be recommended with an annual volume unless contained in a license, transfer or reasonable decree").

The withdrawal of a certain volume of water from an aquifer has the same effect upon that water resource regardless of the use designated on the water right. And, one could even argue that the withdrawal of a certain amount of groundwater for irrigation purposes has less effect upon the water source than the withdrawal of the same amount for municipal purposes, because some of the irrigation water seeps back into the aquifer. Moreover, as the Department acknowledges, water rights that are designated with a municipal purpose of use include an irrigation component for potable water that is used to irrigate lawns:

> Q. . . . You indicated that municipal water rights do not have an annual diversion volume in the recommendations unless they had that element in licenses; is that correct?
>
> A. Correct.
>
> Q. And municipal water rights include irrigation; correct?
>
> A. They may.
>
> * * *
>
> May somebody irrigate their lawn with the potable water? Yes, they may. I do.
>
> Q. So that is irrigation; right?
>
> A. It is irrigation. Yes, sir.

(Shaff Dep., 115:14-115:21, 116:7-116:10 (emphasis added).)

Despite these factors, the Department's policy is to impose annual diversion volume limits on the rights that are designated with a purpose of use of "irrigation," but not on rights that are designated as "municipal." Far from being a "uniform parameter," annual

diversion volume limits appear to be applied arbitrarily by the Department, which vitiates any such authority possibly provided by Section 42-1401B.

D. The Department's Internal Policies Have Not Been Formally Adopted and Therefore Lack Legal Force

As the previous sections of this Brief have explained, the Department lacked statutory authority to use the SRBA to impose a new restrictive annual diversion volume limitation on the Tluceks' Water Right. And, importantly, the Department has not promulgated any rules or regulations that could provide such authority in the SRBA. To the contrary, as the Shaff and Tuthill depositions demonstrate, the primary support relied upon by the Department are internal guidances and memoranda. Specifically, the Department relies upon the 1990 Claims Investigation Manual, the Updated Claims Investigation Manual (1999), the Operations Division Administrator's Memorandum (Dunn, Apr. 7, 1975), the Administrator's Memorandum (Young, Nov. 5, 1979), and the Administrative Memorandum (Saxton, June 14, 1979). (*See, e.g.,* Supp. Dir. Rep. p. 4; Shaff Dep. 42:23-43:11, 47:2-47:14, 68:15-68:17; Tuthill Dep. 11:9-11:21, 29:25-30:5, 39:8-40:21.)

In this regard, it is important to emphasize that the Department policies relied on in support of such limitations do not represent persuasive authority, because they are merely internal agency guidelines, and not rules pursuant to the Idaho Administrative Procedure Act. *See* IDAHO CODE § 67-5201(19)(b)(iii) (excluding intra-agency memoranda from definition of rule). While Idaho case law provides little discussion regarding the weight of authority given to such agency guidelines, the Idaho Administrative Procedure Act is analogous to the federal Administrative Procedure Act, and federal case law addressing similar issues provides helpful guidance for this Court.

The U.S. Supreme Court has held that agency statutory interpretations "contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," are entitled only to "respect"—not to the substantial deference that is generally accorded to rulemakings. *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000); *see also Reno v. Koray*, 515 U.S. 50, 61, 115 S. Ct. 2021, 2027 (1995) (an "internal agency guideline" is only entitled to "some deference."). In addition, both Idaho and federal courts have firmly established that even properly promulgated administrative rules that have undergone notice and comment proceedings are subject to judicial review and interpretation, because "[i]t is fundamental that the judiciary has the ultimate responsibility to construe legislative language to determine the law." *Mason v. Donnelly Club*, 135 Idaho 581, 583, 21 P.3d 903, 905 (2001) (citing *J.R. Simplot Co. v. Tax Comm'n*, 120 Idaho 849, 853, 820 P.2d 1206, 1210 (1991)) (emphasis added); *see also Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 177, 2 L. Ed. 60, 73 (1803).

In the present case, the Department acknowledges that it did not adopt the internal policies relied upon to support the inclusion of an annual diversion volume limitation as official rules pursuant to the Idaho Administrative Procedure Act. (Shaff Dep., 72:1-72:11, 72:18-73:1; Tuthill Dep., 20:19-20:23.) The only instance in which similar policies regarding annual diversion volume limitations have been adopted as official rules is in the Beneficial Use Examination Rules, which are inapplicable to the present case because they apply only to beneficial use field examinations conducted for new water right applications. (Tuthill Dep., 11:25-12:6); IDAPA 37.03.02. In addition, the Department's Adjudication Rules, which govern the SRBA, do not have a provision requiring the inclusion of a volumetric limitation. (Shaff Dep., 101:5-101:6); IDAPA 37.03.01.

In summary, the Department's internal policies do not represent official administrative rules and have little if any persuasive authority and have no binding effect on the Tluceks or this Court.

E. The Department Mischaracterizes the Effects of Invalidating the Annual Diversion Volume Limitation

In the Supplemental Director's Report, the Department makes a couple of arguments in support of its inclusion of the annual diversion volume limitation that are based upon practical considerations. However, neither of these arguments has merit. First, the Department argues that inclusion of this limitation is necessary for water resource administration purposes because it is necessary to define the maximum volume per year that can be withdrawn from the groundwater resource. (Supp. Dir. Rep., p. 6.) As this Brief has already explained, however, this argument is disingenuous because a diversion rate expressed in cubic feet per second is easily converted into an annual diversion volume expressed in acre feet per year. So, even though the original license for the Water Right did not include an annual diversion volume limitation, there has in reality always been one on the Water Right.

Second, the Department argues that a ruling by this Court invalidating the annual diversion volume limitation on the Tluceks' Water Right would open up to re-examination hundreds of partial decrees that have already been issued. (Supp. Dir. Rep., p. 7.) As an initial matter, it is important to clarify that the Tluceks are not bound by those prior proceedings. Perhaps if this precise issue had already been litigated and decided, the Department could argue that *stare decisis* should preclude this challenge. However, neither the Tluceks nor their counsel are aware of any such prior resolution.

And, to address the Department's concerns more directly, resolution of this particular subcase would not subject previous partial decrees to re-examination because doing so

would be barred by the rules of procedure and *res judicata* principles. Water right claimants for whom partial decrees have already been issued are bound by the terms of those decrees, whether they challenged the inclusion of an annual diversion volume limitation or not. Section 14(d) of this Court's Administrative Order 1 provides:

> Parties seeking to modify a partial decree shall comply with I.R.C.P. 60(a) or 60(b). Partial decrees are final judgments and cannot be modified by an administrative proceeding except as provided in I.C. § 42-222.

AO1 § 14(d) (emphasis added).

Rule 60(a) is only available to correct "[c]lerical mistakes" in partial decrees and therefore would not be a proper means for challenging the inclusion of an annual diversion volume limitation. Rule 60(b) may be used to correct partial decrees under certain limited circumstances, and is available only within 6 months after the issuance of the partial decree. Moreover, because partial decrees are "final judgments" pursuant to AO1, *res judicata* would bar a claimant's objection to an annual diversion volume limitation contained in a partial decree, because such an objection should have been raised prior to the issuance of that decree. *See, e.g., U.S. Bank Nat'l Ass'n v. Kuenzli*, 134 Idaho 222, 226, 999 P.2d 877, 881 (2000) ("[i]t is 'well established' in Idaho law that 'in an action between the same parties upon the same claim or demand, the former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim but also every matter which might and should have been litigated in the first suit'"). Therefore, the Department's concern regarding the potential re-examination of previously issued partial decrees is totally unfounded.

F. The Department Should Not Be Allowed to File a Responsive Brief Because It Is Not a Party to the Subcase

The Tluceks object to the filing of any responsive documents in this matter by the Department because, according to Idaho statute, the Department is not a party to the SRBA. Idaho Code Section 42-4101B specifically provides:

> The director's role under this chapter is as an independent expert and technical assistant. . . . The director shall not be a party to an adjudication.

IDAHO CODE § 42-4101B (emphasis added).

Pursuant to Idaho Rule of Civil Procedure 56(c), only an "adverse party" may respond to a motion for summary judgment. Therefore, the Department is specifically prohibited by statute and rule from filing a response to the Tluceks' Motion for Summary Judgment.

Similarly, Section 10(k) of AO1 allows "[a]ny party to the adjudication who is not a party to a subcase [to] seek leave to participate in a subcase by filing a timely *Motion to Participate*," which this Court treats as a motion to intervene under Idaho Rule of Civil Procedure 24. Again, because the Idaho Legislature has specifically stated in Idaho Section 42-1401B that the Department is not a party to an adjudication, the Department cannot seek leave to participate pursuant to Section 10(k) of AO1.

In summary, there is simply no legal basis for allowing the Department to file any responsive documents to the Tluceks' Motion for Summary Judgment. Therefore, this Court should not consider any such responses filed by the Department.

V. CONCLUSION

In summary, this Court may decide this case as a matter of law, because there are no disputed issues of fact. As this Brief has explained, the Department lacks legal authority to impose a new, restrictive annual diversion volume limitation on the Tluceks' Water Right

because it is represented by a water right license which, according to Section 42-220, is "binding upon the state" and constitutes "prima facie evidence as to such right." Pursuant to this Court's prior decisions, the Department may not use the SRBA to impose new restrictions on water rights previously established by license.

Perhaps the Department's inclusion of this new limitation would be appropriate if it were based upon the Tluceks' use of water after the license was issued. However, this is simply not the case. As this Brief has established, and based upon the testimony of multiple Department employees, the Department conducted little if any factual investigation into the historical use of the Water Right. Instead, it imposed the new limitation on the Water Right based only upon its own internal guidelines and procedures that have not been formally adopted as law, rule, or regulation. And, the Supplemental Director's Report provides no legal support for the Department's position. That Report is a legal document prepared by attorneys, not a technical document prepared by experts, and therefore violates the Idaho Rules of Evidence.

Simply put, the Department has no factual or legal basis for imposing an annual diversion volume limitation on the Tluceks' Water Right. The Tluceks respectfully request that this Court grant their Motion for Summary Judgment and invalidate the annual diversion volume limitation imposed on their Water Right.

DATED this 3rd day of January, 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By 
Scott L. Campbell – Of the Firm
Attorneys for Jerry L. Tlucek and
Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of January, 2008, I caused a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

(X) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Scott L. Campbell

Attachments may be viewed in the repository or legal file

CERTIFICATE OF SERVICE

I certify that on this 3rd day of January 2008, I caused to be served the original and copies of the IDP&R'S AMENDED LIST OF WITNESSES on the following persons by the indicated methods:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

2. Copies to

Special Master Ted Booth
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☒ Facsimile: (208) 736-2121
- ☐ Statehouse Mail

Hart-Davis Ditch Company
Represented by:
S. Bryce Farris
RINGERT CLARK
455 South Third St.
PO Box 2773
Boise, ID 83701-2773

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

Mace-Catlin Mutual Ditch Company Incorporated
Represented by:
Jon Gould
RINGERT CLARK
455 South Third St.
PO Box 2773
Boise, ID 83701-2773

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: (303) 312-7379
- ☐ Statehouse Mail

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Idaho Department of Parks and Recreation
5657 Warms Springs Avenue
Boise, ID 83716

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☒ Statehouse Mail

Ron Sali & Ron Sali Properties
Ron Sali Properties, Inc.
Represented by:
Michael C. Creamer
GIVENS PURSELY
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PO Box 2720
Boise, ID 83701-2720

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

Ron Sali
PO Box 488
Boise, ID 83701-0488

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

Ron Sali Properties, Inc.
Profit Sharing Plan
100 N 9th St. Ste 200
Boise, Idaho 83702-5700

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

Ron Sali
919 South Linden Rd.
Eagle, Idaho 83616

- ☒ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile:
- ☐ Statehouse Mail

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

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FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
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Telephone (208) 345-2000
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slc@moffatt.com
dbl@moffatt.com
ajs@moffatt.com
22377.1

RECEIVED
JAN 07 2008
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

In Re SRBA, Case No. 39576	Subcase No. 63-03174 **AFFIDAVIT OF SCOTT L. CAMPBELL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Ada)

I, SCOTT L. CAMPBELL, having been duly sworn upon oath, depose and state as follows:

1. I am the attorney of record for Jerry L. Tlucek and Mary Lou Tlucek (hereafter "Tluceks") in this action, and make this affidavit based upon my personal knowledge.

2. Attached hereto as Exhibit A is a true and correct copy of the deposition transcript of Donald V. Shaff, dated October 25, 2007, as cited in the Tluceks' Brief in Support of Motion for Summary Judgment.

3. Attached hereto as Exhibit B is a true and correct copy of the deposition transcript of David R. Tuthill, dated November 26, 2007 (Vol. I), and December 7, 2007 (Vol. II), as cited in the Tluceks' Brief in Support of Motion for Summary Judgment.

4. Attached hereto as Exhibit C is a true and correct copy of the deposition transcript of Jan Grover Shurte, dated November 26, 2007, as cited in the Tluceks' Brief in Support of Motion for Summary Judgment.

5. Attached hereto as Exhibit D is a true and correct copy of the original license for water right no. 63-3174 issued on June 26, 1967 by the state of Idaho.

6. Attached hereto as Exhibit E is a true and correct copy of the Idaho Department of Water Resources' recommendation for water right no. 63-3174 filed on December 16, 2005.

7. Attached hereto as Exhibit F is a true and correct copy of the Supplemental Director's Report Regarding Subcase No. 63-3174 issued on September 14, 2007.

Further your affiant sayeth naught.

DATED this 3rd day of January, 2008.

Scott L. Campbell

SUBSCRIBED AND SWORN to before me this 3rd day of January, 2008.

DEBORAH L. LONG NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 10/10/13

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of January, 2008, I caused a true and correct copy of the foregoing **AFFIDAVIT OF SCOTT L. CAMPBELL IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

(✓) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Scott L. Campbell

DISTRICT COURT - SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
MAR - 3 2008
By _____ Clerk
_____ Deputy Clerk

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

In Re SRBA	)	**Subcase 63-03174 and 63-23182**
	)	
Case No. 39576	)	**ORDER SETTING STATUS**
	)	**CONFERENCE and VACATING TRIAL**
	)	**IN 63-03174**

On January 4, 2008, the Tluceks filed their *Motion for Summary Judgment* in Subcase no. 63-03174, together with supporting briefing and affidavit. Oral argument on the motion was heard on February 11, 2008. In the process of preparing an order on summary judgment, this Special Master has become aware of some questions regarding the relationship between 63-03174 and 63-23182.

Water right no. 63-23182, which was reported in the Basin 63 Part III *Director's Report*, is a claim for an enlargement of water right 63-03174. Because 63-03174 was reported in the *Director's Report* for Basin 63 Part II, and because 63-23182 was not identified by IDWR in the Basin 63 Part II *Case Management Proposal* (dated July 28, 2006) as an overlapping water right to 63-03174, these two subcases have heretofore proceeded on separate tracks, with 63-03174 being procedurally ahead of 63-23182.

The *Director's Report* in 63-23182 recommends an irrigated place of use of 86 acres, which was an enlargement of water right 63-03174 that occurred on May 1, 1973. The total number of acres allowed to be irrigated under both rights is 200 acres. The *Director's Report* for 63-23182 also recommends a remark which states: "This right when combined with Right No. 63-3174 shall provide no more than 1.85 cfs nor more than 513 AF per annum." The Tluceks have timely filed an objection on 63-23182, including an objection to IDWR's recommendation of quantity.

In the course of proceedings in 63-03174, it is clear that IDWR's recommendation of 513 AFY in 63-03174 is based upon IDWR's standard for the Treasure Valley area of

4.5 acre feet per acre multiplied by 114 acres, which is the number of acres licensed to be irrigated under water right 63-03174. *See* Supplemental Director's Report, Section III. D.; Deposition Testimony of Dave Tuthill, *Campbell Aff.* Exhibit B, at pp. 22-30. In other words, the recommended 513 AFY appears to be made without allowance for any additional annual volume for the 86 acres of the enlargement claim.[1]

In *Freemont-Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 460, 926 P.2d 1301 (1996), the Idaho Supreme Court stated: "Section 42-1426 of the Idaho Code does not proscribe enlargements that include an increase in volume of water diverted, so long as the enlargement does not exceed the rate of diversion originally authorized . . .." It appears to this Special Master that irrespective of the legal issues raised on summary judgment in subcase 63-03174 regarding whether IDWR has the authority to impose a volumetric limitation where one was not expressly stated in the 1967 license, any volumetric limitation that may ultimately become part of the partial decree for 63-23182 will be inextricably linked to the determinations made in subcase 63-03174. It is the opinion of this Special Master that subcases 63-03174 and 63-23182 need to proceed on the same track.

In accordance with the foregoing, and for the purpose of discussing with the claimants and IDWR how best to proceed with both subcases together, a status conference will be held on **March 11, 2008 at 10:30 AM Mountain Time** at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate by telephone by dialing 225-383-1099 and when prompted entering the code 675342. The March 28, 2008, trial is **vacated.**

Dated March 3, 2008

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

[1] If IDWR's standard 4.5 acre feet per annum were applied to the total of 200 acres, the resulting volumetric limitation would be 900 acre feet per year. The Tlucek's argue that the volumetric limitation of water right 63-03174 is 903 acre feet per year, which is arrived at by calculating the volume of water that could be diverted under a continuous diversion of 1.85 cfs for the entire irrigation season. Among other things, it is not clear to this Special Master whether or not IDWR's calculation of 513 AFY for right 63-03174 took into account the additional volume necessary, if any, for the 86 acre enlargement.

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

2007 MAY 7 AM 11 10

COPY

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

In Re SRBA Case No 39576	**Subcase No. 63-3174** **STIPULATION TO PARTIALLY RESOLVE OBJECTION**

This form is used to report the stipulated elements of one water right acquired under state law and/or one federal reserved water right. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right

The parties agree that the Snake River Basin Adjudication Court has jurisdiction of the parties and subject matter to enter a partial decree for this water right; that they have been served with sufficient process, according to the law; and that they have appeared, prosecuted, and defended their positions with regard to this water right dispute.

The claimants and IDWR agree and stipulate that the place of use element of this water right should be described per the attached. The claimants and IDWR have further indicated their concurrence by initialing each of the attached pages. This stipulation resolves only the claimants' objection to the number of irrigated acres within the place of use. It does not resolve the claimants' objection to the quantity element of this right.

CLAIMANT(s)OBJECTOR(s):
Jerry L and Mary Lou Tlucek

Scott Campbell 4/26/07

Scott Campbell Date
attorney

IDWR Concurrence:

Jan Shurte 4-23-07 Nicholas B. Spencer 4-23-07

Jan Shurte — Date — Adjudication Supervisor

Nicholas B. Spencer — Date — Deputy Attorney General

CERTIFICATE OF MAILING

I certify that on May 4, 2007, I mailed the original and copies of this form, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1 Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P O. Box 2707
Twin Falls, Idaho 83303-2707

2. Copies to:

Jerry & Mary Lou Tlucek
represented by:
Scott L. Campbell
101 S Capitol Blvd, 10th Floor
PO Box 829
Boise, ID 83701-0829
Phone: 208-345-2000

IDWR Repository
P.O. Box 83720
Boise, ID 83720

Signature of person or attorney mailing the form

IDAHO DEPARTMENT OF WATER RESOURCES RECOMMENDED
WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3174

NAME AND ADDRESS:

JERRY L ILUCEK
15180 S CAN-ADA RD
MELBA ID 83641

MARY LOU ILUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SLC
NBS

SOURCE: Source: Tributary:

GROUND WATER

QUANTITY: 1 850 CFS

513 000 AFY

This right when combined with Right No. 63-23182 shall provide no more than 1.85 cfs nor more than 513 AF per annum

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION:

I01N R01W S22 SESE
Within ADA County

PURPOSE AND PERIOD OF USE:	Purpose of use	Period of use:	Quantity:
	IRRIGATION	03/15 11/15	1 850 CFS 513 00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT

PLACE OF USE: IRRIGATION within ADA County

T01N R01W S22 SESW 40.0
T01N R01W S22 NESE 40.0 ~~T01N R01W S22 NESE 35.0~~
T01N R01W S22 NWSE 40.0
T01N R01W S22 SWSE 40.0 ~~T01N R01W S22 SWSE 39.0~~
I01N R01W S22 SESE 40 0

200 ACRES TOTAL ~~114 ACRES TOTAL~~

This right is limited to the irrigation of 114 acres within the place of use described above in a single irrigation season.
This right and Right No. 63-23182 are limited to the irrigation of a combined total of 200 acres in a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

Right No. 63-23182 is an enlargement of this right pursuant to Section 42-1426, Idaho Code.

RECEIVED
APR 26 2007
DEPARTMENT OF WATER RESOURCES

DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED
2007 APR 25 PM 1 11

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

In Re SRBA	)	**Subcase 63-03174**
	)	
Case No. 39576	)	**ORDER REQUESTING 706 REPORT FROM IDWR;**
	)	
	)	**ORDER SETTING TRIAL DATE AND SUPPLEMENTAL SCHEDULING CONFERENCE**

I. ORDER REQUESTING 706 REPORT FROM IDWR

Pursuant to Idaho Rule of Evidence 706, and Idaho Code § 42-1401B, it is ordered that IDWR shall prepare and serve upon the parties to the subcase and the SRBA Court a report detailing the basis for its recommendation. The deadline for filing this report is **Friday, September 14, 2007**. The report may address any or all of the elements of the water right claim as IDWR deems appropriate, but particular emphasis should be placed upon the disputed element of quantity, and the basis for the inclusion in the *Director's Report* of an annual limitation in the expressed in terms of acre-feet per year.

In accordance with I.R.E. 706, a deposition of IDWR may be taken by any party; and IDWR may be called to testify by any party or by the Court pursuant to I.R.E. 614(a); and IDWR shall be subject to cross-examination by each party.

II. ORDER SETTING TRIAL DATE AND SUPPLEMENTAL SCHEDULING CONFERENCE

A trial in this subcase will begin on Wednesday, **January 9, 2008 at 9:00 AM Mountain Time**. The trial will be held at the Idaho Supreme Court Building, Lower Conference Room, 451 West State Street, Boise, Idaho.

A supplemental scheduling conference in this subcase will be held on **Tuesday, September 25, 2007 at 9:00 AM Mountain Time** at the Snake River Basin Adjudication Courthouse, 253 3rd Avenue North, Twin Falls, Idaho. Parties may participate in the supplemental scheduling conference by telephone by dialing 225-383-1099 and when prompted entering the code 675342.

Dated April 25, 2007.

THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the ORDER REQUESTING 706 REPORT FROM IDWR; ORDER SETTING TRIAL DATE AND SETTING SUPPLEMEN SCHEDULING CONFERENCE was mailed on April 25, 2007, with sufficient first-class postage to the following:

JERRY L & MARY LOU TLUCEK
JERRY L TLUCEK
MARY LOU TLUCEK
Represented by:
SCOTT L. CAMPBELL
101 S CAPITOL BLVD, 10TH FLOOR
PO BOX 829
BOISE, ID 83701-0829
Phone: 208-345-2000

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

Deputy Clerk

10/24/2007

IDAHO DEPARTMENT OF WATER RESOURCES

RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3174

NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD

MELBA ID 83641

MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER TRIBUTARY:

QUANTITY: 1.850 CFS
513.00 AFY

This right when combined with Right No. 63-23182 shall provide no more than 1.85 cfs nor more than 513 AF per annum

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION:

T01N R01W S22 SESE Within ADA County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/15 11/15	1.850 CFS 513.00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE: IRRIGATION in ADA County

T01N R01W S22	SESW	40.00	T01N R01W S22	NESE	40.00
T01N R01W S22	NWSE	40.00	T01N R01W S22	SWSE	40.00
T01N R01W S22	SESE	40.00			

200 ACRES TOTAL

This right is limited to the irrigation of 114 acres within the place of use described above in a single irrigation season.

This right and Right No. 63-23182 are limited to the irrigation of a combined total of 200 acres in a single irrigation season.

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no

later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

Right No. 63-23182 is an enlargement of this right pursuant to Section 42-1426, Idaho Code.

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

208 345 2000
208 385 5384 Fax
208 385 5323 Direct

FACSIMILE

From: Scott L. Campbell

Re: Subcase No. 63-03174

Date: October 19, 2007

File No.: 22377.1

Number of pages being transmitted including the cover page: 5
Please call fax operator at (208) 345-2000 if all pages are not received.

To:

Name	Organization	Fax No.	Voice No.
Jan Shurte	Idaho Department of Water Resources Western Region Office	334-2348	334-2190
Director	Idaho Department of Water Resources	287-6700	287-4800
Lori Pulsifer	QNA Court Reporting	286-7426	484-6309

Message:

Notice of Deposition

PLEASE DELIVER IMMEDIATELY

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for return of the original document to us. Thank you.

Scott L. Campbell, ISB No. 2251
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
slc@moffatt.com
22377.1

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,	Subcase No. 63-03174
Case No. 39576	**NOTICE OF DEPOSITION OF JAN SHURTE**

PLEASE TAKE NOTICE that Jerry L. Tlucek and Mary Lou Tlucek will take testimony upon oral examination of Jan Shurte, before an officer authorized to administer oaths on Thursday, October 25, 2007, at 10:30 a.m., and continuing thereafter from day to day until completed, at the offices of MOFFATT THOMAS BARRETT ROCK & FIELDS, CHARTERED, located at 101 S. Capitol Boulevard, 10th Floor, Boise, Idaho 83702, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 19th day of October, 2007.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Scott L. Campbell – Of the Firm
Attorneys for Jerry L. Tlucek and Mary Lou Tlucek

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of October, 2007, I caused a true and correct copy of the foregoing **NOTICE OF DEPOSITION OF JAN SHURTE** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

Lori Pulsifer
QNA Court Reporting
PMB 219
111 Broadway, Suite 133
Boise, ID 83702
Fax: 208-286-7426

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

_____
Scott L. Campbell

Scott L. Campbell, ISB No. 2251
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
slc@moffatt.com
22377.1

Attorneys for Jerry L. Tlucek
and Mary Lou Tlucek

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA,

Case No. 39576

Subcase No. 63-03174

NOTICE OF SERVICE OF DEPOSITION
NOTICE OF JAN SHURTE

I HEREBY CERTIFY that on this 19th day of October, 2007, I caused a true and correct copy of the **NOTICE OF DEPOSITION OF JAN SHURTE** and the foregoing **NOTICE OF SERVICE** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
P.O. Box 83720
Boise, ID 83720-0098
Fax: 208-287-6700

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Lori Pulsifer
QNA Court Reporting
PMB 219
111 Broadway, Suite 133
Boise, ID 83702
Fax: 208-286-7426

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( ) Hand Delivered
( ) Overnight Mail
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Scott L. Campbell

COPY

SUPPLEMENTAL DIRECTOR'S REPORT REGARDING SUBCASE NO. 63-3174

In Re SRBA
Twin Falls County Civil Case No. 39576

Report to the SRBA District Court

Prepared by the Idaho Department of Water Resources
David R. Tuthill Jr., Director
Donald V. Shaff, Adjudication Bureau Chief

September 14, 2007

I. INTRODUCTION

Special Master Theodore R. Booth of the Snake River Basin Adjudication ("SRBA") Court issued a trial scheduling order on April 25, 2007, requesting the Director of the Idaho Department of Water Resources ("IDWR" or the "Department") submit a report to the Court detailing IDWR's basis for its recommendation in subcase no. 63-3174. In particular, Special Master Booth asked IDWR to discuss the quantity element and the basis for including an annual volume limitation in its recommendation. In response to this request, IDWR submits this Supplemental Director's Report Regarding Subcase No. 63-3174 in accordance with Idaho Code § 42-1412(4) and Administrative Order 1. This report was prepared under the supervision of David R. Tuthill, Jr., Director, and Donald V. Shaff, Adjudication Bureau Chief for IDWR.

The following IDWR employees have knowledge of the information contained in this report: Jan Shurte, Adjudication Water Rights Supervisor, Western Regional Office; David R. Tuthill, Jr., Director.

II. BACKGROUND

On September 13, 1989, Jerry L. and Mary Lou Tlucek ("Tluceks") originally claimed in the SRBA water right no. 63-3174 based on a license for irrigation by ground water. On August 8, 1990, the Tluceks filed an amended claim for 63-3174. See Amended Claim, Exh. 1. The Amended Claim sought fewer irrigated acres, 114 instead of 200, and consequently a smaller consumptive amount, 399 acre feet per annum ("AFY") instead of 700 AFY. See id.

On December 16, 2005, IDWR filed its recommendation for water right no. 63-3174 with the SRBA District Court. See IDWR Director's Report ("Recommendation"),

Exh. 2. On April 18, 2006, the Tluceks filed an objection, contesting the quantity and place of use elements of IDWR's recommendation. See Tluceks' Objection ("Objection"), Exh. 3. No other objections or responses have been filed on subcase no. 63-3174. On May 7, 2007, the Tluceks and IDWR filed a Stipulation to Partially Resolve Objection as to the Tluceks' place of use objection.

III. DISCUSSION

This report first introduces briefly the Tluceks' objection to IDWR's recommendation and then provides the relevant history of water right no. 63-3174. This report concludes with a discussion of the manifold independent bases supporting IDWR's recommendation for the quantity element.

A. The Tluceks' Objection.

The Tluceks originally objected to both the quantity and place of use elements as recommended for subcase no. 63-3174, however only the quantity element remains at issue. For the quantity element of the Tluceks' claim, IDWR recommended 1.85 cfs and 513.00 AFY. See Recommendation, Exh. 2 at 1.

In their objection, the Tluceks state that the right should provide for 1.85 cfs without the AFY limitation. See Objection, Exh. 3 at 2. In the reasons supporting their objections, the Tluceks state the proposed change will "make the recommendation consistent with the license." Id.

Clarifying their objection at the initial hearing, the Tluceks proposed that because there was no AFY descriptor for the quantity on the 1967 license, IDWR therefore could not add said descriptor to the SRBA recommendation and right. Counsel for the Tluceks

asserted as authority for this proposition Judge Barry Wood's decision in the "Fish Facility Volume" case.[1]

B. History of Water Right No. 63-3174.

Water right no. 63-3174 is based upon a 1967 ground water license. See License and Certificate of Water Right No. G-28285 ("License"), Exh. 4. As to quantity, the License states, "[t]hat the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 1.85 cubic feet per second." Id.

C. Basis for IDWR's Inclusion of an AFY Descriptor in the Recommendation.

IDWR's inclusion of the AFY descriptor is thrice grounded in statute, practice and policy. Read separately or read together, sections of Title 42 of the Idaho Code demonstrate IDWR's authority to include an AFY quantity designation. Interwoven with the statutory authority, annual diversion volumes have been part of IDWR's ground water convention since before the SRBA was created. The value of uniform parameters in water rights, explicitly recognized by the Legislature, coupled with the legislative directive to regulate the extent of diversions, and the policy behind annual volume diversions, provide the framework for IDWR's recommendation.

Section 1427 of Title 42[2] demonstrates the Idaho Legislature contemplated precisely the situation presented here.

> The legislature finds that existing water rights are not uniformly described. Many old water rights were simply defined by source, priority date and diversion rate. Over time, the legislature and courts have made this original description of a water right more specific by the addition of other elements. Because of the increasing demand for water, it is important that the elements of a water right be standardized to allow for fair and efficient

[1] SRBA Subcase Nos. 36-02708, et al. See Part III.C *infra*.
[2] All section references are to Title 42 of the Idaho Code.

> administration of the limited water supply. One (1) purpose of chapter 14, title 42, Idaho Code, is to establish through an adjudication a uniform description for surface water rights, ground water rights and water rights which include storage.

I.C. § 42-1427(1)(a). Here, the License, upon which the Tluceks' right is based, includes the diversion rate but fails to include a diversion volume.

While the volume of diversion was not always included in older decrees and licenses, as was the case with other elements, it has become an IDWR standard since before the inception of the SRBA. Since the mid 1970's, it has been the Department's policy to include a volume limitation on all licensed ground water rights. Furthermore, it has long been a standard practice of IDWR to include a volume limit on ground water recommendations in the SRBA. For example, the first version of the claims manual used at IDWR during the adjudication of the first basin in the SRBA stated explicitly that the water right "[a]mount includes the rate and volume of diversion for each nature of use, and the total rate and volume of diversion and total consumptive use." Claim Investigation Handbook ("Original Claims Manual"), Exh. 5, p. 67.[3] The latest version of the claims manual ("Revised Claims Manual") continues to emphasize IDWR's standard practice of including volumes on ground water rights. Revised Claims Manual, Exh. 6, Nature of Use ("NOU") section, p. 3 (Agents are directed to "recommend an annual volume for all ground water irrigation rights.").[4]

The recurring statutory theme of annual volume for quantity is evident. Section 1409 states pointedly that a notice of claim shall include, among other elements, the quantity of water claimed such that the quantity "shall describe the rate of diversion or,

[3] For the sake of brevity, IDWR is attaching as exhibits the relevant pages only of both the Original and the Revised Claims Manuals. IDWR can supply the whole manual(s) if requested by the Court.
[4] The Revised Claims Manual includes revisions from September 1999 and February 2000.

for an instream flow claim, a rate of water flow in cubic feet per second or the annual volume of water for use or storage in acre-feet per year, or both." I.C. § 42-1409(c)(i). Echoing that provision for annual volume, the director's report recommendation must include a quantity element. See I.C. § 42-1411(2)(c). Specifically, the quantity shall be determined as "the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right." Id.

Section 1427 specifically authorizes the IDWR Director to implement the rubric of the Original and Revised Claims Manuals outlined above. Where, as here, a licensed right does not describe all of the elements of the right required in section 1409, then "the director shall include in his report recommendations for those elements not defined by the prior license or decree based upon the extent of beneficial use of the water right as of the date of the commencement of an adjudication." I.C. § 42-1427(2). The Director is charged with making recommendations to the extent of beneficial use and is specifically authorized to "use uniform parameters for quantification of beneficial use." I.C. § 42-1401B(1).

In section 1427, the Legislature expresses the public policy rationale for authorizing IDWR to standardize the descriptions of water rights. "[I]t is in the public interest to provide a mechanism to decree previously undefined elements of existing water rights based upon conditions existing on the date of commencement of the adjudication provided the claimant is not exceeding any previously determined and recorded element of the decreed or licensed right." I.C. § 42-1427(i)(b).

In addition to the legislatively-recognized policy reasons for a volume descriptor, from a practical, administrative standpoint, annual volumes are important to define the water rights fully based on ground water in the State of Idaho. Ground water diversion is, at its root, a withdrawal from the aquifer so the volume diverted, not the rate of flow, is the true measure of impact to the State's water. Quantifying volume associated with each ground water right allows IDWR to consider and administer the impact of existing (and future) rights on an aquifer. The absence of a volume descriptor, and reliance on mere rate of flow, makes water rights vulnerable to injurious enlargement.[5] Moreover, annual volume descriptors further define the right, helping to settle the matter for future administration. One of the goals of the current SRBA adjudication is to do just that, determine the nature and extent of water rights. See generally I.C. §§ 42-1401, 1401A(5), 1412(6).

The Revised Claims Manual further expresses the Department policy that an annual volume may also be necessary "if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water and should be recommended if contained in a license, transfer or reasonable decree." Exh. 6, NOU p. 3. Here, an annual volume limit is critical because of the need to protect junior priority rights in the Treasure Valley where ground water supplies are limited.

The Department does not view the Fish Facility Volume case as limiting its statutory authority to recommend diversion volumes pursuant to the authorities discussed above. In his Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and

[5] For example, without a volume descriptor, the Tluceks could divert 1.85 cfs for 24 hours a day for the duration of the period of use, 246 days, for a total of 903 AFY. IDWR recommends 513.00 AFY based on a standardized calculation for fair and efficient administration of the limited water supply. See also Part III.D, *infra*.

"Additional Evidence" Issue ("Fish Facility Order"), Judge Wood made clear that facility volume was not a "third parameter" to quantity. See Fish Facility Order, SRBA Subcase Nos. 36-02708, etc., www.srba.state.id.us/FORMS/volume.PDF, at *8-9 (5th Dist. Idaho Dec. 29, 1999). In contrast, there is no indication from the decision that annual volume is unauthorized. Rather, the language of the decision suggests the contrary. Judge Wood reminded that when statutory language is clear and unambiguous, "the court applies the statute without engaging in statutory construction, giving the language its plain, obvious and rational meaning." Id. at *8. Interpreting section 42-1411(2), Judge Wood states, "[t]he statute requires quantity to be measured by rate of diversion or flow in cfs or afy." Id. at *8. Here, the plain meaning of the statute provides for the inclusion of a diversion volume.[6]

For the Tluceks to read the Fish Facility Order as precluding IDWR from recommending a volume descriptor on a licensed ground water right whose quantity is described only by diversion rate would require Judge Wood's decision be interpreted as very narrowly construing sections 42-1409, 1411 and 1401B and rendering section 42-1427 meaningless. The Fish Facility Order does not mention section 42-1427, and the Department cannot believe he intended to accomplish such a drastic outcome *sub silentio*.

In sum, for longer than the SRBA has existed, IDWR has included a diversion volume to ground water recommendations, including those based on old licenses and decrees. To belatedly challenge this long-established practice could potentially affect hundreds of recommendations, most already partially decreed in the SRBA. The Legislature has already provided the statutory resolution of the issue, instructing IDWR

[6] The Fish Facility Order is further distinguishable from the present matter because it concerned, and indeed emphasized, the non-consumptive nature of use, as opposed to the Tluceks' consumptive irrigation

that for purposes of standardized, fair and efficient administration of water rights, the Director is authorized to use uniform parameters for quantification of beneficial use. See I.C. §§ 42-1401B(1), 1427(1)(a). The Director is explicitly commanded to include in the recommendations those elements not defined in the old licenses and decrees. See I.C. § 42-1427(2). Annual volume is part of the quantity element. See I.C. §§ 42-1409(c)(i), 1411(2)(c); IDAPA 37.03.08.35.03.b.iv. Therefore, IDWR has sufficient basis for including an AFY descriptor for the quantity element of a ground water right based on a license, which is silent as to the same.

D. IDWR's Calculation of the Annual Volume Limitation Used in the Recommendation.

IDWR's current ground water volume standard allows 4.5 acre feet per acre of water at the field headgate. Therefore, for the quantity element, the recommended diversion volume for water right no. 63-3174 is simply the number of irrigated acres (114 acres) multiplied by the field headgate requirement (4.5 acre feet per acre) for a total of 513 AFY.

IV. CONCLUSION

IDWR's inclusion of the annual volume limitation on water right no. 63-3174 is supported by unambiguous statutory authority buttressed by practice and policy. Accordingly, IDWR recommends that the Special Master adopt IDWR's recommendation for water right no. 63-3174.

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use. See Fish Facility Order, at *9.

Respectfully submitted this 14th day of September 2007.

Carter Fritschle
Section Manager, Adjudications Bureau

CERTIFICATE OF MAILING

I certify that on 9-14, 2007, I caused to be mailed the original and copies of the **Supplemental Director's Report (706)**, including all attachments, to the following persons by mailing the original and/or copies, postage prepaid and addressed as follows:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
P. O. Box 2707
Twin Falls, Idaho 83303-2707

original mailed
copy served via facsimile

2. Copies to:

Scott L Campbell
101 S Capitol Blvd, 10th Floor
PO Box 829
Boise, ID 83701-0829
Attorney for Jerry & Mary Lou Tlucek

IDWR Repository
P.O. Box 83720
Boise, ID 83720

Becky Harvey
Signature of person mailing the form

EXHIBIT 1

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

IN RE THE GENERAL ADJUDICATION
OF RIGHTS TO THE USE OF WATER FROM
THE SNAKE RIVER BASIN WATER SYSTEM.

CIVIL CASE NUMBER: 39576

If questions arise during the processing of this application please contact:
SCOTT L. CAMPBELL
Elam, Burke and Boyd
P. O. Box 1539
Boise, ID 83701-1539
343-5454

Ident. Number: A63-03174
Date Received: 9/19/1989
Receipt No: C011672
Received By:

AMENDED

NOTICE OF CLAIM TO A WATER RIGHT ACQUIRED UNDER STATE LAW

AMENDED

1. Name: JERRY L. TLUCEK 208-495-2550
   Address: RT. 1
   MELBA, ID 83641
   AND/OR
   Name: MARY LOU TLUCEK 208-495-2550
   Address: RT. 1
   MELBA, ID 83641

RECEIVED
AUG 13 1990
Department of Water Resources

2. Date of Priority: NOV 27, 1959

3. Source: GROUNDWATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4	Lot	County
01N	01W	22	SE SE		ADA

5. Description of diverting works:
WELL, 385', 12", 100 HP VERT. TURB. PUMP, 8" LINE, 60 HP BOOSTER

6. Water is used for the following purposes:

Purpose	From	To	C.F.S (or)	A.F.A.
IRRIGATION	03/15	11/15	1.850	

7. Total Quantity Appropriated is:
1.850 C.F.S. (and/or) A.F.A.

8. Total consumptive use is ~~XXXXX~~ 399.0 Acre Feet Per Annum.

9. Non-irrigation uses:

10. Place of Use:

Township	Range	Section	1/4 of 1/4	Lot	Use	Acres
01N	01W	22	NE SE		IRR	35.0

10. Place of Use: Continued

Township	Range	Section	1/4 of 1/4		Lot	Use	Acres
01N	01W	22	SW	SE		IRR	39.0
			SE	SE		IRR	40.0
						Section Acres	114.0
						Total Acres	114.0

11. Place of use in counties: ADA

12. Do you own the property listed above as place of use? YES

13. Other Water Rights Used:
NONE

14. Remarks:

15. Basis of Claim: LICENSE

Water Right Number: 28285

16. Signature(s)

(a.) By signing below, I/We acknowledge that I/We have received, read and understand the form entitled "How you will receive notice in the Snake River Basin Adjudication." (b.) I/We do ____ do not X wish to receive and pay a small annual fee for monthly copies of the docket sheet.

Number of attachments: 0

For Individuals:

I/We do solemnly swear or affirm that the statements contained in the foregoing document are true and correct.

Signature of Claimant(s): Jerry L Lucas Date: 8/8/90

Mary Lou Lucas Date: 8-8-90

State of Idaho)
) SS.
County of Canyon)

Subscribed and sworn (or affirmed) before me this 8th day of Aug. 19 90

Seal

Notary Public

Residing at Melba

My Commission Expires 11-12-92

17. Notice of Appearance:
Notice is hereby given that I, Scott L. Campbell (Print Name) will be acting as attorney at law on behalf of the claimant signing above, and that all notices required by law to be mailed by the director to the claimant signing above, should be mailed to me at the address listed below.

Signature Scott L. Campbell

Address P.O. Box 1539, Boise, Idaho 83701-1539

Date 8/10/90

EXHIBIT 2

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDED WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3174

NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD

MELBA ID 83641

MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER TRIBUTARY:

QUANTITY: 1.850 CFS
513.00 AFY

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION: T01N R01W S22 SESE Within ADA County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/15 11/15	1.850 CFS 513.00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE: IRRIGATION Within ADA County

T01N R01W S22	NESE	35.00	T01N R01W S22	SWSE	39.00
T01N R01W S22	SESE	40.00			

114 ACRES TOTAL

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

EXHIBIT 3

COPY

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
APR 20 2006
By _____ Clerk
Deputy Clerk

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

In Re SRBA)
)
Case No. 39576)
)
)
)

A. Subcase 63-03174
(Insert water right number)

STANDARD FORM 1 OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road
Melba, Idaho 83641

Daytime Phone: (208) 495-2034

Name & Address of Attorney, if any:
Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields
PO Box 829, Boise, Idaho 83701

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road
Melba, Idaho 83641

EXHIBIT A

SCANNED
MAR 06 2007

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
   Should be: _____

2. ☐ **Source**
   Should be: _____

3. ☒ **Quantity**
   Should be: 1.850 cfs without any afa limitation

4. ☐ **Priority Date**
   Should be: _____

5. ☐ **Point(s) of Diversion**
   Should be: _____

6. ☐ **Instream Flow Description**
   Should be: _____

7. ☐ **Purpose(s) of Use**
   Should be: _____

8. ☐ **Period of Year**
   Should be: _____

9. ☒ **Place of Use**
   Should be: Please see Attachment A attached hereto.

11. **I object because:**

☐ This water right should not exist.

☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION(S):

Concerning quantity, there is no basis for inclusion of the acre feet per year volumetric limitation. This is a licensed water right and the license did not contain the acre feet per year volumetric limitation.

Concerning place of use, claimant has claimed an additional 86 irrigated acres to increase the permissible place of use from 114 acres to 200 acres, as such 200 acre place of use is set forth in Attachment A. This expansion in the amount of irrigated acres is made pursuant to Idaho Code § 42-1416B.

EXHIBIT A

SCANNED
MAR 0 6 2007

F. **VERIFICATION** (Must be Completed)

State of Idaho)
)ss.
County of Ada)

Scott L. Campbell, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

(Attorney signing in representative capacity)

Subscribed and sworn to before me on: April 18th

TIFFINY RUDAK NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
My Commission Expires: 9/16/09

EXHIBIT A

SCANNED
MAR 0 6 2007

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. **FAX filings will not be accepted**. You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on April 18th, 2006, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

Clerk of the District Court
Snake River Basin Adjudication
253 Third Avenue North
PO Box 2707
Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

Name: Jerry L. Tlucek and Mary Lou Tlucek
Address: 15188 S. Can-Ada Road
Melba, Idaho 83641

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

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

United States Department of Justice
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, ID 83724

mailing on Objector's behalf

EXHIBIT A

SCANNED

ATTACHMENT A TO
STANDARD FORM 1 – OBJECTION FOR SUBCASE 63-03174

Jerry L. Tlucek and Mary Lou Tlucek are objecting to the place of use of 114 irrigated acres for the reason set forth in the Objection. The correct place of use is as follows:

1N	1W	22	SE	SW	40
			NE	SE	40
			NW	SE	40
			SW	SE	40
			SE	SE	40
				TOTAL ACRES	200

EXHIBIT A

SCANNED

2006 SEP 26 AM 10:15
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

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

In Re SRBA Case No. 39576	) NOTICE SETTING SUBCASE(S) FOR INITIAL HEARING)) SUBCASE NO: 63-03174

The Initial Hearing for this subcase will be held before Special Master THEODORE R. BOOTH

TUESDAY, JANUARY 23, 2007 at 02:30 PM (MT
IDAHO SUPREME COURT BUILDING
451 WEST STATE STREET
BOISE, ID

ATTENDANCE IS MANDATORY. All parties are required to attend and must have full settlement authority.

At the Initial Hearing you will have an opportunity to meet with a representative of the Idaho Department of Water Resources (IDWR) and/or the objector in an attempt to reconcile any difference between the claim and the Director's Report. Bring any and all information you believe is relevant to your claim and/or objection. If the claim cannot be reconciled at the Initial Hearing, the court will set the subcase(s) for trial within 45 days of the Initial Hearing. IF YOU INTEND TO AMEND YOUR CLAIM, YOU MUST DO SO AT OR BEFORE THE INITIAL HEARING.

Settlement documents must be filed with the court by JANUARY 15, 2007 or hearing will not be vacated.

Dated: SEPTEMBER 26, 2006

DEBBIE LASH
Deputy Clerk
Snake River Basin Adjudication

FILE COPY FOR 01177
FILE COPY FOR 01177

EXHIBIT B

SCANNED
MAR 0 5 2007

CERTIFICATE OF MAILING

I Certify that a true and correct copy of the NOTICE SETTING SUBCASE(S) FOR INITIAL HEARING was mailed on SEPTEMBER 26, 2006, with sufficient first-class postage to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

JERRY L & MARY LOU TLUCKEK
JERRY L TLUCEK
MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA, ID 83641
Phone: 208-495-2034

Deputy Clerk

EXHIBIT B

SCANNED

MAR 0 6 2007

EXHIBIT 4

M. 3-1-59

State of Idaho

License and Certificate of Water Right

Water License No. G-28285 Priority November 27, 1959 Amount 1.85 c.f.s.

THIS IS TO CERTIFY that KENT BUNN

of Boise, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated November 27, 1959; that Permit No. G-28285 was issued under said application; that Certificate of Completion of Works, with a carrying capacity of 1.85 second feet, was issued thereunder on June 26, 1967, showing that said works were completed on the 4th day of November, 1966; and that on the 4th day of November, 1966 KENT BUNN

of Boise, State of Idaho, made proof to the satisfaction of the State Reclamation Engineer of Idaho, of a right to the use of the waters of a well

a tributary of subterranean flow for the purpose of irrigation, under Use Permit No. G-28285 of the Department of Reclamation, and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume 14 of Licenses, at Page 8828, on the 26th day of June, 1967.

The right hereby confirmed dates from November 27, 1959.

The Point of Diversion is located in the SE ¼ SE ¼, Sec. 22, Twp. 1 N, R. 1 W, B.M. Ada County.

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 1.85 cubic feet per second.

Description and location of use:

Twp.	Range	Section	Forty-Acre Tract	No. Acres Described in Permit	No. Acres Actually Irrigated
1 N	1 W	22	NE¼ SE¼	40	35
			SW¼ SE¼	40	39
			SE¼ SE¼	40	40
			Total number of acres to be irrigated:		114

The right to the use of the water aforesaid hereby confirmed is restricted to the lands or place of use herein described, as provided by the laws of Idaho.

WITNESS the seal and signature of the State Reclamation Engineer, affixed at Boise, Idaho, this 26th day of June, 1967.

Jack A. Barnett
Deputy State Reclamation Engineer.

63 6174

28285

State of Idaho

LICENSE AND CERTIFICATE OF WATER RIGHT

Water License No. G-28285

To Kent Bunn

Boise, Idaho

Source of Supply subterranean

Ada County

Amount 1.85 Sec. Ft.

Point of Diversion $SE\frac{1}{4}SE\frac{1}{4}$, Sec. 22,

T. 1 N, R. 1 W, B.M.

Place of Use $NE\frac{1}{4}SE\frac{1}{4}$, $S\frac{1}{2}SE\frac{1}{4}$, Sec.

22, T. 1 N, R. 1 W, B.M.

Purpose irrigation

Date of Priority November 27, 1959

Recorded June 26, 1967

in Book 14 of Licenses, Page 8828

28285

EXHIBIT 5

V. NATURE OF USE (NU), AMOUNT FOR EACH NATURE OF USE, AND TOTAL AMOUNT

A. GENERAL

1. Other uses

Where the NU to be recommended is domestic, stock, industrial, commercial, or mining, the use should be further described in "other uses." With domestic use for households, the number of households should be described; for stockwater, the number and type of stock should be described; for the others (ESPECIALLY uses pursuant to part B of the domestic definition), the facility in which the water is used should be described. For example, small domestic use in a gas station should be described as use in a gas station; industrial use in a sugar factory should be described as a sugar factory, etc. The distinction between commercial and industrial is that commercial involves service or sales to the general public, whereas industrial involves manufacturing, refining, or other types of processing. Mining includes extraction of minerals and related processes that accompany the mining operation, such as milling, gravel washing, etc. Domestic and stockwater uses should be described in the following form: DOMESTIC, 1 HOME; STOCKWATER, 40 CATTLE, 10 HORSES.

2. Forfeiture

Since a water right is limited to the amount of water beneficially used, a portion of a water right may be forfeited by nonuse. Since forfeiture of the entire right affects whether the right is recommended for disallowal, it is addressed in Part I (priority date). Since partial forfeiture affects the amount recommended, forfeiture of a portion of a right is addressed in this Part V. The analysis in both cases is essentially the same.

3. Amount

Amount includes the rate and volume of diversion for each nature of use, and the total rate and volume of diversion and total consumptive use. See Adjudication Memo #31 as to measurement of flow for ground water claims that require field exam; see Adjudication Memo #34 as to which rights require determination of diversion volume. See Application Processing Memo 14 as to determination of amount for rights that include storage purposes.

Generally, consumptive use for irrigation should be recommended based on current standards. This is true even where claimed differently (more or less), or licensed or decreed differently (more or less). This is an exception to the general rule that IDWR may not recommend more than was claimed, and is also an exception to the rule of res judicata (see Intro Part J). Consumptive use may be treated differently because consumptive use

is not necessary for watermaster distribution. (The adjudication statute provides that consumptive use "is included as a rebuttable presumption in a decree only for the purpose of transfers pursuant to section 42-222, Idaho Code.")

Diversion volume for irrigation should generally be recommended in accordance with IDWR standards, unless there is some reason to believe otherwise. If the volume is determined by decree, then the volume recommended should be the volume decreed (unless it can be determined that a portion of the water right has been forfeited, or unless there has been an expansion in irrigated acres of a decreed right pursuant to the first presumption). With beneficial use rights, reason to believe that the volume is different than IDWR standards may arise from the field exam, or from volumes decreed for similar diversion systems of the same time period. If an excessive rate of diversion is to be recommended (more than 1" per acre), then the volume should be proportionately higher. Also, diversion volume should not be in excess of the volume that can be diverted under the recommended rate of diversion (in computing volume, the dates for season of use are inclusive).

4. Remarks describing amount

Adjudication Memo #32 sets forth standard remarks to describe the following:

a. right measured at point other than point of diversion (D01),
b. portion of right solely for conveyance loss (D02 - D04),
c. storage capacity (D05),
d. facility volume (D06).

See Part VIII below as to combined use limits for multiple rights.

5. Excessive flows for irrigation

Claims to flows in excess of the statutory standard of an inch per acre have been referred to generally as "excessive flow" claims. Excessive flow claims can be of two types - a single water right for more than an inch per acre, or multiple rights that total more than an inch per acre.

For irrigation claims to more than an inch per acre, the water agent should complete the excess irrigation requirement worksheet to determine if more than an inch per acre is reasonably required. Where this information is not already available to the agent, then the claimant should be contacted to provide the information (regardless of whether the claim is based on beneficial use, license, or decree). Where an amount in excess of current standards is actually needed under the claimant's irrigation practices, then the claim should be referred to the bureau chief

EXHIBIT 6

CHAPTER 6

PURPOSE OF USE, QUANTITY FOR EACH PURPOSE, AND TOTAL QUANTITY

I. INTRODUCTION

The purpose and quantity elements of a water right lie at the heart of the description of water use under a water right. The agent must be familiar with how to describe the various uses of water the investigation uncovers. Further, the method by which the water right was established determines to a large extent what evidence is relevant to the purpose of use and quantity to be recommended.

II. PURPOSES OF USE AND QUANTITY

Any use of water can be recommended for a water right so long as the use is for a beneficial purpose. The following subsections describe various beneficial uses, how they should be reported, and the quantity to recommend for each.

Adjudication Memo #32 sets forth standard remarks to describe the following:

a. right measured at point other than point of diversion (D01),
b. portion of right solely for conveyance loss (D02 - D04),
c. storage capacity (D05),
d. facility volume (D06).

The agent's recommendation on quantity must include the rate and volume of diversion for each use, and the total rate and volume of diversion. See Adjudication Memo #31 as to measurement of flow for ground water claims that require field exam; see Adjudication Memo #34 as to which rights require determination of diversion volume. Application Processing Memo 14 discusses the determination as to the amount for rights that include storage purposes.

For a claimed quantity to be recommended, the full amount must be beneficially used and the amount must be reasonable. Otherwise the amount recommended will be limited to a reasonable amount. In determining whether the amount used is reasonable, the following factors should be taken into account: the nature of use, the purpose of use, transmission losses, quantities used for the same purpose by others in the area, and amount of return flows. The fact that water is returned to the stream does not automatically make the diversion unreasonable. A determination that the quantity diverted for a long-standing use is not reasonable is a decision that should be made only after consultation with legal staff and the bureau chief.

There may be instances in which the total quantity may appropriately be less than the sum of the amounts for each purpose, such as where all or part of the amount for one purpose may also be used for another purpose. (For example, if an appropriator diverts 10

cfs for irrigation, and runs that same 10 cfs through a small hydropower facility, the total rate of diversion would be 10 cfs, not 20.)

A. Irrigation.

"Irrigation" is the spreading of water on land to materially increase the productiveness of the land for raising crops. The particular crop to be raised does not need to be identified in the recommendation, but may be necessary to conduct a Hubble analysis. The number of acres irrigated needs to be identified in the recommendation.

1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for irrigation. Idaho Code § 42-220 provides that no more than an inch per acre may be decreed under a water right unless it is shown that a greater amount of water is necessary. The quantity, alone or as combined, to be recommended for most irrigation rights is an inch per acre. Claims to flows in excess of the statutory standard of an inch per acre have been referred to generally as "excessive flow" claims. Excessive flow claims can be of two types - a single water right for more than an inch per acre, or multiple rights that total more than an inch per acre.

The agent should complete the excess irrigation requirement worksheet to determine if more than an inch per acre is reasonably required. The agent should use the Hubble analysis to determine if the excess amount is necessary due to field requirements. If so the claim should include a remark identifying the per acre rate of diversion at the field headgate. It may be that the excess flow is required for conveyance loss, which is discussed in subsection Q of this section.

The quantity to be recommended should, in the first instance, be the quantity based upon the irrigation system used at the time the adjudication commenced. However, if the water user demonstrates that in the past a reasonable water system used more water to accomplish the same purpose, the agent should recommend a quantity consistent with the needs under the historic system. Use the Hubble analysis to calculate this quantity.

Adjudication Memo #32 sets forth standard remarks for claims to be recommended with excessive flows for irrigation (D02, D03, D04, D08).

The agent should not recommend less than an inch per acre unless (1) the claim is for less than an inch per acre, or (2) historic use has always been less than an inch per acre. When a claimant claims much less water than would appear to be reasonably necessary to irrigate the number of acres claimed the agent should make further inquiry to ensure that the water use is beneficial.

2. Annual Volume.

The agent should recommend an annual volume for all groundwater irrigation rights. Use the "Field Headgate Requirement" map for this determination if the information is not otherwise determined in a license, transfer or reasonable decree.

Annual volume may also be recommended if there is a need to protect junior priority rights on a stream, spring or other source with limited quantities of water and should be recommended if contained in a license, transfer or reasonable decree.

B. Municipal.

Municipal use is defined by statute:

> "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Idaho Code § 42-202B(4). Further relevant definitions are also contained in this section .

1. Instantaneous Quantity.

If not otherwise determined by a license or reasonable decree the agent must determine an instantaneous quantity for this purpose.

The amount of water to be recommended for a municipal water right should be at least the amount actually diverted by the municipal provider, and should not exceed the full constructed capacity of the municipal system. The total amount recommended should equal the amount that is reasonably necessary to provide for the existing uses plus the reasonably anticipated future needs of the municipality.

2. Annual Volume.

Municipal water rights should not be recommended with an annual volume unless contained in a license, transfer or reasonable decree.

C. Stockwatering.

Stockwatering use refers to the diversion of water for drinking by domestic livestock or wildlife. This use can be either instream (or "in situ"), in which case the diversion is made by the animal itself, or out-of-stream stock watering use. In the case of wildlife there must be some type of human intent to divert the water to create a water right. Thus, drinking from a natural source by natural wildlife does not constitute stockwatering.

RECEIVED
2006
DEPARTMENT OF
WATER RESOURCES
RECEIVED
APR 19 2006
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

In Re SRBA)
)
Case No. 39576)
)
)
)

A. **Subcase** 63-03174
(Insert water right number)

STANDARD FORM 1 OBJECTION

Please fill in the following information:

B. NAME AND ADDRESS OF PERSON OBJECTING

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road
Melba, Idaho 83641

Daytime Phone: (208) 495-2034

Name & Address of Attorney, if any:
Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields
PO Box 829, Boise, Idaho 83701

C. CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road
Melba, Idaho 83641

SCANNED
APR 25 2006

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
   Should be: _____

2. ☐ **Source**
   Should be: _____

3. ☒ **Quantity**
   Should be: 1.850 cfs without any afa limitation

4. ☐ **Priority Date**
   Should be: _____

5. ☐ **Point(s) of Diversion**
   Should be: _____

6. ☐ **Instream Flow Description**
   Should be: _____

7. ☐ **Purpose(s) of Use**
   Should be: _____

8. ☐ **Period of Year**
   Should be: _____

9. ☒ **Place of Use**
   Should be: Please see Attachment A attached hereto.

11. **I object because:**

☐ This water right should not exist.

☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION(S):

Concerning quantity, there is no basis for inclusion of the acre feet per year volumetric limitation. This is a licensed water right and the license did not contain the acre feet per year volumetric limitation.

Concerning place of use, claimant has claimed an additional 86 irrigated acres to increase the permissible place of use from 114 acres to 200 acres, as such 200 acre place of use is set forth in Attachment A. This expansion in the amount of irrigated acres is made pursuant to Idaho Code § 42-1416B.

SCANNED
APR 2 5 2006

F. **VERIFICATION** (Must be Completed)

State of Idaho)
)ss.
County of Ada)

Scott L. Campbell, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

Scott L. Campbell
(Attorney signing in representative capacity)

Subscribed and sworn to before me on: April 18th

TIFFINY HUDAK NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
My Commission Expires: 9/16/09

SCANNED
APR 7 5 2006

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. **FAX filings will not be accepted**. You must also send a copy to all the parties listed below in the Certificate of Mailing.

G. CERTIFICATE OF MAILING

I certify that on April 18th, 2006, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

   Clerk of the District Court
   Snake River Basin Adjudication
   253 Third Avenue North
   PO Box 2707
   Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

   Name: Jerry L. Tlucek and Mary Lou Tlucek
   Address: 15188 S. Can-Ada Road
   Melba, Idaho 83641

3. Copies to:

   IDWR Document Depository
   PO Box 83720
   Boise, ID 83720-0098

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

   United States Department of Justice
   Environment and Natural Resource Division
   550 West Fort Street, MSC 033
   Boise, ID 83724

Keith L. Campbell
mailing on Objector's behalf

SCANNED
APR 25 2006

ATTACHMENT A TO
STANDARD FORM 1 – OBJECTION FOR SUBCASE 63-03174

Jerry L. Tlucek and Mary Lou Tlucek are objecting to the place of use of 114 irrigated acres for the reason set forth in the Objection. The correct place of use is as follows:

TWP	RNG	SEC	1/4 of	1/4	Acres
1N	1W	22	SE	SW	40
			NE	SE	40
			NW	SE	40
			SW	SE	40
			SE	SE	40
				TOTAL ACRES	200

SCANNED

APR 2 5 2006

COPY

DISTRICT COURT-SRBA
Fifth Judicial District
County of Twin Falls - State of Idaho
APR 2 0 2006
By _____ Clerk
_____ Deputy Clerk

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

In Re SRBA

Case No. 39576

A. Subcase 63-03174
(Insert water right number)

STANDARD FORM 1 OBJECTION

Please fill in the following information:

B. **NAME AND ADDRESS OF PERSON OBJECTING**

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road

Melba, Idaho 83641

Daytime Phone: (208) 495-2034

Name & Address of Attorney, if any:
Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields
PO Box 829, Boise, Idaho 83701

C. **CLAIMANT OF WATER RIGHT AS LISTED IN DIRECTOR'S REPORT**

Name: Jerry L. Tlucek and Mary Lou Tlucek

Address: 15188 S. Can-Ada Road

Melba, Idaho 83641

EXHIBIT A

D. I object to the following elements as recommended in the Director's Report. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
   Should be: _____

2. ☐ **Source**
   Should be: _____

3. ☒ **Quantity**
   Should be: 1.850 cfs without any afa limitation

4. ☐ **Priority Date**
   Should be: _____

5. ☐ **Point(s) of Diversion**
   Should be: _____

6. ☐ **Instream Flow Description**
   Should be: _____

7. ☐ **Purpose(s) of Use**
   Should be: _____

8. ☐ **Period of Year**
   Should be: _____

9. ☒ **Place of Use**
   Should be: Please see Attachment A attached hereto.

11. **I object because:**

☐ This water right should not exist.

☐ This water right was not recommended, but should be recommended with the elements described above.

E. REASONS SUPPORTING OBJECTION(S):

Concerning quantity, there is no basis for inclusion of the acre feet per year volumetric limitation. This is a licensed water right and the license did not contain the acre feet per year volumetric limitation.

Concerning place of use, claimant has claimed an additional 86 irrigated acres to increase the permissible place of use from 114 acres to 200 acres, as such 200 acre place of use is set forth in Attachment A. This expansion in the amount of irrigated acres is made pursuant to Idaho Code § 42-1416B.

F. **VERIFICATION** (Must be Completed)

State of Idaho)
)ss.
County of Ada)

Scott L. Campbell, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

That I am the party/claimant filing this objection, as defined by I.C. §§ 42-1401A(1) and (6) or that I am the attorney for the party/claimant objecting and that I have read this objection, know its contents and believe that the statements are true to the best of my knowledge.

(Signature of person filing objection)

(Attorney signing in representative capacity)

Subscribed and sworn to before me on: April 18th

TIFFINY HUDAK NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Boise
My Commission Expires: 9/16/09

INSTRUCTIONS FOR MAILING

You must mail the objection, to the Clerk of the Court. **FAX filings will not be accepted**. You must also send a copy to all the parties listed below in the Certificate of Mailing.

G.

CERTIFICATE OF MAILING

I certify that on April 18th, 2006, I mailed the original and copies of this objection, including all attachments, to the following persons:

1. Original to:

   Clerk of the District Court
   Snake River Basin Adjudication
   253 Third Avenue North
   PO Box 2707
   Twin Falls, ID 83303-2707

2. One copy to the claimant of the water right at the following address:

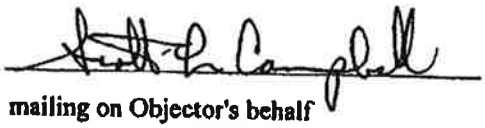
   Name: Jerry L. Tlucek and Mary Lou Tlucek
   Address: 15188 S. Can-Ada Road
   Melba, Idaho 83641

3. Copies to:

   IDWR Document Depository
   PO Box 83720
   Boise, ID 83720-0098

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

   United States Department of Justice
   Environment and Natural Resource Division
   550 West Fort Street, MSC 033
   Boise, ID 83724



mailing on Objector's behalf

ATTACHMENT A TO
STANDARD FORM 1 – OBJECTION FOR SUBCASE 63-03174

Jerry L. Tlucek and Mary Lou Tlucek are objecting to the place of use of 114 irrigated acres for the reason set forth in the Objection. The correct place of use is as follows:

1N	1W	22	SE	SW	40
			NE	SE	40
			NW	SE	40
			SW	SE	40
			SE	SE	40
				TOTAL ACRES	200

EXHIBIT A

2006 SEP 26 AM 10:15
DISTRICT COURT - SRBA
TWIN FALLS CO., IDAHO
FILED _____

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

In Re SRBA
Case No. 39576

NOTICE SETTING SUBCASE(S) FOR INITIAL HEARING

SUBCASE NO: 63-03174

The Initial Hearing for this subcase will be held before Special Master THEODORE R. BOOTH

TUESDAY, JANUARY 23, 2007 at 02:30 PM (MT
IDAHO SUPREME COURT BUILDING
451 WEST STATE STREET
BOISE, ID

ATTENDANCE IS MANDATORY. All parties are required to attend and must have full settlement authority.

At the Initial Hearing you will have an opportunity to meet with a representative of the Idaho Department of Water Resources (IDWR) and/or the objector in an attempt to reconcile any difference between the claim and the Director's Report. Bring any and all information you believe is relevant to your claim and/or objection. If the claim cannot be reconciled at the Initial Hearing, the court will set the subcase(s) for trial within 45 days of the Initial Hearing. IF YOU INTEND TO AMEND YOUR CLAIM, YOU MUST DO SO AT OR BEFORE THE INITIAL HEARING.

Settlement documents must be filed with the court by JANUARY 15, 2007 or hearing will not be vacated.

Dated: SEPTEMBER 26, 2006

DEBBIE LASH
Deputy Clerk
Snake River Basin Adjudication

FILE COPY FOR 01177
FILE COPY FOR 01177

CERTIFICATE OF MAILING

I Certify that a true and correct copy of the NOTICE SETTING SUBCASE(S) FOR INITIAL HEARING was mailed on SEPTEMBER 26, 2006, with sufficient first-class postage to the following:

DIRECTOR OF IDWR
PO BOX 83720
BOISE, ID 83720-0098

JERRY L & MARY LOU TLUCKEK
JERRY L TLUCEK
MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA, ID 83641
Phone: 208-495-2034

Deputy Clerk

EXHIBIT B

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

In Re SRBA Case No. 39576	)	**Subcase No. 63-3174** **STIPULATION TO PARTIALLY RESOLVE OBJECTION**

This form is used to report the stipulated elements of one water right acquired under state law and/or one federal reserved water right. Submission of this form will not automatically result in the issuance of a partial decree. The Presiding Judge or Special Master will conduct any hearing necessary to determine whether the facts, data, expert opinions and law support the issuance of a partial decree for the water right.

The parties agree that the Snake River Basin Adjudication Court has jurisdiction of the parties and subject matter to enter a partial decree for this water right; that they have been served with sufficient process, according to the law; and that they have appeared, prosecuted, and defended their positions with regard to this water right dispute.

The claimants and IDWR agree and stipulate that the place of use element of this water right should be described per the attached. The claimants and IDWR have further indicated their concurrence by initialing each of the attached pages. This stipulation resolves only the claimants' objection to the number of irrigated acres within the place of use. It does not resolve the claimants' objection to the quantity element of this right.

CLAIMANT(s)OBJECTOR(s):
Jerry L and Mary Lou Tlucek

_____

Scott Campbell Date
attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of January, 2007, I caused a true and correct copy of the foregoing **AFFIDAVIT OF TIFFINY HUDAK IN SUPPORT OF MOTION TO VACATE AND RESCHEDULE INITIAL HEARING** to be served by the method indicated below, and addressed to the following:

Director
IDAHO DEPARTMENT OF WATER RESOURCES
PO Box 83720
Boise, Idaho 83720-0095
Fax: (208) 287-6700

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(x) Facsimile

Scott L. Campbell

2. On or about April 20, 2006, our office filed, on behalf of Jerry L. Tlucek and Mary Lou Tlucek, a Standard Form 1 – Objection in Subcase 63-03174. Attached hereto as Exhibit A is a true and correct copy of the Standard Form 1 – Objection.

3. On January 22, 2007, I received a telephone call from Jerry L. Tlucek, one of the claimants in the above-captioned subcase proceeding, regarding the initial subcase hearing scheduled for January 23, 2007, before the above-referenced Court.

4. After a review our files pertaining to this matter, I could not locate a copy of the notice of initial hearing.

5. On January 22, 2007, I contacted Diana Delaney, the Snake River Basin Adjudication Case Administrator, via telephone, to inquire about the initial hearing scheduled for January 23, 2007.

6. At my request, Mrs. Delaney faxed me a copy of the Notice Setting Subcase(s) for Initial Hearing concerning Subcase 63-03174. Attached hereto as Exhibit B is a true and correct copy of such Notice Setting Subcase(s) for Initial Hearing.

7. It appears that Moffatt, Thomas, Barrett, Rock & Fields, Chartered, was not listed on the certificate of mailing and, therefore, not served with a copy of the Notice Setting Subcase(s) for Initial Hearing.

Tiffiny Hudak

SUBSCRIBED AND SWORN to before me this 22nd day of January, 2007.

DEBORAH L. LONG NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC FOR IDAHO
Residing at ~~Meridian~~ Boise, Id.
My Commission Expires 10/10/07

IDAHO DEPARTMENT OF WATER RESOURCES

PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3174

NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER TRIBUTARY:

QUANTITY: 1.850 CFS
513.000 AFY

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION:

T01N R01W S22 SESE Within ADA County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/15 11/15	1.850 CFS 513.00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE: IRRIGATION Within ADA County

T01N R01W S22	NESE	35.0	T01N R01W S22	SWSE	39.0
T01N R01W S22	SESE	40.0			

114 ACRES TOTAL

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

IDAHO DEPARTMENT OF WATER RESOURCES

PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3174

NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER TRIBUTARY:

QUANTITY: 1.850 CFS
513.000 AFY

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION:

T01N R01W S22 SESE Within ADA County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/15 11/15	1.850 CFS 513.00 AFY

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE: IRRIGATION Within ADA County

T01N R01W S22	NESE	35.0	T01N R01W S22	SWSE	39.0
T01N R01W S22	SESE	40.0			

114 ACRES TOTAL

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

Responded orally -
Plz advise if more time is needed.

RECEIVED
NOV 25 2005
Department of Water Resources

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise
Idaho Falls
Pocatello
Twin Falls

Eugene C. Thomas
John W. Barrett
R. B. Rock
Richard C. Fields
John S. Simko
John C. Ward
D. James Manning
Gary T. Dance
Larry C. Hunter
Randall A. Peterman
Mark S. Prusynski
Stephen R. Thomas
Glenna M. Christensen
Gerald T. Husch
Scott L. Campbell
Robert B. Burns
Michael E. Thomas
Patricia M. Olsson
James C. deGlee
Bradley J Williams
Lee Radford
Michael O. Roe
David S. Jensen
James L. Martin
C. Clayton Gill
David P. Gardner
John O. Fitzgerald, II
Julian E. Gabiola
Angela Schaer Kaufmann
Michael W. McGreaham
Kimberly D. Evans Ross
Jon A. Stenquist
Eric M. Barzee
Valerie N. Charles
Tyler J. Henderson
Jason G. Murray
Mark C. Peterson
Andrew J. Waldera
Tyler J. Anderson
Joel A. Flake, Jr.
Russell G. Metcalf

Robert E. Bakes, *of counsel*
Morgan W. Richards, *of counsel*

Willis C. Moffatt, 1907-1980
Kirk R. Helvie, 1956-2003

US Bank Plaza Building
101 S Capitol Blvd 10th Fl
PO Box 829
Boise, Idaho 83701 0829

208 345 2000
800 422 2889
208 385 5384 Fax
www.moffatt.com

November 23, 2005

Jr., David R. Tuthill
Administrator
Resource Protection Bureau
Idaho Department of Water Resources
322 E. Front Street
Idaho Water Center
Boise, ID 83702

Re: Preliminary Recommendations in Basin 36, Part II
MTBR&F File No. 22377.0

Dear Dave:

I am in receipt of preliminary recommendations for water rights in the name of my client, Jerry Tlucek, which, following your telephone call to Tiffiny Hudak on November 22, 2005, were immediately picked-up from the Idaho Department of Water Resources. It appears from instruction sheet enclosed with the Director's correspondence that responses to the preliminary recommendations are due by December 2, 2005. I am concerned with this relatively short response period and feel that is borders on a violation of my client's constitutional due process rights. That being said, we will undertake evaluation of the preliminary recommendations and attempt to respond timely, if necessary.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Scott L. Campbell

SLC/tmh
cc: Jerry Tlucek

11/22/2005

NOTICE OF ERROR

REPLY

Please type or print clearly, fill out this form completely and mail.

Return this reply form to IDWR by the deadline date printed below if you want IDWR to change your recommendation or you want to let IDWR know that you agree with its recommendation.

YOUR DEADLINE FOR RETURNING A NOTICE OF ERROR REPLY IS: December 2, 2005

Water right number: 63-3174

JERRY L. TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641
Telephone Number: (208) 495-2550

MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641
Telephone Number: (208) 495-2550

1. Describe the portion of the proposed recommendation with which you disagree (e.g. priority date, period of use, source):

   Quantity; Place of Use

2. Describe the changes you wish to make in the proposed recommendation:

   Quantity: Delete the volumetric limitation of 513 acre feet per year.) Needs to stay DNR 12/9/05

   Place of Use: Modify place of use as follows:

TWP	RNG	SEC	1/4 of	1/4	Acres
1N	1W	22	SE	SW	40
			NE	SE	40
			NW	SE	40
			SW	SE	40
			SE	SE	40
				TOTAL	200

} Keep at 114 ac

3. Give a brief explanation as to why you disagree with these portions:

Quantity: There is no basis for inclusion of the acre feet per year volumetric limitation.) Basis is 42-1427

Place of Use: The place of use is not as claimed.

_____ **I AGREE with this proposed recommendation: no changes need to be made.**

DATE: 12/02/05 **SIGNATURE:** Scott L Campbell

Please print your name: Scott L. Campbell
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
PO Box 8729
Boise, Idaho 83701

Counsel of record for Jerry and Mary Lou Tlucek

IDWR Regional Office, 2735 Airport Wy, Boise, ID 83705, 2083342190

State of Idaho

License and Certificate of Water Right

Water License No. G-28285 Priority November 27, 1959 Amount 1.85 c.f.s.

THIS IS TO CERTIFY that KENT BUNN

of Boise, Idaho, made application for a permit to appropriate the public waters of the State of Idaho, dated November 27, 1959; that Permit No. G-28285 was issued under said application; that Certificate of Completion of Works, with a carrying capacity of 1.85 second feet, was issued thereunder on June 26, 1967, showing that said works were completed on the 4th day of November, 1966; and that on the 4th day of November, 1966 KENT BUNN

of Boise, State of Idaho, made proof to the satisfaction of the State Reclamation Engineer of Idaho, of a right to the use of the waters of a well

a tributary of subterranean flow for the purpose of irrigation under Use Permit No. G-28285 of the Department of Reclamation, and that said right to the use of said waters has been perfected in accordance with the laws of Idaho, and is hereby confirmed by the State Reclamation Engineer of Idaho and entered of record in Volume 14 of Licenses, at Page 8828, on the 26th day of June, 1967.

The right hereby confirmed dates from November 27, 1959.

The Point of Diversion is located in the SE ¼ SE ¼, Sec. 22, Twp. 1 N, R. 1 W, B.M. Ada County.

That the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually needed and beneficially used for said purposes, and shall not exceed 1.85 cubic feet per second.

Description and location of use:

Twp.	Range	Section	Forty-Acre Tract	No. Acres Described in Permit	No. Acres Actually Irrigated
1 N	1 W	22	NE¼ SE¼	40	35
			SW¼ SE¼	40	39
			SE¼ SE¼	40	40
			Total number of acres to be irrigated:		114

The right to the use of the water aforesaid hereby confirmed is restricted to the lands or place of use herein described, as provided by the laws of Idaho.

WITNESS the seal and signature of the State Reclamation Engineer, affixed at Boise, Idaho, this 26th day of June, 1967.

Jack A. Barnett
Deputy State Reclamation Engineer.

63 3174

28285

Form 23
2M-4-65

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

BOISE

REPORT OF EXAMINER

PERMIT NO. G-28285

REPORT ON PROOF OF Completion of Works & Beneficial Use

Form 23
2M-4-65

STATE OF IDAHO

DEPARTMENT OF RECLAMATION

BOISE, IDAHO

REPORT OF EXAMINER

Permit No. G-28285

This proof is for Completion of Works & Beneficial Use In Water District No.

1. Name of applicant Kent P. Bunn

2. Source of water supply: subterranean

3. Location of point of diversion: Is in the SW¼SW¼ SE¼SE¼ of Section 22

T. 1 N R. 1 W County of Ada

4. Describe works as they exist, giving dimensions and capacities of same: Wells 100 HP C.S. Motor Ser# 1392536 C.S. Pump Ser# 23609 Discharge 10" x 6' into open pond Aprox 50' x 50' x 3' deep ; Sprinkler system: G.E. Motor 5K440 4XA 243

5. Water is used for: irrigation

6. State whether or not water has been turned into works of diversion: Yes

7. List legal subdivisions of lands to be irrigated. If proof is for beneficial use, give exact number of acres under cultivation in each forty-acre tract. (Describe manner and place of use if other than irrigation):

S½, Sec. 22, T. 1 N, R. 1 W, B.M. (320 acres)

(Submit map on attached plat, showing location and details of above description.)

8. What large stream would the water here appropriated finally reach?

Remarks: Mr. Bunn assisted on examination

This examination was made on the 15 day of June, 1967

(Signed) Donald W. McElhaney
Examiner

Plat
FWU
28285

APPLICATION FOR PERMIT

63-3

To Appropriate the Subterranean Waters of The State of Idaho

Application No. G- 36254
Permit No. G- 28285
District No.

1. Name of Applicant: Kent Bunn

   Postoffice address: Boise 4215 Emerald County: Ada State: Idaho

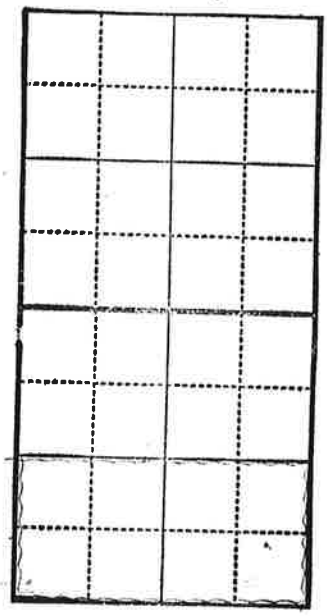
2. Quantity of water claimed:

   (a) Rate of withdrawal in cubic feet per second 6.0 or Idaho Miners' inches 300 or gallons per minute

   (b) Annual withdrawal in acre feet per annum

3. Source of water supply: subterranean

4. Location of point of diversion or well is in the SW SE ¼ of the SW SE ¼ of Section 22 Twp. 1 N. , Rge. 1 W., B.M., County of Ada



5. Water is to be used for: irrigation

6. If for municipal, industrial or recreational purposes, give:

   (a) Point of use of water is in the ¼ of the ¼ of Section , Twp. Rge. , B. M.

   (b) Waste water or sewage effluent is to be returned to at a point in the ¼ of the ¼ of Section , Twp. , Rge. , B. M.

7. Kind of works: wells, pumps and ditches

8. Estimated cost of works: $ 20,000

9. (a) Is reservoir to be used? No

   (b) Capacity of reservoir:

10. The time required for the completion of such work and complete application of the water to the proposed use is 5 years.

11. If applicant is a corporation, give:

   I. (a) Date and place of incorporation:

   (b) Amount of capital stock: $ (c) Amount paid in: $

   (d) Names and addresses of directors:

   II. The financial resources of the applicant are (a) Cash on hand: $

   (b) Treasury stock: (c) Bonds to be issued:

   (d) Other resources:

12. The land to be irrigated is described in the following tabulation:

13. Existing water rights and/or valid permits appurtenant to the lands to be irrigated are: None

   (a) (cubic feet per second, inches or gallons per minute) of the water herein applied for is to be supplemental to the existing water rights.

Remarks: This applic[illegible]on is made in connection with a Desert [illegible]d Entry

BE IT KNOWN THAT The undersigned hereby makes appli cation for permit to appropriate the public waters of the State of Idaho as herein set forth.

KENT BUNN *Applicant.*

By *Agent.*

Date of first receipt at Department of Reclamation: 3:30 P. M. November 27, 1959

Returned to applicant for correction:

Corrected application received:

Approval of State Reclamation Engineer

The number of this permit is G— 28285

Recorded in Book 99 Page 28285 Approved December 4, 1959

This is to certify that I have examined the within application for a permit tc appropriate the public waters of the State of Idaho, and hereby approve the same, subject to the following limitations and conditions:

Bond in the sum of $ to be filed on or before

Work to begin on or before and to continue deligently and uninterruptedly to completion, unless temporarily interrupted by circumstances over which the permit holder has no control.

One-fifth of the work above specified to be completed on or before June 4, 1962

The whole of said work to be completed and beneficial use of water appropriated in accordance herewith, to be made and proofs offered on or before December 4, 1964

Witness my hand this 4th day of December, 1959

GEO. N. CARTER
STATE RECLAMATION ENGINEER.

IN TESTIMONY WHEREOF, We, ROBERT E. SMYLIE, Governor of the State of Idaho, and ARNOLD WILLIAMS, Secretary of State of the State of Idaho, have caused this instrument to be executed in the name of the State of Idaho, and caused the Great Seal of the State of Idaho to be hereunto affixed, this 4 day of December, 19 59

Countersigned:

STATE OF IDAHO

(SEAL)

By ARNOLD WILLIAMS
Secretary of State.

By: Paula L. Fleenor
Deputy Secretary of State

By ROBERT E. SMYLIE
Governor

12.

Twp.	Range	Sec.	NE¼				NW¼				SW¼				SE¼				Totals
			NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	NE¼	NW¼	SW¼	SE¼	
1 N	1 W	22									40	40	40	40	40	40	40	40	320

WHEREAS, Permit No. G-28285, in the name of Kent Bunn requires proofs of completion of works and beneficial use to be made on or before December 4,1964; and,

WHEREAS, said Permit was issued in connection with Desert Land Entry Idaho Serial #011123; and,

WHEREAS, Applicant was prevented from proceeding with construction pending allowance of said Desert Land Entry, which was not allowed until November 9, 1961;

NOW, THEREFORE, An Extension of Time is allowed for Completion of Works and Beneficial Use Proofs on Permit No. G-28285 to November 9, 1965, or the length of time applicant was prevented from proceeding pending allowance of his Desert Land Entry and a similar extension is allowed for every other act required under the terms and conditions of Permit No. G-28285.

Signed at Boise, Idaho, this 3rd day of November, 1964.

s/ RALPH W. THOMAS, Deputy
State Reclamation Engineer

STATE OF IDAHO
DEPARTMENT OF RECLAMATION

WHEREAS, Permit No. G-28285, in the name of Kent Bunn, was changed November 3, 1964, by allowance of an extension of time to make proofs of completion of works and beneficial use of the water from December 4, 1964, to November 9, 1965, or four years after allowance of his Desert Land Entry, Idaho Serial No. 011123; and,

WHEREAS, said holder of Permit No. G-28285 could have an extension of time to November 9, 1966; and,

NOW, THEREFORE, An Extension of Time is allowed for Completion of Works and Beneficial Use Proofs on Permit No. G-28285 to November 9, 1966, or the length of time applicant was prevented from proceeding pending allowance of his Desert Land Entry and a similar extension is allowed for every other act required under the terms and conditions of Permit No. G-28285.

Signed at Boise, Idaho, this 1st day of October, 1965.

S/ RALPH W. THOMAS
Deputy State Reclamation Engineer

Permit No. G-28285
CERTIFICATE OF COMPLETION OF WORKS

TO ALL WHOM IT MAY CONCERN:

This is to certify that KENT BUNN of Boise, County of Ada, and State of Idaho, the holder of Permit No. G-28285, issued upon Application No. G-36254 bearing date of priority of November 27, 1959, authorizing the diversion of 6.0 second feet of waters of a well, County of Ada, State of Idaho, for irrigation purposes, has fully complied with the provisions of the laws of the State of Idaho relating to the proof of completion of the works of diversion set out and described in said Permit; that said works are adequate for diverting and conveying to the place of intended use 1.85 second feet of the waters of a well, from subterranean flow; that the point of diversion of said waters $SE\frac{1}{4}SE\frac{1}{4}$, Sec. 22, T. 1 N, R. 1 W, B.M. and the the lands proposed to be irrigated by the use or place of use of said water are described as follows, to-wit: $NE\frac{1}{4}SE\frac{1}{4}$, $S\frac{1}{2}SE\frac{1}{4}$, Sec. 22, T. 1 N, R. 1 W, B.M.

Proof of Completion of Works made: November 4, 1966.

Witness my hand this 26th day of June, A.D. 1967.

S/ JACK A. BARNETT
Deputy State Reclamation Engineer

ENTITLED TO USE FOR 1.85 SEC. FT.
LICENSE PAGE NO. 2825

Boise
Idaho Falls
Pocatello
Twin Falls

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Eugene C. Thomas
John W. Barrett
R. B. Rock
Richard C. Fields
John S. Simko
John C. Ward
D. James Manning
Gary T. Dance
Larry C. Hunter
Randall A. Peterman
Mark S. Prusynski
Stephen R. Thomas
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101 S Capitol Blvd 10th Fl
PO Box 829
Boise Idaho 83701 0829

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800 422 2889
208 385 5384 Fax
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October 26, 2005

RECEIVED
OCT 28 2005
WATER RESOURCES
WESTERN REGION

Lori Graves
Western Region Office
Idaho Department of Water Resources
2735 Airport Way
Boise, ID 83705

Re: Notice of Appearance on Behalf of Jerry Tlucek
MTBR&F File No. 22377.1

Dear Lori:

Please take notice that the undersigned attorney, Scott L. Campbell of the firm of MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED, represents Jerry Tlucek concerning his water right matters, including, without limitation, water right nos. 63-03174, 63-07068, 63-07389, 63-07392, 63-23182, and 63-32184. Please direct all notices, correspondence, pleadings, filings or other communication me at the address and telephone number listed above.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Scott L. Campbell

SLC/tmh
cc: Jerry Tlucek

Draft

10/26/2005

IDAHO DEPARTMENT OF WATER RESOURCES

PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3174

NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD

MELBA ID 83641

MARY LOU TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER TRIBUTARY:

QUANTITY: 1.850 CFS

PRIORITY DATE: 11/27/1959

POINT OF DIVERSION:

T01N R01W S22 SESE Within ADA County

PURPOSE AND PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/15 11/15	1.850 CFS

THE USE OF WATER FOR IRRIGATION UNDER THIS RIGHT MAY BEGIN AS EARLY AS MARCH 1 AND MAY CONTINUE TO AS LATE AS NOVEMBER 15, PROVIDED OTHER ELEMENTS OF THE RIGHT ARE NOT EXCEEDED. THE USE OF WATER BEFORE MARCH 15 UNDER THIS REMARK IS SUBORDINATE TO ALL WATER RIGHTS HAVING NO SUBORDINATED EARLY OR LATE IRRIGATION USE AND A PRIORITY DATE EARLIER THAN THE DATE A PARTIAL DECREE IS ENTERED FOR THIS RIGHT.

PLACE OF USE: IRRIGATION Within ADA County 35

T01N R01W S22	NESE	~~30.~~0	T01N R01W S22	SWSE	39 ~~40.0~~
T01N R01W S22	SESE	40.0			

119 ACRES TOTAL

OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This partial decree is subject to such general provisions necessary for the definition of the rights or for the efficient administration of the water rights as may be ultimately determined by the Court at a point in time no later than the entry of a final unified decree. Section 42-1412(6), Idaho Code.

EXPLANATORY MATERIAL: BASIS OF CLAIM - License

OWNER CODE	NAME & ADDRESS	PRIORITY DATE	WATER USE	USE PERIOD FROM	USE PERIOD TO	DIVERSION RATE	DIVERSION VOLUME
C	JERRY L TLUCEK	11/27/1959	IRRIGATION	03-15	11-15	1.850 CFS	
C	MARY LOU TLUCEK						
	RT 1				TOTAL DIVERSION:	1.850 CFS	
	MELBA ID 83641				CONSUMPTIVE USE:		399.00 AFA
	(208) 495-2550						

Water Source: GROUNDWATER Tributary to: Stage: LICENSE

Point(s) of Diversion: T01N R01W S22 SESE ADA County

Place of use Legal Description for: IRRIGATION

			NE				NW				SW				SE				
			NENE	NWNE	SWNE	SENE	NENW	NWNW	SWNW	SENW	NESW	NWSW	SWSW	SESW	NESE	NWSE	SWSE	SESE	
T	R	S	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	Lt Ac	SUM
01N	01W	22													35		39	40	114.0
																	TOTAL ACRES		114.0

POU County: ADA

Other Rights: NONE

Other Water Rights with Same Point(s) of Diversion with Stage (Includes All Sources):
A63-23182

Other Water Rights Listing Overlapping Place(s) of Use:
A63-23182

Dates: Exam Made Date: Verified Date: Objection Filed Date:

Misc: Water District Number: Field Inspection Flag:
Presumption Flag:

Audit: 04/19/90 HARRINGT 06/04/90 HARRINGT 07/31/90 SCHULD 03/22/95 SSHERMAN
03/30/95 POST-STD 07/17/95 JSHURTE

IDAHO DEPARTMENT OF WATER RESOURCES
WATER RIGHT PROOF READING REPORT

Water Right Number - 63-03174 Prefix Translation: WATER RIGHT Old (D) Number - 28285

Last Name	First Name	Address
*** C - CURRENT OWNER *** BUNN	KENT	1 - 4215 EMERALD ST. 2 - 3 - City- BOISE State- ID Zip- 83706 Phone -

Priority Date	Region	Stage	Status
11/27/1959	14 WESTERN	L - LICENSE	

Source: GROUNDWATER

Tributary:

Point of Diversion

Twn	Rng	Sec	Tract	Lot	RFlg	County	Diversion Name	Diversion Rate	Diversion No.
01N	01W	22	SE SE			(1) ADA			

Water Use

Code	Description	Period From	Period To	Diversion Rate	Diversion Volume
01	IRRIGATION			1.850	

Total Div. Rate: 1.850
Total Div. Volume:
Total Div. Capacity:

Place of Use

Twn	Rng	Sec	Tract	Lot	Acres	Code	Description	County
01N	01W	22	NE SE		35.0	01	IRRIGATION	(1) ADA
01N	01W	22	SW SE		39.0	01	IRRIGATION	(1) ADA
01N	01W	22	SE SE		40.0	01	IRRIGATION	(1) ADA
				Total Acres:	114.0			

Diversion Means -

Non-Irrigation Use -

Other Rights for Same Use -

Remarks
No Remarks found.

Old Water Right Numbers
No Old Water Right Numbers found.

Conditions of Approval
No Conditions of Approval found.

Water right number - 63-03174 Prefix Translation: WATER RIGHT

Decree Plaintiff	Decree Defendant	Decree Date
		00/00/0000

Comments
No Comments Found

Audit Fields - 05/06/85 05/01/88

Water Rights Dates and Flags Area

Proof Due Date	00/00/0000	Field Exam Made	00/00/0000	Field Exam Fee	
Approved/Denied	00/00/0000	Protested Date	00/00/0000	Swan Falls	
Proof Made Date	00/00/0000	Hearing Date	00/00/0000	Temporary Right	P
Exam to S.O. Date	00/00/0000	Verified Date	05/06/1985	DLE/Carey Act	
Order Show Cause	00/00/0000	Receipt Number		Water District	
Licensed Date	08/28/1979	Appl Received	00/00/0000	Transfer/Amended	
Decree Date	00/00/0000	Name Connector		POU Ownership Flag	
Presumption Flag					

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 -(208) 327-7900

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

August 28, 1990

Mr. Scott L. Campbell
Elam, Burke, & Boyd
P. O. Box 1539
Boise, ID 83701

RECEIVED
AUG 28 1990
Department of Water Resources
Western Regional Office

RE: Snake River Basin Adjudication - Ada County
Claim Nos. A63-23182 and A63-03174 (Amended)
Jerry L. and Mary Lou Tlucek

Dear Mr. Campbell:

In response to your letter dated August 10, 1990 and the explanation presented regarding a Request for Extension of time to file water rights in Ada County. The original filing deadline for this claim was September 8, 1989. This letter is granting an extension of time for the filing of Notice of Claims to a Water Right.

The extension is granted until August 13, 1989, which is the date your Notice of Amended Claims Nos. A63-23182 and A63-03174 was received in our office. Please keep this extension of time with your other legal documents.

This extension is granted under the authority of §42-1409 (10), Idaho Code.

Signed this 28th day of August, 1990.

David B. Shaw
Adjudication Bureau Chief

DBS;dms

cc: IDWR, Western Region

From: DWR03::SHAFF 15-AUG-1990 14:59:18.78
To: DWR80::SHURTE
CC: SHAFF
Subj: RE: TLUCEK CLAIMS - SCOTT CAMPBELL, ATTORNEY

Ah, Ah. Funny you should be asking about this. I probably got Campbell's letter with the Tlucek claims Monday. I read the letter today and sent the package to Dave to consider the request for extension.

Tell ya what. Why don't I send it all to you when Dave has taken action on the extension? Sounds like you have all the background info., and I won't have to start at ground zero. From memory "Campbell" amended one claim and submitted another. The claims are related to the prior correspondence/conversations, but I cannot recall specifically how. When I read the extension stuff I passed the package on to Dave, thus delaying sorting out the details of the claims.

From: DWR80::SHURTE 15-AUG-1990 13:26:44.30
To: DWR03::SHAFF
CC:
Subj: TLUCEK CLAIMS - SCOTT CAMPBELL, ATTORNEY

HI DON. I FOUND A CLAIM NO. A63-03174 WITH A LETTER ATTACHED FROM JOHN C. STATING THAT TLUCEK'S HAD CLAIMED 200 ACRES WHEN THEIR ORIG. LICENSE WAS FOR 114 ACRES. SCOTT C. HAD CALLED STEVE LESTER AND HE HAD GIVEN ME A MEMO TO CHECK THE CLAIM, ETC. I FINALLY RECEIVED THE CLAIM WITH JOHN'S LETTER AND SCOTT CAMPBELL TELLS ME THAT HE HAD TALKED TO BRUCE AND SENT ANOTHER CLAIM FOR THE ADDITIONAL 86 ACRES DIRECTLY TO YOU. THEN, BRUCE STATES HE ALSO SENT SCOTT AN AMENDED CLAIM FOR A63-03174 TO REDUCE THE ACRES TO 114. IN LOOKING AT THE HOST TEMP. I FOUND A63-23182 FOR TLUCEK'S 86 ACRES, BUT NO RECEIPT ATTACHED AND IT'S STILL IN HOST TEMP. I ASSUME THEY WOULD HAVE TO SUBMIT ANOTHER $50. WHAT I WOULD LIKE TO KNOW IS IF YOU RECEIVED THOSE CLAIMS BACK, AND WHERE THEY MIGHT BE. I HESITATE TO THINK YOU SENT THEM HERE, BECAUSE THE ONE IS STILL IN THE HOST TEMP. WOULD YOU CHECK IT OUT FOR ME SO I CAN ATTACH THIS ORIGINAL, AND CORRESPONDENCE TO THE AMENDED CLAIM. THANKS, JAN.

ELAM, BURKE AND BOYD
ATTORNEYS AND COUNSELORS AT LAW

KEY FINANCIAL CENTER
702 WEST IDAHO
POST OFFICE BOX 1539
BOISE, IDAHO 83701

TELEPHONE
208-343-5454
TELECOPIER
208-384-5844

SCOTT L. CAMPBELL

August 10, 1990

RECEIVED
AUG 13 1990
Department of Water Resources

Mr. Don Shaff
Assistant Adjudication Bureau Chief
Idaho Department of Water Resources
1301 N. Orchard
Boise, Idaho 83706

RE: Claim Nos. A63-23182 and A63-03174 (Amended)
Jerry L. and Mary Lou Tlucek

Dear Don:

Pursuant to our recent telephone conversation with regard to the above-captioned claims, I have enclosed the executed originals of the above-referenced claims. As I indicated in our telephone conversation, these claims were revised and are submitted in accordance with the prior correspondence with John Carlson of your Department and dated June 20, 1990, and in accordance with the correspondence of Bruce Schuld of the Western Region Office of your Department dated July 31, 1990, a copy of which is enclosed per Mr. Schuld's request.

As I indicated during our telephone conversation, there were extenuating circumstances which prevented Mr. and Mrs. Tlucek from providing me with the necessary direction to comply with the thirty-day time frame outlined in John Carlson's correspondence of June 20, 1990. After I received John Carlson's correspondence, I notified Mr. and Mrs. Tlucek by letter dated June 25, 1990. After I received no response, I followed the initial letter with a second letter dated July 11, 1990. The day after the deadline outlined in John Carlson's correspondence, I received a telephone call from Mr. Tlucek, who indicated that he and his wife had been out of town for three weeks and had not read either of my letters until that day. Accordingly, they requested that I proceed as necessary and hoped that the penalty could be waived. I then attempted to contact John Carlson, who was on vacation, and ultimately ended up speaking with Bruce Schuld of the Western Region Office regarding this matter. Given the circumstances, I hereby request that the Department exercise its discretion and waive the penalty charge for the additional claim.

You also informed me during our telephone conversation that a written description of these circumstances in this letter would satisfy the requirement of filing a formal Request for Extension of Time to File Adjudication Claim. Therefore, I have not supplied one. If you do, in fact, require such a formal filing, please notify me.

Based upon the assumption that the Department will treat this request favorably, I have enclosed our check payable to the Idaho Department of Water Resources in the amount of $50.00 for Claim No. A63-23182. The per-acre charge for irrigation use on the property has already been paid in the prior filings under Claim A63-03174. Needless to say, if the Department does not waive the late penalty charge, we will provide that additional fee after notification from the Department.

I also request that the Department provide me with a receipt, as well as conformed copies of the Claims as filed, so that I have a complete record for my files.

Thank you for your anticipated cooperation.

Very truly yours,

ELAM, BURKE AND BOYD

Scott L. Campbell

SLC:bhb
Encl.

cc: Mrs. and Mrs. Jerry L. Tlucek

State of Idaho
DEPARTMENT OF WATER RESOURCES

Western Region, 2735 Airport Way, Boise, Idaho 83705 - (208) 334-2190

CECIL D. ANDRUS
GOVERNOR

R. KEITH HIGGINSON
DIRECTOR

July 31, 1990

Scott Cambell
Elam Burke and Boyd
P.O. Box 1539
Boise, Idaho 83701

RE: A63-03174 and A63-23182, attached.

Dear Mr. Cambell;

As per our conversation this morning, I am sending you forms for requesting an Extension of Time. Requests should be submitted with any claims done after the county's due date. In this instance, A63-23182. If the request is granted by Dave Shaw, then the late fees will be waived. If, however, you are denied your request, you are required to immediately submit the late fees due or the claim will be rejected and a refund of adjudication fees will be instigated. Please be very specific in describing the circumstances that resulted in late submittal or response to our Bureau's queries.

Furthermore, I have taken the initiative and filled out A63-23182, attached, which is a beneficial use claim to the irrigation of the acreage in excess of that covered by license #63-03174. I have also made amended version of A63-03174, attached, which is the proper way to make claim to the license. There are three packages of claims, two of them are stamped for the files of you and your clients. One set, containing a copy of each claim, should be signed by you, your client, and his/her signature must be notarized. The claims should then be re-submitted to this office with the request for an Extension of Time to waive the late fees for A63-23182, and a $50 filing fee for A63-23182. No acreage fee is due as acreage fees were paid for in the original submittal of A63-03174. A copy of this letter should also be submitted, as it will help to expedite this office's handling of the claims.

Regards,

Bruce A. Schuld
Senior Water Resource Agent
Western Region

cc:BAS:SC:file

JAN

CONVERSATION MEMORANDUM

DATE 7/30/90

FILE A63-03174

NAME OF PARTY Scott Campbell, Attorney 343-5454

EMPLOYEE Steve Lester

RE: Scott Campbell called about claim A63-03174. He has a letter of 6/20/90 from John Carlson. The State office told Scott that file was at Western.

I didn't see file in Atty. filing cabinet.

Could you have someone track this down & call Scott?

Thanks,

SL

State of Idaho
DEPARTMENT OF WATER RESOURCES
1301 North Orchard Street, Statehouse Mail, Boise, Idaho 83720 - (208) 327-7900

CECIL D. ANDRUS
GOVERNOR
R. KEITH HIGGINSON
DIRECTOR

June 20, 1990

Scott L. Campbell
Attorney at Law
P.O. Box 1539
Boise, ID 83701

RE: Notice of Claim to a Water Right A63-03174
in the name of Jerry L. and/or Mary Lou Tlucek, Ada County

Dear Mr. Campbell:

Enclosed please find a file copy of the above-referenced document. This claim has been processed and no additional action is required. Also enclosed is the yellow file copy.

During the review of the claim, we noted that the original license was issued for 114 acres. Therefore, the claim as processed for 200 acres appears to be an expansion according to Idaho Code §42-1416.

If you wish to modify this claim to reflect the 114 acres and submit a separate claim for the expanded acres, you may do so within 30 days without the penalty of a late fee.

Another option is to file an Application for Permit on this additional irrigated acreage. A form is enclosed for your possible use in this matter.

Please do not hesitate to contact this office if you have any questions or we can be of asssitance.

Sincerely,

John D. Carlson

John D. Carlson
Adjudication Supervisor

JDC:HHT:sf:state
Enclosures:
A63-03174, Computer File Copy
& Yellow File Copy
Application for Permit

A63-23182 generated for 86 acres