

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 63-3323
Date Received: 10/12/2006
Receipt No: W034785
Received By:

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

JERRY L TLUCEK Phone: (208)495-2550
15188 S CAN-ADA RD
MELBA ID USA 83641

MARY LOU TLUCEK Phone: (208)495-2550
15188 S CAN-ADA RD
MELBA ID USA 83641

2. Date of Priority: 01/02/1963

3. Source: GROUND WATER Trib. to:

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot	County	Type
01N	02W	26	NW NW	CANYON	

5. Description of diverting works:

Well and pump to buried mainlines to wheel and/or hand lines.

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
IRRIGATION	03/15	11/15	2.4	

7. Total Quantity Appropriated is:
2.4 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

10. Place of use:

Township	Range	Section	1/4	of 1/4	Lot	Use	Acres
01N	02W	26	NW	NW	/	IRRIGATION	38
			SW	NW	/	IRRIGATION	40
			SE	NW	/	IRRIGATION	38
			NE	SW	/	IRRIGATION	40
			NW	SW	/	IRRIGATION	36
			NE	NW		IRRIGATION	3
Section Acres							195
01N	02W	27	NE	NE	/	IRRIGATION	35.5
			NW	NE	/	IRRIGATION	18.5
			SE	NE	/	IRRIGATION	33
			SW	NE	/	IRRIGATION	3.5
Section Acres							90.5
Total Acres							285.5

11. Place of use in counties: CANYON

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

13. Other Water Rights Used: 63-3324

14. Remarks:

The point of diversion and place of use claimed herein were established prior to November 19, 1987, and accordingly qualify as accomplished transfers pursuant to Idaho Code Section 42-1425.

15. Basis of Claim: License

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 63-03323

Date Received 10-12-06

Receipt Number W034785

NOTICE OF CLAIM
TO A
WATER RIGHT
ACQUIRED UNDER STATE LAW

RECEIVED

OCT 12 2006

WATER RESOURCES
WESTERN REGION

Please type or print clearly

1. Name of Claimant (s) Jerry L. Tlucek and Mary Louise Tlucek Phone (208) 495-2034

Mailing Address 15188 S. Can-Ada Road, Melba, ID Zip 83641

2. Date of Priority (Only one (1) per claim) 1/2/63

3. Source of water supply (a) Groundwater

which is tributary to (b)

4. a. Location of existing point of diversion is: Township 01N Range 02W Section 26 ,
NW 1/4 of NW 1/4 of 1/4 , Govt. Lot, B.M., County of Canyon

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 and pump to buried mainlines to wheel and/or hand lines.

SCANNED

OCT 19 2006

6. Water is claimed for the following purposes:

(both dates are inclusive)

(cfs)

(acre feet)

For Irrigation purposes from 3/15 to 11/15 amount 2.4 or

For purposes from to amount or

For purposes from to amount or

For purposes from to amount or

7. Total quantity claimed (a) 2.4 (cfs) and/or (b) (acre feet)

8. Total consumptive use claimed is 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	
01N	02W	26					3	38	40	38	40	36							195.0
01N	02W	27	35.5	18.5	3.5	33													90.5

Total number of acres irrigated 285.5

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

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

63-3324

or None ()

14. Remarks:

The point of diversion and place of use claimed herein were established prior to November 19, 1987, and accordingly qualify as accomplished transfers pursuant to Idaho Code Section 42-1425.

Last Name Tlucek Ident No. 63-03323

BOI_MT2:622406.1

SCANNED
OCT 19 2006

Scale: 2 inches equals 1 mile Please see attached map.

A 16x16 grid of squares. Each square contains a crosshair pattern formed by two dashed lines intersecting at the center. The lines are oriented horizontally and vertically, creating a central point where they meet. The grid is composed of 16 columns and 16 rows of these squares.

BOI_MT2:622406.1

SCANNED
OCT 19 2006

15. Basis of Claim (check one) Beneficial Use _____ Posted Notice _____ License ☒ Permit _____
Decree _____
If applicable provide IDWR Water Right Number 63-3323
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 ☒
wish to receive and pay a small annual fee for monthly copies of the docket sheet.
Number of attachments 1

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

Signature of Claimant (s) _____

Date 10/6/06

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 _____

Title _____

of _____

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 IDAHO)
County of ADA) SS.

Subscribed and sworn (or affirmed) before me this 6 day of October



Notary Public Terry Fesler

Residing at Eagle ID

My Commission Expires 7-21-08

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 829, Boise, ID 83701-0829

Date 10/09/06

Last Name Tlucek Ident. Number 63-03323

SCANNED

OCT 19 2006

BOI_MT2:622406.1

Water Rights 63-03323 and 63-00324

Place of Use in Sections 26 and 27, Township 1 North, Range 2 West, Ada County, Idaho

-  Point of Diversion
-  Place of Use
-  Section Line



SCANNED
OCT 19 2006

Sent to J.O. on
1-5-10

**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. 63-3323
	)	
Case No. 39576	)	
	)	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 Louise Tlucek

RESPONDENT:
State of Idaho

Scott L. Campbell Date
Attorney for Claimants/Objectors

Shasta Kilminster-Hadley Date
Attorney for Respondent

DWR Concurrence:


Jan Shurte
Water Right Supervisor
Date 2/3/10


Andrea L. Courtney
Deputy Attorney General
Attorney for IDWR
Date 2/2/10

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3323

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

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 2.400 CFS
1,111.500 AFY

Right Nos. 63-3323 and 63-3324 are limited to a total combined annual diversion volume of 1111.5 AF.

PRIORITY DATE: 01/02/1963

POINT OF DIVERSION:

T01N R02W S26 NWNW Within CANYON County

T01N R02W S26 SWNW Within CANYON CountyPURPOSE AND
PERIOD OF USE:PURPOSE OF USEPERIOD OF USEQUANTITY

IRRIGATION

03/01 11/15

2.400 CFS
1,111.50 AFY

PLACE OF USE:

IRRIGATION in CANYON County

T01N R02W S26	NWNW	39.00	T01N R02W S26	SWNW	40.00
T01N R02W S26	SENW	40.00	T01N R02W S26	NESW	40.00
T01N R02W S26	NWSW	39.00	T01N R02W S27	NENE	34.00
T01N R02W S27	NWNE	18.00	T01N R02W S27	SWNE	4.00
T01N R02W S27	SENE	31.00			

285 ACRES TOTAL

Right Nos. 63-3323 and 63-3324 are limited to the irrigation of a combined total of 247 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 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 includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

Right includes accomplished change in point of diversion pursuant to Section 42-1425, Idaho Code.

CERTIFICATE OF MAILING

I certify that on _____, 2010, 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:

STATE OF IDAHO
Represented by:
NATURAL RESOURCES DIVISION CHIEF
STATE OF IDAHO
ATTORNEY GENERAL'S OFFICE
P.O. BOX 44449
BOISE, ID 83711-4449

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

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 63-3323 V1

WATER RIGHT NUMBER: 63-3323 V1

<u>Owner Type</u>	<u>Name and Address</u>
Original Owner	KENNETH D CASPER C/O JAY C NEIDER RT 3 BOX 251 NAMPA, ID 83651
Current Owner	JERRY L TLUCEK 15188 S CAN-ADA RD MELBA, ID 83641 (208)495-2550
Current Owner	MARY LOUISE TLUCEK 15188 S CAN-ADA RD MELBA, ID 83641 (208)495-2550
Attorney	MOFFATT THOMAS BARRETT ROCK & FIELD CHTD C/O SCOTT L CAMPBELL PO BOX 829 BOISE, ID 83701-0829 (208) 345-2000

Priority Date: 01/02/1963

Basis: License

Status: Active

Source

GROUND WATER

TributaryBeneficial Use

IRRIGATION

From To
03/01 to 11/15

Diversion Rate
2,400 CFS

Annual Volume
1,111.50 AF

Total Diversion: 2,400 CFS

1,111.50 AF

Location of Point(s) of Diversion

GROUND WATER

CANYON County

NW1/4NW1/4

Sec. 26, Twp 01N, Rge 02W, B.M.

Place of UseIRRIGATION Within CANYON County

T01N R02W S26	NWNW	39.0	T01N R02W S26	SWNW	40.0
T01N R02W S26	SENW	40.0	T01N R02W S26	NESW	40.0
T01N R02W S26	NWSW	39.0	T01N R02W S27	NENE	34.0
T01N R02W S27	NWNE	18.0	T01N R02W S27	SWNE	4.0
T01N R02W S27	SENE	31.0			

Total Acres: 285

Conditions of Approval:

Added in well located in SWNW per evidence in the file for path. Shows path wells ring used on path lands (same lands) in 1965.

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 63-3323 V1

1. C18 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.
2. E53 Right Nos. 63-3323 and 63-3324 are limited to a total combined annual diversion volume of 1111.5 AF.
3. C05 Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.
4. E55 Right Nos. 63-3323 and 63-3324 are limited to the irrigation of a combined total of 247 acres within the place of use described above in a single irrigation season.

Remarks:

SubCase:

SubCase Number: 63-3323

Class: 1

SF5 Filed Date:

Special Master Recom Signed Date:

Attorney Assigned:

Adjudication Agent: Michael Ciscell

Basis of Claim: License

Date Filed: 8/17/2007 Objection Status: Active

Date Filed: 6/19/2007 Objection Status: Active

Water Supply Bank:

Amended Director's Report
Right No. 63-3323

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3323
NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641
MARY LOUISE TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER
QUANTITY: 2.400 CFS
1,111.500 AFY

TRIBUTARY:

Right Nos. 63-3323 and 63-3324 are limited to a total combined annual diversion volume of 1111.5 AF.

PRIORITY DATE: 01/02/1963

POINT OF DIVERSION:

T01N R02W S26 NWNW Within CANYON County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	03/01 11/15	2.400 CFS 1,111.50 AFY

PLACE OF USE:

IRRIGATION in CANYON County

T01N R02W S26	NWNW	39.00	T01N R02W S26	SWNW	40.00
T01N R02W S26	SESW	40.00	T01N R02W S26	NESW	40.00
T01N R02W S26	NWSW	39.00	T01N R02W S27	NENE	34.00
T01N R02W S27	NWNE	18.00	T01N R02W S27	SWNE	4.00
T01N R02W S27	SENE	31.00			

285 ACRES TOTAL

Right Nos. 63-3323 and 63-3324 are limited to the irrigation of a combined total of 247 acres within the place of use described above in a single irrigation season.

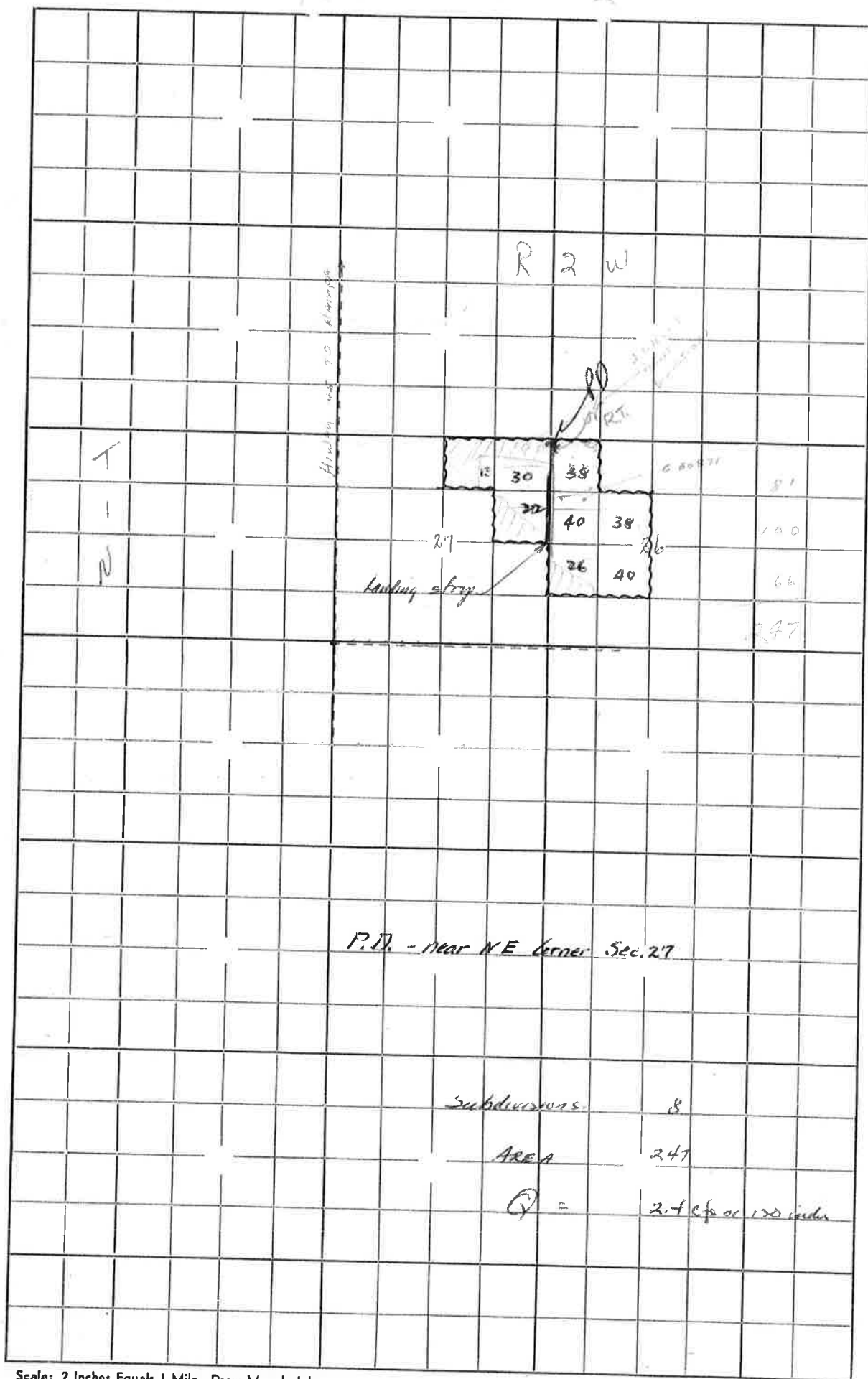
OTHER PROVISIONS NECESSARY FOR DEFINITION OR ADMINISTRATION OF THIS WATER RIGHT:

This 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 includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

Amended Director's Report
Right No. 63-3323



30870

345-2000

Shurte, Jan

From: Shurte, Jan
Sent: Tuesday, November 10, 2009 10:50 AM
To: 'Dylan Lawrence'
Cc: Courtney, Andrea; Williams, Ray
Subject: RE: 63-3323 & 63-3324

Hi Dylan. That's great. At this point a withdrawal of the objection would be the easiest way to go. If we do an SF5, it will look just like the recommendation and will have to go around the signing circuit. Since nothing is changing, the withdrawal would be cleaner. I am cc'ing this to Andrea Courtney in case I am missing something. Thanks so much for getting back to me and hopefully we can finish these. Andrea, do you agree with this approach?

Thanks,
Jan

From: Dylan Lawrence [mailto:DBL@moffatt.com]
Sent: Tuesday, November 10, 2009 10:09 AM
To: Shurte, Jan
Subject: RE: 63-3323 & 63-3324

Hi Jan. I apologize that it has taken me this long to respond to you on this issue. The Claimant is comfortable with the place of use recommended by IDWR. Please advise as to how we should proceed--SF5s, withdrawal of objection, etc.

Thanks,
Dylan

Dylan Lawrence
Moffatt Thomas Barrett Rock & Fields, Chtd.
P.O. Box 829
Boise, Idaho 83701-0829
Phone & fax: (208) 385-5417

From: Shurte, Jan [mailto:Jan.Shurte@idwr.idaho.gov]
Sent: Tuesday, October 06, 2009 3:31 PM
To: Dylan Lawrence
Subject: 63-3323 & 63-3324

Here you go.

Jan

NOTICE: This e-mail, including attachments, constitutes a confidential attorney-client communication. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this communication in error, do not read it. Please delete it from your system without copying it, and notify the sender by reply e-mail or by calling (208) 345-2000, so that our address record can be corrected. Thank you.

NOTICE: To comply with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any U.S. federal tax advice contained in this e-mail, including attachments, is not intended or written to be used, and cannot be used, by any person for the purpose of avoiding any penalties that may be imposed by the Internal Revenue Service.

11/10/2009

Shurte, Jan

From: Shurte, Jan
Sent: Tuesday, October 06, 2009 3:31 PM
To: 'DBL@Moffatt.com'
Subject: 63-3323 & 63-3324
Attachments: img-X06153117.pdf

Here you go.

Jan

10/20/2009

Amended Director's Report
Right No. 63-3323

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3323
NAME AND ADDRESS: JERRY L TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641
MARY LOUISE TLUCEK
15188 S CAN-ADA RD
MELBA ID 83641

SOURCE: GROUND WATER
QUANTITY: 2.400 CFS
1,111.500 AFY

TRIBUTARY:

Right Nos. 63-3323 and 63-3324 are limited to a total combined annual diversion volume of 1111.5 AF.

PRIORITY DATE: 01/02/1963

POINT OF DIVERSION:

T01N R02W S26 NWNW Within CANYON County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	03/01 11/15	2.400 CFS 1,111.50 AFY

PLACE OF USE: IRRIGATION in CANYON County

T01N R02W S26	NWNW	39.00	T01N R02W S26	SWNW	40.00
T01N R02W S26	SENW	40.00	T01N R02W S26	NESW	40.00
T01N R02W S26	NWSW	39.00	T01N R02W S27	NENE	34.00
T01N R02W S27	NWNE	18.00	T01N R02W S27	SWNE	4.00
T01N R02W S27	SENE	31.00			

285 ACRES TOTAL

Right Nos. 63-3323 and 63-3324 are limited to the irrigation of a combined total of 247 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 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 includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

Amended Director's Report
Right No. 63-3323



Idaho Department of Water Resources

SRBA Recommendations:

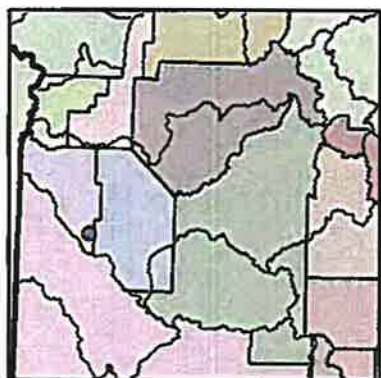
63-3323

63-3324

(Irrigation)

Legend

- ⊙ Point of Diversion
- ▭ Place of Use
- ▭ Townships
- ▭ PLS Sections
- ▭ Quarter Quarters



Canyon County
IDWR Basin 63



0 0.4 0.8 Miles

Prepared by M. Ciscell
On Wednesday, November 1, 2006
1987/88 Aerial Photography

STATUS CONFERENCE NOTES:

RIGHT NO. 63-3324

DATE: 10-6-09

Y 63-3323

Dylan Lawrence states the AF
Amount is not worth fighting
for & will take a look at the acre
objection & if OK will let me know.
The acres look exactly correct to
me as recommended. I will
send him a copy of each rec.
w/ the GIS map. He can review

IDAHO DEPARTMENT OF WATER RESOURCES

Water Right Report 63-3323

WATER RIGHT NUMBER: 63-3323

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	KENNETH D CASPER C/O JAY C NEIDER RT 3 BOX 251 NAMPA, ID 83651

Priority Date: 01/02/1963

Basis: License

Status: Active

<u>Source</u>	<u>Tributary</u>
GROUND WATER	

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
IRRIGATION	/ to /	2.400 CFS	
	<u>Total Diversion:</u>	2.400 CFS	

Location of Point(s) of Diversion

GROUND WATER	NE1/4NE1/4	Sec. 27, Twp 01N, Rge 02W, B.M.
CANYON County		

Place of Use

IRRIGATION

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
01N	02W	26						38.0	40.0	38.0	40.0	26.0							182.0
01N	02W	27	30.0	13.0		22.0													65.0

Total Acres: 247

Conditions of Approval:Remarks:Comments:

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
Glenna M. Christensen
Gerald T. Husch
Scott I. Campbell
Robert B. Burns

Michael E. Thomas
Patricia M. Olsson
Bradley J. Williams
Lee Radford
Michael O. Roe
David S. Jensen
James I. Martin
C. Clayton Gill
Michael W. McGreaham
David P. Gardner
Julian E. Gabiola
Angela Schaefer Kaufmann
Kimberly D. Evans Ross
Paul D. McFarlane
Jon A. Stenquist
Tyler J. Henderson

Jason G. Murray
Mark C. Peterson
Andrew J. Waldera
Tyler J. Anderson
Dylan B. Lawrence
Russell G. Metcalf
Benjamin C. Ritchie
Rebecca A. Rainey
Robert E. Bakes, *of counsel*
Morgan W. Richards, *of counsel*
Willis C. Moffatt, 1907-1980
Kirk R. Helvie 1956-2003

RECEIVED

OCT 31 2006

DEPARTMENT OF
WATER RESOURCES

October 24, 2006

Boise
Idaho Falls
Pocatello
Twin Falls

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

Jan Shurte
Idaho Department of Water Resources Western
Region Office
2735 Airport Way
Boise, ID 83705

Re: Jerry Tlucek / Water Rights 63-3323 and 63-3324
MTBR&F File No. 22377.1

Dear Jan:

The purpose of this letter is confirm our telephone conversation yesterday, wherein we discussed the above-referenced water rights. As we discussed, the adjudication claims filed by our client, Jerry Tlucek, identified a 285.5 acre permissible place of use. The intent was not to seek an enlargement of the licensed quantity of water and number of irrigated acres (247); rather, the intent was to seek confirmation of the claimed 285.5 acre place of use which has been irrigated, rotationally, since before November 19, 1987.

It is my understanding from our conversation that water rights 63-3323 and 63-3324 will be recommended with a 285.5 acre permissible place of use, with the limitation that no more than 247 acres can be irrigated at any given time. If my understanding is incorrect, please immediately notify me.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



Tiffany M. Hudak
Paralegal

/tmh

cc: Jerry Tlucek

RECEIVED

OCT 26 2006

WATER RESOURCES
WESTERN REGION

Amended Director's Report
Right No. 63-3323

IDAHO DEPARTMENT OF WATER RESOURCES
RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3323

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

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

SOURCE: GROUND WATER

TRIBUTARY:

QUANTITY: 2.400 CFS
1,111.500 AFY

Right Nos. 63-3323 and 63-3324 are limited to a total combined annual diversion volume of 1111.5 AF.

PRIORITY DATE: 01/02/1963

POINT OF DIVERSION:

T01N R02W S26 NWNW Within CANYON County

PURPOSE AND
PERIOD OF USE:

<u>PURPOSE OF USE</u>	<u>PERIOD OF USE</u>	<u>QUANTITY</u>
IRRIGATION	03/01 11/15	2.400 CFS 1,111.50 AFY

PLACE OF USE: IRRIGATION in CANYON County

T01N R02W S26	NWNW	39.00	T01N R02W S26	SWNW	40.00
T01N R02W S26	SESW	40.00	T01N R02W S26	NESW	40.00
T01N R02W S26	NWSW	39.00	T01N R02W S27	NENE	34.00
T01N R02W S27	NWNE	18.00	T01N R02W S27	SWNE	4.00
T01N R02W S27	SENE	31.00			

285 ACRES TOTAL

Right Nos. 63-3323 and 63-3324 are limited to the irrigation of a combined total of 247 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 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 includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

11/01/2006

IDAHO DEPARTMENT OF WATER RESOURCES
PRELIMINARY RECOMMENDATION OF WATER RIGHTS ACQUIRED UNDER STATE LAW

RIGHT NUMBER: 63-3323
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: 2.400 CFS
1,111.50 AFY

Right Nos. 63-3323 and 63-3324 are limited to a total combined annual diversion volume of 1111.5 AF.

PRIORITY DATE: 01/02/1963

POINT OF DIVERSION:
T01N R02W S26 NWNW Within CANYON County

PURPOSE AND
PERIOD OF USE:

PURPOSE OF USE	PERIOD OF USE	QUANTITY
IRRIGATION	03/01 11/15	2.400 CFS 11,111.50 AFY

PLACE OF USE: IRRIGATION Within CANYON County **CLAIM**

T01N R02W S26	NWNW	39.00 38	T01N R02W S26	SWNW	40.00 SAME
T01N R02W S26	SESW	40.00 38	T01N R02W S26	NESW	40.00 SAME
T01N R02W S26	NWSW	39.00 36	T01N R02W S27	NENE	34.00 35.5
T01N R02W S27	NWNE	18.00 18.5	T01N R02W S27	SWNE	4.00 3.5
T01N R02W S27	SENE	31.00 33			

285 ACRES TOTAL

~~This right is limited to the irrigation of 247 acres within the place of use described above in a single irrigation season.~~

Right Nos. 63-3323 and 63-3324 are limited to the irrigation of a combined total of 247 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 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 includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

Need to change in our database
BACK INK IS WHAT WAS CLAIMED

NEW 5.26 - 3 AC



Idaho Department of Water Resources

SRBA Recommendations:

63-3323

63-3324

(Irrigation)

Legend

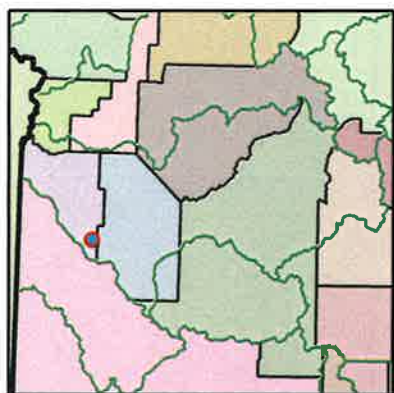
● Point of Diversion

Place of Use

Townships

PLS Sections

Quarter Quarters



Canyon County
IDWR Basin 63



0

0.4

0.8 Miles

Prepared by M. Ciscell
On Wednesday, November 1, 2006
1987/88 Aerial Photography

Hi Mike,

Here are the Tlucek files. The acre foot objection will be combined with all the other acre foot objections by Scott Campbell and likely recommended for Summary Judgment by the Special Master.

In the meantime, Scott Campbell feels like the place of use should be recommended the same as claimed. However, it looks to me like your layout is more accurate. I was thinking that if you sent them a layout with the number of acres indicated in each and asked them to come up with where, exactly, they think the acres are incorrect or where they should be then you would be able to see if it can be changed.

My idea is that Mr. Tlucek feels something is being taken away from him where it looks to me like it is being distributed accurately with only .5 acres less. Maybe we could see where the .5 acres went and if it can be added to any of the 1/41/4s.

So, I am returning these to you for follow-up. I am not sure why they had me do these anyway – maybe they thought the af objection would be a bigger deal at the time. You could get the pou ok'd and then hold these until the summary judgment comes out. Once that comes out we can do an SF5 on them.

Thanks,
Jan

Ps – we do need to change the AFY under the Period of Use on 63-3323 to 1,111.5 afy rather is one you could get the pou ok'd, fix the afy and then just hold until the af summary judgment than 11,111.5 afy. Just a fat finger and I told them we would include it in the final SF5.

RECEIVED

AUG 19 2008

DEPARTMENT OF
WATER RESOURCES

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
David B. Lincoln
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
Christine E. Nicholas
Bradley J. Williams
Lee Radford
Michael O. Roe
Nancy J. Garrett
David S. Jensen
James L. Martin
C. Clayton Gill
Michael W. McGraham
David P. Gardner
Tara Martens
Julian E. Gabiola
Kimberly D. Evans Ross
Jason G. Murray
Mark C. Peterson

Paul D. McFarlane
Jon A. Stenquist
Tyler J. Henderson
C. Edward Cather III
Michelle C. Michaud
Andrew J. Waldera
Tyler J. Anderson
Dylan B. Lawrence
Benjamin C. Ritchie
Rebecca A. Rainey
Nathan R. Starnes
Andrew J. Snook

Robert E. Bakes, *of counsel*

Willis C. Moffatt, 1907-1980
Kirk R. Helvie, 1956-2003

July 28, 2008

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

RECEIVED

JUL 29 2008

DEPARTMENT OF
WATER RESOURCES

David J. Barber
Idaho Attorney General's Office
P.O. Box 83720
Boise, ID 83720-0010

Andrea Courtney
Idaho Attorney General's Office
322 E. Front Street
P.O. Box 83720
Boise, ID 83720-0098

Re: Consolidated SRBA Proceeding to Address Annual Diversion Volume
MTBR&F File No. 00UFO.5432

Dear Counsel:

As you will recall, at the June 5, 2008 initial hearing in Nampa, we agreed to a consolidated proceeding to address the inclusion of new annual diversion volume limitations on previously licensed water rights. Scott Campbell and I agreed to provide you with a list of our clients' water rights to be included in such a proceeding, once we obtained final approval from each client. Here is that list:

Pioneer Irrigation District

63-2529
63-9109

Jan

Jerry L. and Mary Lou Tlucek

63-3323
63-3324

Michael

DBSI Tiegs 979 LLC

63-3163
63-3274

Sandy

Perhaps the next step should be to coordinate a meeting or conference call to discuss the consolidation of these subcases and a potential briefing schedule. Please let me know how you would like to proceed.

David J. Barber
Andrea Courtney
July 28, 2008
Page 2

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dylan B. Lawrence", with a long, sweeping horizontal stroke at the end.

Dylan B. Lawrence

DBL/llw

cc: Scott L. Campbell

COPY

RECEIVED

JUN 12 2008

DEPARTMENT OF
WATER RESOURCES

LAWRENCE G. WASDEN
Attorney General

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

DAVID J. BARBER (ISB #2597)
Deputy Attorney General
P.O. Box 44449
Boise, Idaho 83711-4449
Telephone: (208) 334-2400
Facsimile: (208) 334-2690

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

In Re SRBA	)	Subcase Nos. 63-03323, 63-03324, & 63-10435
	)	
	)	RESPONSE TO REQUEST REGARDING
	)	REPRESENTATION BY THE STATE OF IDAHO
Case No. 39576	)	
	)	
	)	

COMES NOW, the State of Idaho, by and through David J. Barber, Deputy Attorney General, and responds to the request for designation of agency representation in the above subcases. Idaho Code § 42-1401C(b) states as follows: "The attorney general may appear in any adjudication and shall represent the position of the state of Idaho." Thus, the office of the attorney general may appear in the Snake River Basin Adjudication without the designation of a specific state agency. Here, the State of Idaho has not designated a specific agency in these three subcases and respectfully declines to do so.

DATED this 11th day of June 2008.

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CLIVE J. STRONG
DEPUTY ATTORNEY GENERAL
STATE OF IDAHO



DAVID J. BARBER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on this 11th day of June 2008, I caused to be served the original and copies of this RESPONSE TO REQUEST REGARDING REPRESENTATION BY THE STATE OF IDAHO 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 the following persons:

Rebekah Tlucek
Kevin Tlucek
Sheeley Tlucek
Byron Tlucek
c/o Scott Campbell
Moffat Thomas Barrett Rock & Fields
PO Box 829
Boise, ID 83701

- ☒ 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

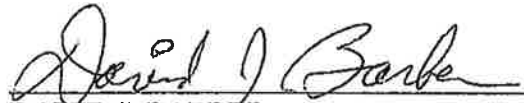
- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Federal Express
- ☐ Facsimile: _____
- ☒ Statehouse Mail

Special Master Theodore 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: 345-8800
- ☐ Statehouse Mail

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

Not Applicable



DAVID J. BARBER
Deputy Attorney General

COPY

RECEIVED

AUG 21 2007

Department of Water Resources
Adjudication Bureau

RECEIVED

AUG 23 2007

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) A. Subcase No.: 63-03323

Case No. 39576)

STANDARD FORM 2
RESPONSE TO OBJECTION

Please print or type the following information:

B. NAME AND ADDRESS OF PERSON RESPONDING

Name: STATE OF IDAHO
Address: Office of the Attorney General
JRW Building, Second Floor
700 West State Street
P.O. Box 44449
Boise, Idaho 83711-4449
Phone: (208) 334-2400

Name and Address of Attorney, if any:

Attorney Name: LAWRENCE G. WARDEN
Attorney General
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division
DAVID J. BARBER (ISB # 2597)
Deputy Attorney General
Attorney Address: Office of the Attorney General
Natural Resources Division
JRW Building, Second Floor
700 West State Street
P.O. Box 44449
Boise, Idaho 83711-4449
Attorney Phone No. (208) 334-2400

C. NAME AND ADDRESS OF PERSON WHO FILED THE OBJECTION TO WHICH YOU ARE RESPONDING

Name: Jerry L. Tlucek
Mary Lou Tlucek
15188 S. Can-Ada Road
Melba, Idaho 83641

Name & Address of Attorney, if any:

Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields
PO Box 829
Boise, ID 83701

D. I am responding to the objections to the following elements. (Please check the appropriate box(es)).

1. ☐ **Name and Address**
2. ☐ **Source**
3. ☒ **Quantity**
4. ☐ **Priority Date**
5. ☐ **Point(s) of Diversion**
6. ☐ **Instream Flow Description**
7. ☒ **Purpose(s) of Use**
8. ☒ **Period of Year**
9. ☒ **Place of Use**
11. **Recommendation**
 - ☐ This water right should not exist.
 - ☐ This water right was not recommended, but should be recommended with the elements described above.

E.

VERIFICATION (Must be Completed)

State of Idaho)
) ss.
County of Ada)

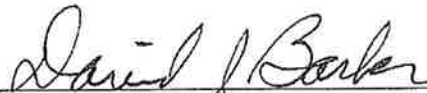
DAVID J. BARBER, Deputy Attorney General, being first duly sworn, upon oath, deposes and says:

That the State of Idaho is the party/claimant filing this response as defined by I.C. §§ 42-1401A(1) and (6), that I am a Deputy Attorney General authorized to represent the State of Idaho and that I have read this response, know its contents and that the statements are true to the best of my knowledge and belief.

LAWRENCE G. WASDEN
Attorney General

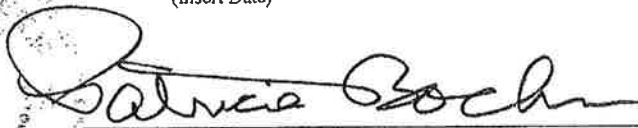
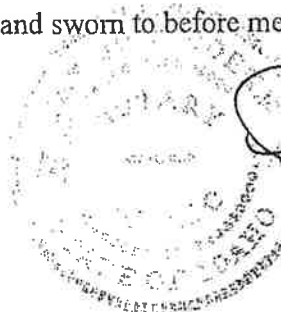
CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division

DAVID J. BARBER
Deputy Attorney General



By Attorney signing in representative capacity

Subscribed and sworn to before me on this 17th day of August 2007
(Insert Date)



Notary Public for IDAHO

Residing at: BOISE, ID

My commission expires: 11/6/09

INSTRUCTIONS FOR MAILING

You must mail the response, including all attachments, 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 this 17th day of August 2007, I caused to be served the original and copies of this response to the following persons by the indicated methods:

1. Original to: Clerk of the District Court
Snake River Basin Adjudication
P.O. Box 2707
253 Third Avenue North
Twin Falls, Idaho 83303-2707

2. One copy to the claimant of the water right at the following addresses:

Name: Jerry L. Tlucek U. S. MAIL
Mary Lou Tlucek
Address: c/o Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields
PO Box 829
Boise, ID 83701

3. One copy to the party who filed the objection at the following address:

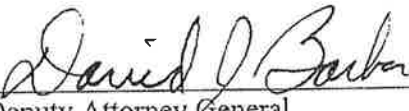
Name: Jerry L. Tlucek (not applicable)
Mary Lou Tlucek
Address: c/o Scott L. Campbell
Moffatt Thomas Barrett Rock & Fields
PO Box 829
Boise, ID 83701

4. Copies to: IDWR Document Depository STATEHOUSE
PO Box 83720 MAIL
Boise, ID 83720-0098

United States Department of Justice U. S. MAIL
Environment and Natural Resource Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

Chief of Natural Resource Division
Office of the Attorney General
State of Idaho
P.O. Box 44449
Boise, Idaho 83711-4449

(not applicable)


Deputy Attorney General

RECEIVED

JUN 25 2007

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 63-03323

(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

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

JUN - 4 2008

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: Please see Attachment 1 hereto
4. ☐ **Priority Date**
Should be: _____
5. ☐ **Point of Diversion**
Should be: _____
6. ☐ **Instream Flow Beginning and Ending Point**
Should be: _____
7. ☒ **Purpose(s) of Use**
Should be: Please see Attachment 1 hereto
8. ☒ **Period of Year**
Should be: Please see Attachment 1 hereto
9. ☒ **Place of Use**
Should be: Please see Attachment 2 hereto
10. ☐ **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 OBJECTIONS(S):**

Please see Attachment 3 hereto.

F.

VERIFICATION (must be completed)

State of Idaho)
)ss.
County of Ada)

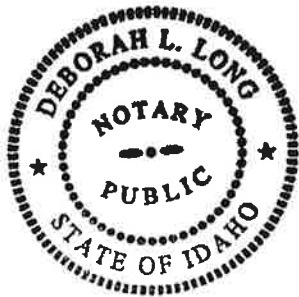
Scott L. Campbell, duly sworn, upon oath, deposes and says:
(Name of person filing objection)

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: 6/19/07



Deborah Long
Notary Public for Idaho

Residing at: Boise

My Commission Expires: 10/10/07

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 June 19, 2007, 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

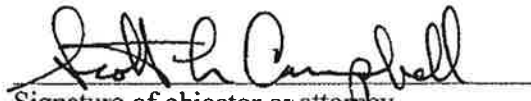
Melba, Idaho 83641

3. Copies to:

IDWR Document Depository
PO Box 83720
Boise, ID 83720-0098

United States Department of Justice
Environment & Nat'l Resources Div
550 W Fort Street, MSC 033
Boise, ID 83724

Chief, Natural Resources Division
Office of Attorney General
PO Box 44449
Boise, ID 83711-4449


Signature of objector or attorney
mailing on Objector's behalf

**ATTACHMENT 1 TO
STANDARD FORM 1 – OBJECTION
SUBCASE 63-03323**

Jerry and Mary Lou Tlucek are objecting to inclusion of the annual volumetric limitation in the amount of 1,111.50 afy, as such appears under the Quantity and Purpose and Period of Use elements of the Director's Report. Additionally, the Tluceks are objecting to the following remark under Quantity, as set forth in the Director's Report:

Right Nos. 63-3323 and 63-3324 are limited to a total combined annual diversion volume of 1111.5 af.

**ATTACHMENT 2 TO
STANDARD FORM 1 – OBJECTION
SUBCASE 63-03323**

The Director's Report incorrectly identifies the place of use for irrigation of lands under this water right. The correct, historic place of use is as follows:

TWP	RNG	SEC	1/4 of	1/4	Lot	Acres
1N	2W	26	NE	NW		3.0
			NW	NW		38.0
			SW	NW		40.0
			SE	NW		38.0
			NE	SW		40.0
			NW	SW		36.0
1N	2W	27	NE	NE		35.5
			NW	NE		18.5
			SW	NE		3.5
			SE	NE		33.0
Total						285.5

**ATTACHMENT 3 TO
STANDARD FORM 1 – OBJECTION
SUBCASE 63-03323**

Reasons Supporting Objection(s)

Quantity:

There is no legal basis for the inclusion of the volumetric limitation or the remark, as neither were contained as restrictions in the license.

Purpose and Period of Use:

There is no legal basis for the inclusion of the volumetric limitation, as it was not contained as a restriction in the license.

Place of Use:

The place of use described in the Director's Report does not accurately describe the lands historically irrigated under this water right.



Idaho Department of Water Resources

SRBA Recommendations:

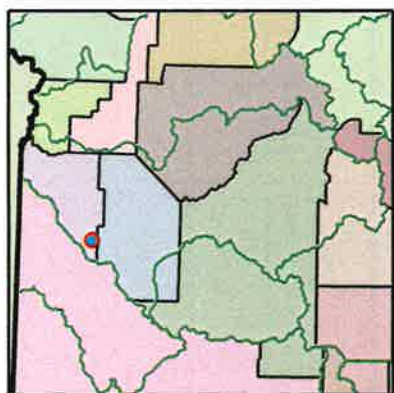
63-3323

63-3324

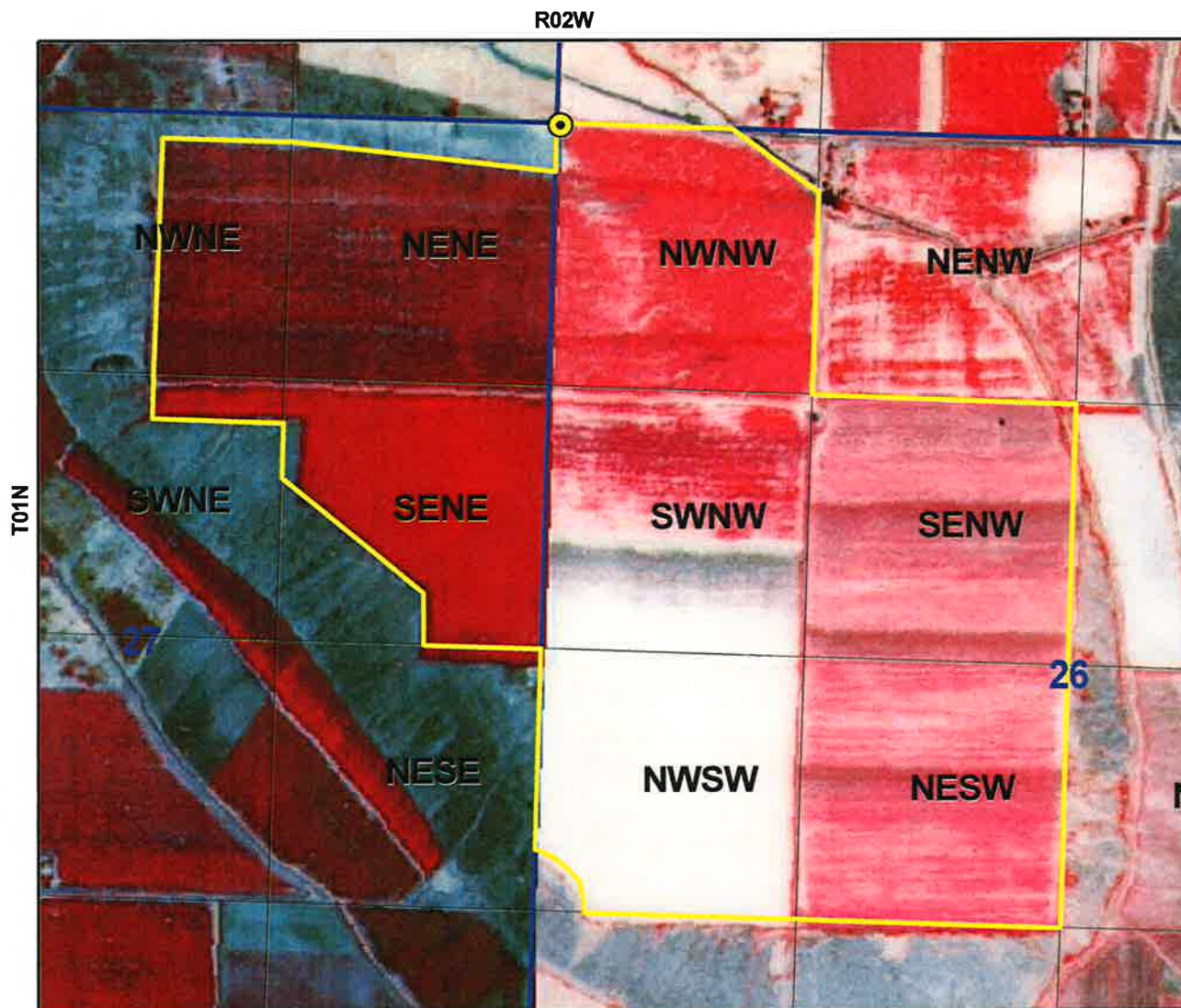
(Irrigation)

Legend

-  Point of Diversion
-  Place of Use
-  Townships
-  PLS Sections
-  Quarter Quarters



Canyon County
IDWR Basin 63



0 0.4 0.8 Miles

Prepared by M. Ciscell
On Wednesday, November 1, 2006
1987/88 Aerial Photography

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
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Robert B. Burns

Michael E. Thomas
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Lee Radford
Michael O. Roe
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James L. Martin
C. Clayton Gill
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David P. Gardner
Julian E. Gabiola
Angela Schaer Kaufmann
Kimberly D. Evans Ross
Paul D. McFarlane
Jon A. Stenquist
Tyler J. Henderson

Jason G. Murray
Mark C. Peterson
Andrew J. Waldera
Tyler J. Anderson
Dylan B. Lawrence
Russell G. Metcalf
Benjamin C. Ritchie
Rebecca A. Rainey

Robert E. Bakes, *of counsel*
Morgan W. Richards, *of counsel*

Willis C. Moffatt, 1907-1980
Kirk R. Helvie, 1956-2003

RECEIVED

OCT 31 2006

DEPARTMENT OF
WATER RESOURCES

Boise
Idaho Falls
Pocatello
Twin Falls

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101 S Capitol Blvd 10th Fl
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Boise, Idaho 83701 0829

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October 24, 2006

Jan Shurte
Idaho Department of Water Resources Western
Region Office
2735 Airport Way
Boise, ID 83705

Re: Jerry Tlucek / Water Rights 63-3323 and 63-3324
MTBR&F File No. 22377.1

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OCT 26 2006

WATER RESOURCES
WESTERN REGION

Dear Jan:

The purpose of this letter is confirm our telephone conversation yesterday, wherein we discussed the above-referenced water rights. As we discussed, the adjudication claims filed by our client, Jerry Tlucek, identified a 285.5 acre permissible place of use. The intent was not to seek an enlargement of the licensed quantity of water and number of irrigated acres (247); rather, the intent was to seek confirmation of the claimed 285.5 acre place of use which has been irrigated, rotationally, since before November 19, 1987.

It is my understanding from our conversation that water rights 63-3323 and 63-3324 will be recommended with a 285.5 acre permissible place of use, with the limitation that no more than 247 acres can be irrigated at any given time. If my understanding is incorrect, please immediately notify me.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



Tiffany M. Hudak
Paralegal

TMH@MOFFATT.COM

/tmh

cc: Jerry Tlucek

SCANNED

NOV 01 2006

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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
Glenna M. Christensen
Gerald T. Husch
Scott L. Campbell
Robert B. Burns

Michael E. Thomas
Patricia M. Olsson
Bradley J. Williams
Lee Radford
Michael O. Roe
David S. Jensen
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Morgan W. Richards, *of counsel*

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OCT 12 2006
WATER RESOURCES
WESTERN REGION

October 10, 2006

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Idaho Department of Water Resources Western
Region Office
2735 Airport Way
Boise, ID 83705

Re: SRBA Claims for Water Right 63-3323 and 63-3324
(In the Names of Jerry and Mary Louise Tlucek)
MTBR&F File No. 22377.1

To Whom It May Concern:

Enclosed please find an original and one copy of the Snake River Basin Notice of Claim to a Water Right for each of water rights 63-3323 and 63-3324, both of which are in the names of Jerry and Mary Louise Tlucek. Also enclosed is the requisite filing fee in the amount of \$772.00 (claim fee of \$100 for each claim plus acreage fee of \$572 (286 acres x \$2 per acre)). Please file the originals and return the receive-stamped copies in the enclosed, self addressed stamped envelope.

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
Enclosures
cc: Jerry Tlucek (w/encls.)

SCANNED
OCT 19 2006

BOI_MT2:629454.1

State of Idaho

License and Certificate of Water Right

Water License No. 30870Amount 2.4 c.f.s.

Water District No.

Priority January 2, 1963

THIS IS TO CERTIFY that KENNETH D. CASPER
 of Nampa, Idaho, made application for a permit to appropriate the
 public waters of the State of Idaho, dated January 2, 19 63; that Permit No. 30870
 was issued under said application; that Certificate of Completion of works, with a carrying capacity of
2.4 second feet, was issued thereunder on February 11, 19 65, showing that said works
 were completed on the 10th day of August, 1964; and that on the 10th
 day of August, 19 64,

KENNETH D. CASPER

of Nampa, State of Idaho, made proof to the satisfaction of the
 State Reclamation Engineer of Idaho, of the right to use the waters of a well
 , a tributary of subterranean flow , for the purpose of irrigation
 , under Use Permit No. 30870 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
13 of Licenses at page 8090, on the 11 day of February, 19 65;
 The right hereby confirmed dates from January 2, 19 63;

The Point of Diversion is located Near NE corner of Sec. 27
 in the 1/4 - 1/4, Sec. --, Tp. 1 N, R. 2 W, B. M. Canyon 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 2.4 cubic feet per second.

Description and location of use:

Twp.	Range	Sec.	Forty-acre Tract	No. Acres Described in Permit	No. Acres Actually Irrigated
1 N	2 W	26	NW $\frac{1}{4}$ NW $\frac{1}{4}$	40	38
			SE $\frac{1}{4}$ NW $\frac{1}{4}$	40	38
			SW $\frac{1}{4}$ NW $\frac{1}{4}$	40	40
			NW $\frac{1}{4}$ SW $\frac{1}{4}$	40	26
			NE $\frac{1}{4}$ SW $\frac{1}{4}$	40	40
		27	NE $\frac{1}{4}$ NE $\frac{1}{4}$	40	30
			NW $\frac{1}{4}$ NE $\frac{1}{4}$	40	13
			SE $\frac{1}{4}$ NE $\frac{1}{4}$	40	22
			Total number of acres to be irrigated:		247

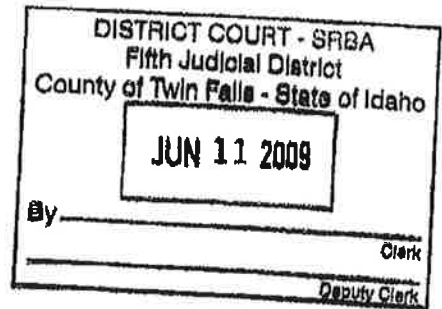
The right to the use of the water aforesaid hereby confirmed is restricted to the lands or place
 of use herein described, as provided by the laws of Idaho.

WITNESS the seal and signature of the State Reclamation Engineer, affixed at Boise, Idaho, this
11th day of February, 19 65.

RALPH W. THOMAS

Deputy State Reclamation Engineer.

(SEAL)



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

In Re SRBA) Subcase Nos. 63-02529, 63-03323, 63-03324,
) and 63-10435
Case No. 39576)
) **MEMORANDUM DECISION AND**
) **ORDER ON MOTIONS FOR SUMMARY**
) **JUDGMENT**
)
) **ORDER DENYING MOTION TO**
) **STRIKE**
)
) **SPECIAL MASTER'S REPORT AND**
) **RECOMMENDATION FOR WATER**
) **RIGHTS 63-02529 and 63-10435**
)
) **ORDER SETTING SCHEDULING**
) **CONFERENCE IN SUBCASES 63-03323**
) **and 63-03324**

I. APPEARANCES

Scott L. Campbell and Dylan B. Lawrence, Moffat, Thomas, Barrett, Rock & Fields, Chartered, Boise, Idaho, for claimants/objectors Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek.

David J. Barber, Deputy Attorney General for respondent State of Idaho.

II. FACTUAL AND PROCEDURAL BACKGROUND

General Description and Background.

Each of the four water right claims in this proceeding are based upon licenses previously issued by IDWR. In three of the four licenses, the quantity of water authorized to be diverted is expressed solely in terms of cubic feet per second (cfs), and not in terms of acre-feet per year (AFY). That is, three of the licenses did not include an

annual diversion volume (sometimes referred to herein as "ADV"). However, in the *Director's Report* recommendation for each of these rights, IDWR added an annual diversion volume under the quantity element for the right.

The Idaho Department of Water Resources has a longstanding policy that the proper administration of irrigation water rights with a source of groundwater requires that the quantity element be expressed in terms of both cubic feet per second and acre-feet per year. See *Deposition Testimony of Director Tuthill, Aff. of Scott Campbell, Ex. B, subcase 63-03174 (Jan. 4, 2008)*. Many older licenses issued for irrigation groundwater rights, however, were issued without having the quantity element described in terms of an annual diversion volume. In the SRBA, IDWR has conformed these older licenses to the current policy of including an ADV by recommending an ADV in the director's report for such rights.

IDWR uses a two-step process to determine an annual diversion volume for irrigation groundwater rights that did not have a ADV limitation set forth in the license. First, IDWR determines the amount of water capable of being diverted based upon the system capacity – i.e. the volume of water that could be diverted if water were continuously pumped from the groundwater well beginning on the first day of the irrigation season and ending on the last day of the irrigation season. The calculation to determine system capacity is rate of flow (cfs) multiplied by the number of days in the irrigation season multiplied by a conversion factor of 1.9835. IDWR refers to this method as the "system capacity method." *Affidavit of Jan Shute Dated March 11, 2009*.

The next step in the two step process is to estimate the maximum amount of water that can be beneficially used by the irrigator. To do this, IDWR multiplies the number of acres allowed to be irrigated under the right by a beneficial use standard developed by IDWR for a particular geographical area of the state. For the Treasure Valley area, this beneficial use standard is 4.5 acre feet per acre. IDWR refers to this calculation as the "beneficial use method." The Department then compares the results of these two calculations and includes the smaller amount in its director's report recommendation. *Id.*

As to the remaining water right claim, the license previously issued did have an annually diversion volume which was carried over in the *Director's Report* for the right,

but the license also had a remark allowing IDWR to make future adjustments to the annual diversion volume. This remark was not carried over in the *Director's Report*.

In all four of these subcases, the claimants filed objections to the inclusion of an annual diversion volume limitation. The State of Idaho filed responses in essence stating that the State of Idaho agrees with the *Director's Report* for these rights. Each of these water right claims are described in more detail below.

Water Right Claim 63-02529.

The license for water right 63-02529 was issued to the Pioneer Irrigation District by the State of Idaho, Department of Water Resources (Department of Reclamation), on February 6, 1943. *Lawrence Aff., Ex. A*. The license allows for the diversion of groundwater from 27 points of diversion for the irrigation of land within the irrigation system of the Pioneer Irrigation District. The water right is for irrigation and domestic purposes and is limited to an amount actually needed for those purposes, not to exceed 87.1 cfs. The license does not specify a period of use, nor does the license describe or limit the annual diversion volume – i.e. there is no AFY designation on the face of the license.

The *Director's Report* recommended the claim essentially as licensed (i.e. 87.1 cfs of groundwater for the irrigation of land within the digital boundary of the Pioneer Irrigation District), with the exception that the quantity element therein states “44,918.30 AFY.” The annual diversion volume recommended in the *Director's Report* is based upon the capacity of the system. In other words, if the Pioneer Irrigation District turned all of the pumps on at full capacity on day one of the irrigation season, and ran the pumps 24/7 until the last day of the irrigation season, the amount of water that would be diverted would be 44,918.30 acre-feet.

The Pioneer Irrigation District, through its attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, and period of year elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume.

The annual diversion volume recommended in the *Director's Report* for this right of 44,918.30 AFY is really not a limitation at all, rather it simply expresses the same

quantity of water using different terms – acre feet per year rather than cubic feet per second. In its briefing, however, the Pioneer Irrigation District further explains the basis for its objection, stating that:

The problem . . . is that IDWR has extended the irrigation season for Basin 63 in the past, and may do so again in the future:

Q. I think, in the previous deposition, you mentioned some updates [to the 4.5 AFA standard] in the 1996 to 1997 time frame. I do not think you and Scott [Campbell] really went into what those updates were. Can you summarize what the updates were that occurred in the late '90's?

A. What is happening is I am expecting that climate change will occur. We appear to be in climate change. I would expect that, over time, the season of use will perhaps lengthen some and that the growing units will perhaps modify some.

Tuthill Dep., p. 55, LL. 9-13; p. 59, LL. 7-11. Once water right 63-02529 is decreed with the annual diversion volume limitation, that limitation is then forever a legally-binding restriction upon the use of that right. Knowing that seasons of use have been extended in the past, and may be extended again in the future, it makes little sense to impose a new annual volume limitation upon that right . . .

Brief in Support of Motion for Summary Judgment, pp 27-28. In other words, the use of water by the Pioneer Irrigation District cannot presently be affected by the recommended annual diversion volume based upon the current 260 day irrigation period of use; rather the concern is that future climatic conditions may make it possible or desirable to irrigate beyond this 260 day period. If this occurs the Pioneer Irrigation District does not want to be stuck with an annual diversion volume limitation that is based upon a 260 day irrigation period.

The State of Idaho timely filed a response to the objection filed by Pioneer Irrigation District.

Water Right Claims 63-03323 and 63-03324.

The licenses for water rights 63-03323 and 63-03324 were both issued Kenneth D. Casper on February 11, 1965, and both have a priority date of January 2, 1963.

Lawrence Aff. Ex. D and G. These two rights have the same 247 acre licensed place of use. The place of use recommended in the *Director's Report* for these rights consists of a permissible place of use of 285 acres, with a combined use limitation of 247 acres within the 285 acre place of use. The change in the place of use was recommended as an accomplished transfer pursuant to I.C. § 42-1425. *Lawrence Aff.* Ex. F and I.

Water right 63-03323 was licensed for 2.4 cfs, and the same was recommended in the *Director's Report*. Water right 63-03324 was licensed for 2.03 cfs, and again the same was recommended in the *Director's Report*. The combined diversion rate of these two water rights of 4.43 cfs will provide approximately 0.018 cfs per acre, or $9/10^{\text{th}}$ of an inch per acre.

The licenses issued for water rights 63-03323 and 63-03324 do not specify a period of use. The *Director's Report* recommended a period of use for each right of March 1 to November 15, i.e. a 260 day period. The combined system capacity of these two rights in terms of AFY is 2,284.6 AFY, or 9.25 AFA. The *Director's Report* recommended that these two rights be limited to a combined annual diversion volume of 1,111.5 AF, which was derived by multiplying the number of acres by the beneficial use standard for the Treasure Valley area (247 acres X 4.5 AFA = 1,111.5 AFY).

The current owners of water rights 63-03323 and 63-03324, Jerry L. Tlucek and Mary Lou Tlucek, through their attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, period of year, and place of use elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume, whether singular or combined. The State of Idaho timely filed a response to the objection filed by Jerry and Mary Lou Tlucek.

Water Right Claim 63-10435.

Water right license 63-10435 was issued to Richard and Jamice Reineke on December 12, 1990, with a priority date of May 9, 1987. *Lawrence Aff.* Ex. J. The license provides for the irrigation of 68 acres, with a rate of diversion of 0.74 cfs and an annual diversion volume of 306.0 AF. The licensed period of use is March 15 to November 15. The *Director's Report* recommended the claim as licensed with two exceptions: (1) a shoulder remark was added to the period of use allowing water use to

begin March 1; and (2) the following remark from the license was omitted from the *Director's Report*:

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

The current owners of water right 63-10435, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek, through their attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, and period of year elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume. The State of Idaho timely filed a response to the objection filed by Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek.

III. PROCEEDINGS ON SUMMARY JUDGMENT

On March 12, 2009, the State of Idaho filed its *Motion for Partial Summary Judgment*, together with a brief in support thereof. Also on March 12, 2009, the Claimants filed a *Motion for Summary Judgment* together with a brief in support thereof. On March 26, 2009, each party filed responsive briefing. Oral argument was heard on April 16, 2009.

IV. ISSUES PRESENTED

Both the water right Claimants and the State of Idaho raise the issue of whether the director is authorized to recommend in a director's report that the quantity element of an irrigation groundwater right include an annual diversion volume where the license for such right did not specify an annual diversion volume.

Additionally, the Claimants raise the issue of whether the responses filed by the State of Idaho are barred by the procedural statutes governing the SRBA.

Finally, the State of Idaho raises the issue of whether the objection filed by the Claimants to the *Director's Report* for water right claim 63-10435 constitutes an impermissible collateral attack on the license issued for that right.

V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

A motion for summary judgment shall be rendered 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 judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

VI. ANALYSIS

1. IDWR has the authority to describe the quantity of a water right using an annual diversion volume in a director's report even though the license for such right did not describe the quantity with an annual diversion volume.

Idaho Code § 42-1411 requires the director to prepare a director's report for water right claims acquired under state law, and sets forth the procedures and authority for making a determination as to the elements of claimed water rights. Idaho Code § 42-1411 states, in part, as follows:

(2) 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 . . . in acre-

feet per year as necessary for the proper administration of the water right;

Idaho Code § 42-1411. Thus while the statute lists the water right elements to be determined by the director, the director is provided some flexibility in describing the elements to provide for the proper administration of the rights. Specifically, with respect to the quantity element, the statute allows the director to describe quantity in terms of an instantaneous rate of diversion (cfs) or in terms of an annual volume in acre-feet per year as necessary for proper administration of the rights. As to irrigation water rights with a source of groundwater, the director has made a determination that the quantity element needs to include an annual volume of diversion, as reflected in IDWR's longstanding policy that the quantity element of such rights be described both in terms of instantaneous rate of flow in cubic feet per second, and in terms of annual volume of diversion in acre-feet per year. In his deposition testimony, Director Tuthill describes the policy as dating back to the early 1970's. *Aff. of Scott Campbell, Ex. B, subcase 63-03174 (Jan. 4, 2008)*.

The methodology used by IDWR to determine the annual diversion volume for irrigation groundwater rights is described by Water Rights Supervisor Jan Shurte as follows:

2. The preparation of a recommendation for a water right in the SRBA with a ground water source involve several steps. If a water right in question with a ground water source had an annual volume of diversion for irrigation described in the original license, the IDWR would use that amount in its recommendation for an annual volume of diversion for irrigation limitation. In the absence of an annual volume of diversion for irrigation limitation in the license, IDWR's procedure for calculating a ground water volume is a two step process. IDWR first calculates a volume by multiplying the number of days in the irrigation season by the rate of flow and multiplying that number by a conversion value of 1.9835 to convert to acre feet. This calculation reflects the amount of acre feet capable of being diverted based upon system capacity (hereinafter referred to as "system capacity method"). IDWR then calculates a volume by multiplying the number of acres of irrigated land and multiplying that amount by the Department's beneficial use standard for the area (hereinafter referred to as "beneficial use method"). This calculation reflects the amount of water that can be beneficially used by the irrigator. IDWR then compares the two calculations and uses the smaller of the two amounts for the recommended volume in the SRBA. Thus, the volume is limited to the lesser of the system capacity or the amount of water IDWR has determined that can be beneficially used.

Affidavit of Jan Shurte Dated March 11, 2009 at 2, 6. As to the particular water rights at issue, Supervisor Shurte states:

7. The methods and amounts of the annual diversion volume for irrigation for these four water rights may be summarized as follows:

Water right number	Limitation amount	Method
63-02529	44,918.30 acre feet	System capacity method
63-03323	1,111.50 acre feet	Beneficial use method
63-03324	1,111.50 acre feet	Beneficial use method
63-10435	306 acre feet	License contained the limitation

Id. As to the beneficial use standard described by Supervisor Shurte and used in the “beneficial use method” calculation, Engineer Jeff Peppersack, IDWR Water Allocations Bureau Chief, states that IDWR has determined that 4.5 acre feet per year is the standard for the maximum amount of water that can be beneficially used in the Treasure Valley area. This determination is based upon a study of crop consumptive irrigation requirements conducted by Richard C. Allen, Ph.D., P.E., and Charles Brockway, Ph.D., P.E. The determination is also based upon an expected irrigation system efficiency of 70 to 75 percent, such expectation being derived from published values for modern irrigation systems. *Affidavit of Jeff Peppersack Dated March 11, 2009* at 3-4.

The Claimants argue that Idaho Code § 42-1411 does not require the Department to impose an annual diversion volume limitation because the language of the statute states that the quantity element be expressed in terms of cubic feet per second “or” acre-feet per year. The Claimants reason that because the subject water right licenses had a quantity element expressed solely in terms of cubic feet per second, the rights are already limited to the amount of water that could be diverted over the course of an irrigation season given the diversion rate – i.e. the system capacity. While it is true that Idaho Code § 42-1411 does not require the Department to use an annual diversion volume to describe the quantity element of all water rights, the Department has clearly determined that such

a description is appropriate and proper to define and administer irrigation water rights with a source of groundwater, including the four rights at issue herein. Because the director has made a determination that irrigation groundwater rights need to be described with an annual diversion volume, any such right previously licensed without an ADV has been so licensed with an undefined or undescribed element. Idaho Code § 42-1427 instructs the director as to how to go about reporting undefined elements in previously licensed or decreed water rights.

The operative portion of Idaho Code § 42-1427 states:

(2) 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. Section 42-1427(2) incorporates Section 42-1409 as the list of elements that shall appear of the standard notice of claim form. The list of elements in Section 42-1409 is the same list of elements that are required to be included in a director's report under Section 42-1411(2). As to the quantity element, Section 42-1409 states in relevant part:

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 annual volume of diversion of water for use or storage in acre-feet per year, or both;

Idaho Code § 42-1409 . The claimants argue that because the above-quoted statute uses the term "or" an annual diversion volume is not a required element. The claimants state that: "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." While it may be true that the quantity element of some water rights in Idaho may be acceptably described solely in terms of diversion rate measured in cubic feet per second, this is not true for groundwater irrigation water rights, where the director has determined that an annual diversion volume measured in acre-feet per year is necessary for the proper administration of this category of water rights. Accordingly, Idaho Code § 42-1427

provides the authority and procedure to determine the previously undefined annual diversion volume for the subject water rights.

For purposes of determining such previously undefined elements, Idaho Code § 42-1427 instructs the director to look to the extent of beneficial use of the rights as of the date of the commencement of an adjudication. In the SRBA that date is November 19, 1987. In other words, the maximum allowable annual diversion volume for an irrigation groundwater right where such volume is undefined in the license would be set at the maximum amount that had been diverted during any irrigation season that occurred prior to the commencement of the SRBA.

Water Rights 63-03323 and 63-03324.

The record reflects that for water rights 63-03323 and 63-03324, the Department used the so-called "beneficial use method" based upon IDWR's standard of 4.5 acre-feet per acre for the Treasure Valley area.¹ The Claimants argue that IDWR's 4.5 AFA standard is an unreliable metric for quantifying beneficial use and therefore cannot be used as a basis for making a determination as to the potential amount of water that may be beneficially used by the irrigator. The record is clear that IDWR did not conduct any particularized factual investigation into the historical water use practices during the claim review and recommendation process. See Tuthill Dep., p. 34, LL 2-4, Ex. M to *Lawrence Aff.*

The Claimants may well be correct that IDWR's 4.5 AFA standard is unreliable regarding the extent of beneficial use for water rights 63-03323 and 63-03324, however this is not an issue that may be resolved on summary judgment. If the Claimants of water rights 63-03323 and 63-03324 assert that IDWR got it wrong, then they will have an opportunity at trial to present evidence in that regard. Until that time, the *Director's Report* is presumed to be correct pursuant to Idaho Code § 42-1411(4).

The crux of the Claimants' argument is that Idaho Code § 42-220 prevents the Department from adding a new restrictive annual diversion volume limitation onto the subject water right licenses. Idaho Code § 42-220 states that water right licenses are

¹ It should be noted that Idaho Code § 42-1401B(1) states that the director "may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state."

“binding upon the state as to the right of such licensee to use the amount of water mentioned therein . . .” The Claimants also rely upon the SRBA District Court decision in the Facility Volume case to support the proposition that the Department cannot use the SRBA to impose a new condition upon a water right that would “redefine the use of a previously issued license . . .” *Order on Challenge (Consolidated Issues) of “Facility Volume” Issue and “Additional Evidence” Issue*, Subcase 36-02708 *et al.*, December 29, 1999)(hereinafter “Facility Volume Order”). The Facility Volume Order recognizes, however, that while Idaho Code § 42-220 prevents a previously licensed water right from being redefined in the SRBA, neither the Facility Volume Order nor Idaho Code § 42-220 prevent the SRBA adjudication process from being used to determine and define any previously undefined elements of a water right.

The Claimants’ position is that the previously issued licenses (particularly for 63-03323 and 63-03324) allow for the diversion of water 24/7 beginning on the first day of the irrigation season and ending on the last day of the season, and any annual diversion volume that is less than that amount (i.e. less than the capacity of the system) imposes a new condition or restriction in violation of Idaho Code § 42-220 and the Facility Volume Order. The relevant inquiry then, is whether or not the licenses issued for water right 63-03323 and 63-03324 would allow for the diversion of an annual volume of water equal to the capacity of the system to divert water.² Each of the licenses for water rights 63-03323 and 63-03324 contains the following statement as to quantity:

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 [2.4 for 63-03323 and 2.03 for 63-03324] cubic feet per second.

Lawrence Aff. Ex D and G. The licenses themselves contain an undefined limitation of an “amount actually needed and beneficially used . . .” and shall not exceed the stated rate of diversion. The Claimants essentially argue that such “amount needed and beneficially used . . .” is equal to the capacity of the system, not some lesser amount. The

² The Claimants’ expert Scott N. King, P.E. opines: “Provided that typical irrigation efficiency of sprinkler irrigation systems can range from 50% to 87%, total annual diversion water requirements for alfalfa and other highly-consumptive crops when irrigated with typical sprinkler systems could range from 4.6 to 8 acre-feet per acre.” As noted above, the combined system capacity for water rights 63-03323 and 63-03324

Director's Report indicates that such amount is 4.5 acre-feet per acre. It is the opinion of this Special Master that the Department is authorized, pursuant to Idaho Code §§ 42-1411 and 42-1427, to numerically define in terms of acre-feet per year the quantity of water described in the license as the "amount needed and beneficially used . . ." The Claimants may well be correct that such amount is greater than 4.5 AFA, but this is an issue of fact that cannot be resolved on summary judgment. Under Idaho Code § 42-1427, the Legislature has directed that this factual question can be answered by looking to the extent of beneficial use prior to the commencement of the SRBA. The *Director's Report* is presumed to be correct, and the Claimants have the burden of demonstrating that during any of the 26 irrigation seasons beginning in 1963 and ending in 1989 (for water rights 63-03323 and 63-03324) more than 4.5 acre feet per acre was actually beneficially used. In accordance with the foregoing, the Claimant's motion for summary judgment is denied and the State of Idaho's motion for summary judgment is granted with respect to water right claims 63-03323 and 63-03324.

Water Right 63-02529.

As to water right claim 63-02529, Claimant Pioneer Irrigation District objected to the quantity and the period of use recommended in the *Director's Report*. The essence of Pioneer Irrigation District's objection is that IDWR may, at some time in the future, extend the period of use for this water right to allow for the use of water earlier (than the recommended beginning date of March 1) or later (than the recommended ending date of November 15) if climate change creates conditions under which such water could potentially be beneficially used. Pioneer Irrigation District is not asserting that the irrigation period of use recommended in the *Director's Report* (3-1 to 11-15) restricts the right beyond what has been historically used, nor beyond what can presently be used based upon the current climate of the Treasure Valley.

In A & B Irrigation Dist. v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568, the Idaho Supreme Court held that the period of use for water rights decreed in the SRBA be identified by specific dates, rather than simply being identified as "irrigation

is 2,284.6 AFY, or 9.25 AFA. In other words, the system capacity exceeds even the maximum amount that could be beneficially used as stated by Engineer King.

season.” 131 Idaho at 424. As stated above, the license issued for water right 63-02529 did not identify any particular period of use. The *Director's Report* recommended a period of use beginning March 1 and ending on November 15, a period of 260 days. The recommendation in the *Director's Report* is presumed to be correct. I.C. § 42-1411(4). The annual diversion volume recommended in the *Director's Report* of 44,918.30 AFA does not limit the use of water under this right, rather it simply restates the amount of water that can physically be diverted during those 260 days.

Claimant Pioneer Irrigation District objects to the inclusion of the recommended annual diversion volume out of concern that IDWR may lengthen the irrigation season for this water right should changes in climatic conditions yield a longer growing season. Pioneer Irrigation District has not, however, informed this Special Master of any basis in Idaho law that would allow IDWR to alter a period of use decreed in the SRBA after such decree has been entered. Pioneer Irrigation District has also not demonstrated how such legal authority on the part of IDWR, should it exist, would be consistent with the Idaho Supreme Court's ruling that irrigation water rights in the SRBA need to be decreed with specifically identified periods of use. Finally, Pioneer Irrigation District has not presented any basis in Idaho law, nor does this Special Master know of any such basis, that would allow a water right to be decreed in the SRBA with a period of use that includes not only the present growing season, but also is expanded to include an anticipated future growing season.

Simply stated, the annual diversion volume recommend in the *Director's Report* for water right 63-02529 is not a new restriction or limitation on the right, rather it is simply a restatement of the amount of water that can physically be diverted during the 260 day irrigation season. There is no basis in Idaho law for a post-decree expansion of the period of use by IDWR; nor is there a legal basis for an SRBA partial decree to include an anticipatorily expanded period of use to account for speculation as to the length of future growing seasons. In accordance with the foregoing, Pioneer Irrigation District's motion for summary judgment is **denied** with respect to water right claim 63-02529.

2. The objection filed by the claimants to the *Director's Report* for water right claim 63-10435 constitutes an impermissible collateral attack on the license issued for that right.

As to water right claim 63-10435, the annual diversion volume recommended in the *Director's Report* of 306 AFA is the same limitation that was set forth in the license. As stated above, the license also contained the following remark:

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

This remark was omitted from the *Director's Report*. The objection filed by the Claimants Rebekah Tlucek, Kevin Tlucek, Shelly Tlucek, and Byron Tlucek states that they are "objecting to the inclusion of the annual volumetric limitation in the amount of 306.00 afy, as such appears under the Quantity and Purpose and Period of Use elements of the *Director's Report*." Although the above-quoted objection appears to pray for a remedy of deleting the annual diversion volume limitation in its entirety, it is the understanding of this Special Master based upon Claimant's briefing and upon comments made at oral argument on summary judgment that the Claimants also pray for alternative relief in the form of carrying the subject remark over to the SRBA partial decree for the right. See *Claimant's Opening Brief*, at 7 ([T]he *Director's Report* does not contain the above-quoted language from Condition 1 of the license.").

To the extent that the relief sought by the Claimants is deletion of the licensed annual diversion volume, the State of Idaho asserts in its motion for summary judgment that this constitutes an impermissible collateral attack on the prior administrative proceedings. To the extent that the Claimants are seeking inclusion of the subject remark in the SRBA partial decree for water right 63-10435, the State of Idaho in its response brief asserts that this issue is not properly before the Court because the Claimants did not assert this concern in their objection. *State of Idaho's Brief in Response* at 19.

This Special Master agrees with the State of Idaho that deletion of the annual diversion volume in this SRBA proceeding would constitute an impermissible collateral

attack on the prior administrative licensure proceeding, and therefore the remedy sought by the claimants of such deletion is simply not available. On the other hand, this Special Master disagrees with the State of Idaho's assertion that the alternative relief of including the subject remark is not properly before the SRBA Court. The basis of the Claimants objection to the inclusion of an annual diversion volume was that the license contained the remark, and the *Director's Report* did not. If the license issued for the right did not have the remark then the Claimants would not even have a colorable argument that the SRBA decree should omit the previously licensed annual diversion volume.

The inquiry is whether or not the SRBA partial decree to be issued for water 63-10435 should contain the subject remark. This Special Master would surmise that the intent of IDWR in including the remark in the license was that the remark could only operate in one direction -- to decrease the annual diversion volume under the right. It could further be surmised that by not including the remark in the *Director's Report*, IDWR intends to waive any further ability to decrease such annual diversion volume. This Special Master is not willing, however, to engage in such speculation. The plain words of the remark simply do not limit the operation of the remark to only a downward adjustment of the annual diversion volume. The last sentence of the remark states: "The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency." Thus, the diversion volume may be adjusted for one of two reasons: (1) "to more accurately describe the beneficial use . . ." or (2) "to implement accepted standards of diversion efficiency." While it is unlikely that the second reason would ever require an upward adjustment of the annual diversion volume, it is certainly possible that the first reason of accurately describing the beneficial use could result in an upward adjustment. Additionally, the remark does not specify the procedural mechanisms that would be employed by the Department to effectuate an adjustment -- whether up or down -- as contemplated in the remark. There is not anything on the face of the remark that would prevent the owner of the right from petitioning IDWR to initiate an administrative proceeding to make such adjustment.

Accordingly, because the remark can be read to reserve a future opportunity in the water right owner to request that the Department make an adjustment to the annual

diversion volume set forth in the license, it is the opinion of this Special Master that such opportunity should not be eliminated in the SRBA, but rather the SRBA partial decree should incorporate the subject remark.

3. The *Responses* filed by the State of Idaho are not barred by the procedural statutes governing the SRBA.

The Claimants assert that IDWR is making an "end run" around Idaho Code § 42-1401B --which directs that the director shall not be a party to a general stream adjudication -- by having the Idaho Attorney General's office file responses and pursue litigation in these subcases. For the reasons set forth below, this Special Master holds that the participation of the State of Idaho through the Attorney General's office in these subcases is proper and not in violation of Idaho Code § 42-1401B.

Idaho Code 42-1401B states:

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.

Idaho Code § 42-1401C states:

Role of state agencies other than the Idaho department of water resources in an adjudication. – (1) Each state agency, and the Idaho water resource board may file a claim and appear separately in any adjudication through the attorney general. This section shall not apply to the Idaho department of water resources.

(2) The attorney general may appear in any adjudication and shall represent the position of the state of Idaho.

The objections filed by the Claimants assert that the director is without authority to limit or describe the annual diversion volume of a previously licensed irrigation ground water right where the license contained no such description or limitation. This

objection necessarily implicates IDWR's longstanding policy that the proper administration of irrigation groundwater rights requires that the quantity elements of such rights include an annual diversion volume. The Attorney General's office filed responses in these subcases for the purpose of protecting IDWR's ability to effectuate this policy as to these water rights as well as other water right claims that are similarly situated to the instant subcases — i.e. previously licensed irrigation ground water rights with no annual diversion volume set forth in the license. The Claimants argue that because this policy was developed and is implemented by the director, Idaho Code § 42-1401B prevents both IDWR and the Attorney General's office from appearing as a party in these subcases.

The State of Idaho argues that resolution of this issue is a matter of statutory interpretation. Specifically, the State argues:

The issue raised is primarily an issue of statutory interpretation, and '[t]he interpretation of a statute is a question of law over which we [the court] exercise free review This Court must construe a statute to give effect to the intent of the legislature It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.' *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006) (citations omitted). 'Statutes that are *in pari materia* must be construed together to effect legislative intent. Statutes are *in pari materia* if they relate to the same subject.' Here, the Idaho Legislature enacted Idaho Code §§ 42-1401B and 42-1401C in the same act, and both sections relate to the authority of the State to participate in a general adjudication of water rights. Thus, these two sections are *in pari materia* and must be construed together.

State's Brief in Response at 10. Under these two statutes, although the director (and hence the Idaho Department of Water resources) cannot be a party, the State of Idaho through the Attorney General's office may appear and have its position represented. The question presented here is whether the State of Idaho may appear and assert a position relative to a policy determination in the situation where such policy determination originated within the Department. This Special Master holds that the appearance of the State of Idaho under Idaho Code § 42-1401C is proper in these subcases and the State may have its position represented despite the fact that the policy sought to be protected by the State originated within the Department.

Under the Constitution and statutes of the state of Idaho, the State of Idaho is vested with ownership and control of all waters of the state. *See* Const. Art. XV §1; Idaho Code § 42-101. The State of Idaho has created an executive branch department (IDWR) to effectuate the State's responsibility to supervise and control the appropriation of water for beneficial use, and the administration of water so appropriated. In this case, the director has determined that in order to properly administer irrigation groundwater rights, the quantity of such rights needs to be described in terms of an annual volume of diversion. The State has appeared in these subcases to protect its ability to effectuate this policy. There are really only two possibilities as to whence this policy may have arisen – the Idaho Legislature or the Department of Water Resources under authority granted by the Legislature. The fact that the particular policy involved in the instant subcases arose within the Department rather than having been specifically articulated by the Legislature does not diminish the fact that such a policy has been determined to be necessary to carry-out the State's Constitutional and statutory responsibilities.

Idaho Code § 42-1401C unequivocally states that the position of the State of Idaho may be represented in an adjudication through the Attorney General's office. The statute does not provide for any threshold inquiry or examination of the position of the State and whether such position is also the position of the Department. This Special Master is unwilling to engraft such an inquiry onto the statute. In accordance with the foregoing, this Special Master holds that the appearance of the State of Idaho through the Attorney General's office is proper in these subcases pursuant to Idaho Code § 42-1401C; that such appearance is not in violation of Idaho Code § 42-1401B; and the Claimants motion for summary judgment on this issue is **denied**.

VII. ORDER DENYING MOTION TO STRIKE

On April 2, 2009, the Claimants filed a *Motion to Strike*, seeking to strike the following: (1) a portion of the *State of Idaho's Brief in Response to Claimant's Motion for Summary Judgment* wherein the State discusses "problem soils" at the place of use for water rights 63-03323 and 63-03324 and excerpts a discussion of soils from the deposition of the Claimants' expert witness Terry Scanlan; (2) a portion of the *Affidavit of David J. Barber Dated March 25, 2009*, and Attachment II thereto, wherein the State

attaches excerpts and exhibits from the deposition of Terry Scanlan related to soils; and (3) the statement of p. 19 of the *State's Brief in Response* that, "[h]e [Terry Scanlan] also acknowledged that the place of use for water right nos. 63-03323 and 63-03324 has significant impairments related to the shallow soils and other factor's that limit irrigation." The Claimants assert that the above-enumerated references regarding soils are not relevant to the legal issue of whether the quantity element of a previously licensed water right may be recommended by the Department (and decreed in the SRBA) with an annual diversion volume where the license described the quantity only in terms of cubic feet per second. The Claimants argue that the references to and discussions of the soils at the place of use for water rights 63-03323 and 63-03324 should be stricken because such references are irrelevant and therefore inadmissible pursuant to I.R.E. 402. The Claimants state that the discussion of soils "is simply a factual issue that the State is attempting to manufacture in order to survive summary judgment." *Motion to Strike* at 5.

The State of Idaho points out in its *Brief in Opposition to Motion to Strike* that the State moved for summary judgment on two finite legal issues, and did not include any information regarding soils in the materials filed in support of its motion. *State of Idaho's Brief in Opposition to Motion to Strike* at 5. The Claimants argue in their *Brief in Support of Motion for Summary Judgment* that "[IDWR's 4.5 AFA standard for Basin 63] is an unreliable metric for quantifying beneficial use under Section 42-1401B, and should therefore not provide a basis for imposing a new restriction on previously-licensed water rights." *Id.* at 20. In other words, the Claimants argue that as a matter of law IDWR cannot recommend an annual diversion volume in the *Director's Report* because the standard used by IDWR in quantifying such annual diversion volume is unreliable. The State asserts that it submitted the information sought to be stricken in response to this argument made by the Claimants. The State states: "The State wanted to make sure that the district court was aware that there are other factual issues related to the amount of water that the claimants can beneficially use on their own land and that these factual issues could not be resolved by a summary judgment proceeding because of the existence of these material facts that the claimants' own expert acknowledged." *Brief in Opposition to Motion to Strike* at 6.

As discussed above, this Special Master agrees with the State that the reliability of the methodology used by IDWR in determining an annual diversion volume to be recommended in a director's report is not a factor that can preclude IDWR from making such a recommendation as a matter of law. Simply stated, if IDWR has the authority to recommend an annual diversion volume, then any issues regarding the reliability or correctness of IDWR's recommendation necessarily involve questions of fact that cannot be resolved on summary judgment. The State is not manufacturing an issue of fact for purposes of surviving summary judgment; rather upon a determination that IDWR may, as a matter of law, recommend an ADV for these water rights, the next step in the process is to provide the Claimants with the opportunity to present testimony and evidence at trial to demonstrate that the particular ADV recommended by IDWR is incorrect.

While the Claimants' correctly assert that the information regarding soils is irrelevant to the question of law presented in these summary judgment proceedings, such information may be relevant to the question of fact that arises upon a determination that IDWR is authorized to recommend an annual diversion volume for these water rights. Therefore the Claimants' assertion of irrelevancy is misplaced. The information regarding soils in the record has had no bearing on this Special Master's ruling herein. Likewise, striking the information from the record will also have no bearing. Therefore, in accordance with the foregoing and in an exercise of discretion the Claimants' *Motion to Strike* is **denied**.

VIII. CONCLUSION AND ORDER

In accordance with the foregoing this Special Master holds: (1) that the director is authorized by Idaho Code § 42-1411 to include an annual diversion volume in the director's report for the subject irrigation groundwater rights; (2) that pursuant to Idaho Code § 42-1427 the proper measure of the annual diversion volume in a contested subcase is the extent of beneficial use prior to the commencement of the adjudication; and that the numerical description of a previously undefined annual diversion volume is not in violation of Idaho Code § 42-220.

As to water right 63-02529, the State's motion for summary judgment is **granted**, and the Claimants' motion for summary judgment is **denied**. A *Special Master's Report and Recommendation* is herein made for water right 63-02529.

As to water right claims 63-03323 and 63-03324, the State's motion for partial summary judgment is **granted**, and the Claimants' motion for summary judgment is **denied**. However, factual issues remain to be resolved. Specifically, the SRBA partial decree for these water rights will include an annual diversion volume under the quantity element, and the Claimants are entitled to an evidentiary hearing to rebut the presumption of the *Director's Report* and to put on evidence of pre-1987 water use pursuant to Idaho Code § 42-1427. In addition, the Claimants objected to the place of use recommended in the *Director's Report*, and there is no indication in the Court's file that the place of use objection has been resolved.

As to water right claim 63-10435, the State's motion for summary judgment is **granted** with respect to deletion of the annual diversion volume in the SRBA decree (i.e. the State's collateral attack argument). The Claimants' motion for summary judgment is **denied** with respect to deletion of the annual diversion volume, but **granted** to the extent that the subject remark from the license is carried forward to the SRBA partial decree. A *Special Master's Report and Recommendation* is herein made for water right 63-10435.

Finally, the Claimants' motion for summary judgment is **denied** with respect to the issues raised regarding Idaho Code §§ 42-1401B and 42-1401C.

IX.

ORDER SETTING SCHEDULING CONFERENCE

A scheduling conference will be held in subcase nos. 63-03323 and 63-03324 on **August 25, 2009 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.

X.

REPORT AND RECOMMENDATION FOR 63-02529 AND 63-10435

Based on the file and record herein, IT IS RECOMMENDED that water rights 63-02529 and 63-10435 be decreed with the elements as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*.

Dated

June 11, 2009



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION; ORDER DENYING MOTION; SPECIAL MASTER REPORT & RECOMMEND; ORDER SETTING HEARING was mailed on June 11, 2009, with sufficient first-class postage to the following:

STATE OF IDAHO

Represented by:

NATURAL RESOURCES DIV CHIEF

STATE OF IDAHO

ATTORNEY GENERAL'S OFFICE

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JERRY L TLUCEK

MARY LOU TLUCEK

PIONEER IRRIGATION DISTRICT

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DIRECTOR OF IDWR

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SUNNY SLOPE FRUIT CO INC

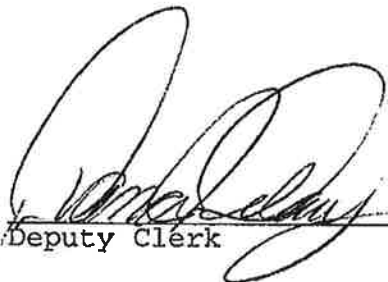
14068 SUNNY SLOPE RD

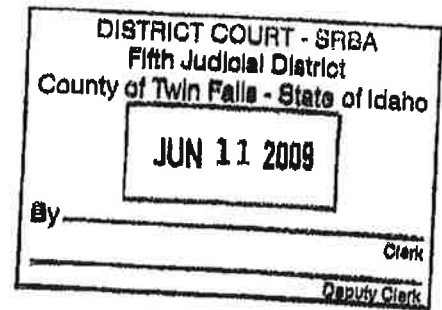
CALDWELL, ID 83605

ORDER

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

In Re SRBA) Subcase Nos. 63-02529, 63-03323, 63-03324,
) and 63-10435
Case No. 39576)
) **MEMORANDUM DECISION AND**
) **ORDER ON MOTIONS FOR SUMMARY**
) **JUDGMENT**
)
) **ORDER DENYING MOTION TO**
) **STRIKE**
)
) **SPECIAL MASTER'S REPORT AND**
) **RECOMMENDATION FOR WATER**
) **RIGHTS 63-02529 and 63-10435**
)
) **ORDER SETTING SCHEDULING**
) **CONFERENCE IN SUBCASES 63-03323**
) **and 63-03324**

I. APPEARANCES

Scott L. Campbell and Dylan B. Lawrence, Moffat, Thomas, Barrett, Rock & Fields, Chartered, Boise, Idaho, for claimants/objectors Pioneer Irrigation District, Jerry L. Tlucek, Mary Lou Tlucek, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek.

David J. Barber, Deputy Attorney General for respondent State of Idaho.

II. FACTUAL AND PROCEDURAL BACKGROUND

General Description and Background.

Each of the four water right claims in this proceeding are based upon licenses previously issued by IDWR. In three of the four licenses, the quantity of water authorized to be diverted is expressed solely in terms of cubic feet per second (cfs), and not in terms of acre-feet per year (AFY). That is, three of the licenses did not include an

annual diversion volume (sometimes referred to herein as "ADV"). However, in the *Director's Report* recommendation for each of these rights, IDWR added an annual diversion volume under the quantity element for the right.

The Idaho Department of Water Resources has a longstanding policy that the proper administration of irrigation water rights with a source of groundwater requires that the quantity element be expressed in terms of both cubic feet per second and acre-feet per year. See *Deposition Testimony of Director Tuthill, Aff. of Scott Campbell, Ex. B, subcase 63-03174 (Jan. 4, 2008)*. Many older licenses issued for irrigation groundwater rights, however, were issued without having the quantity element described in terms of an annual diversion volume. In the SRBA, IDWR has conformed these older licenses to the current policy of including an ADV by recommending an ADV in the director's report for such rights.

IDWR uses a two-step process to determine an annual diversion volume for irrigation groundwater rights that did not have a ADV limitation set forth in the license. First, IDWR determines the amount of water capable of being diverted based upon the system capacity – i.e. the volume of water that could be diverted if water were continuously pumped from the groundwater well beginning on the first day of the irrigation season and ending on the last day of the irrigation season. The calculation to determine system capacity is rate of flow (cfs) multiplied by the number of days in the irrigation season multiplied by a conversion factor of 1.9835. IDWR refers to this method as the "system capacity method." *Affidavit of Jan Shute Dated March 11, 2009*.

The next step in the two step process is to estimate the maximum amount of water that can be beneficially used by the irrigator. To do this, IDWR multiplies the number of acres allowed to be irrigated under the right by a beneficial use standard developed by IDWR for a particular geographical area of the state. For the Treasure Valley area, this beneficial use standard is 4.5 acre feet per acre. IDWR refers to this calculation as the "beneficial use method." The Department then compares the results of these two calculations and includes the smaller amount in its director's report recommendation. *Id.*

As to the remaining water right claim, the license previously issued did have an annually diversion volume which was carried over in the *Director's Report* for the right,

but the license also had a remark allowing IDWR to make future adjustments to the annual diversion volume. This remark was not carried over in the *Director's Report*.

In all four of these subcases, the claimants filed objections to the inclusion of an annual diversion volume limitation. The State of Idaho filed responses in essence stating that the State of Idaho agrees with the *Director's Report* for these rights. Each of these water right claims are described in more detail below.

Water Right Claim 63-02529.

The license for water right 63-02529 was issued to the Pioneer Irrigation District by the State of Idaho, Department of Water Resources (Department of Reclamation), on February 6, 1943. *Lawrence Aff.*, Ex. A. The license allows for the diversion of groundwater from 27 points of diversion for the irrigation of land within the irrigation system of the Pioneer Irrigation District. The water right is for irrigation and domestic purposes and is limited to an amount actually needed for those purposes, not to exceed 87.1 cfs. The license does not specify a period of use, nor does the license describe or limit the annual diversion volume – i.e. there is no AFY designation on the face of the license.

The *Director's Report* recommended the claim essentially as licensed (i.e. 87.1 cfs of groundwater for the irrigation of land within the digital boundary of the Pioneer Irrigation District), with the exception that the quantity element therein states “44,918.30 AFY.” The annual diversion volume recommended in the *Director's Report* is based upon the capacity of the system. In other words, if the Pioneer Irrigation District turned all of the pumps on at full capacity on day one of the irrigation season, and ran the pumps 24/7 until the last day of the irrigation season, the amount of water that would be diverted would be 44,918.30 acre-feet.

The Pioneer Irrigation District, through its attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, and period of year elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume.

The annual diversion volume recommended in the *Director's Report* for this right of 44,918.30 AFY is really not a limitation at all, rather it simply expresses the same

quantity of water using different terms – acre feet per year rather than cubic feet per second. In its briefing, however, the Pioneer Irrigation District further explains the basis for its objection, stating that:

The problem . . . is that IDWR has extended the irrigation season for Basin 63 in the past, and may do so again in the future:

Q. I think, in the previous deposition, you mentioned some updates [to the 4.5 AFA standard] in the 1996 to 1997 time frame. I do not think you and Scott [Campbell] really went into what those updates were. Can you summarize what the updates were that occurred in the late '90's?

A. What is happening is I am expecting that climate change will occur. We appear to be in climate change. I would expect that, over time, the season of use will perhaps lengthen some and that the growing units will perhaps modify some.

Tuthill Dep., p. 55, LL. 9-13; p. 59, LL. 7-11. Once water right 63-02529 is decreed with the annual diversion volume limitation, that limitation is then forever a legally-binding restriction upon the use of that right. Knowing that seasons of use have been extended in the past, and may be extended again in the future, it makes little sense to impose a new annual volume limitation upon that right . . .

Brief in Support of Motion for Summary Judgment, pp 27-28. In other words, the use of water by the Pioneer Irrigation District cannot presently be affected by the recommended annual diversion volume based upon the current 260 day irrigation period of use; rather the concern is that future climatic conditions may make it possible or desirable to irrigate beyond this 260 day period. If this occurs the Pioneer Irrigation District does not want to be stuck with an annual diversion volume limitation that is based upon a 260 day irrigation period.

The State of Idaho timely filed a response to the objection filed by Pioneer Irrigation District.

Water Right Claims 63-03323 and 63-03324.

The licenses for water rights 63-03323 and 63-03324 were both issued Kenneth D. Casper on February 11, 1965, and both have a priority date of January 2, 1963.

Lawrence Aff. Ex. D and G. These two rights have the same 247 acre licensed place of use. The place of use recommended in the *Director's Report* for these rights consists of a permissible place of use of 285 acres, with a combined use limitation of 247 acres within the 285 acre place of use. The change in the place of use was recommended as an accomplished transfer pursuant to I.C. § 42-1425. *Lawrence Aff.* Ex. F and I.

Water right 63-03323 was licensed for 2.4 cfs, and the same was recommended in the *Director's Report*. Water right 63-03324 was licensed for 2.03 cfs, and again the same was recommended in the *Director's Report*. The combined diversion rate of these two water rights of 4.43 cfs will provide approximately 0.018 cfs per acre, or $9/10^{\text{th}}$ of an inch per acre.

The licenses issued for water rights 63-03323 and 63-03324 do not specify a period of use. The *Director's Report* recommended a period of use for each right of March 1 to November 15, i.e. a 260 day period. The combined system capacity of these two rights in terms of AFY is 2,284.6 AFY, or 9.25 AFA. The *Director's Report* recommended that these two rights be limited to a combined annual diversion volume of 1,111.5 AF, which was derived by multiplying the number of acres by the beneficial use standard for the Treasure Valley area (247 acres X 4.5 AFA = 1,111.5 AFY).

The current owners of water rights 63-03323 and 63-03324, Jerry L. Tlucek and Mary Lou Tlucek, through their attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, period of year, and place of use elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume, whether singular or combined. The State of Idaho timely filed a response to the objection filed by Jerry and Mary Lou Tlucek.

Water Right Claim 63-10435.

Water right license 63-10435 was issued to Richard and Janice Reineke on December 12, 1990, with a priority date of May 9, 1987. *Lawrence Aff.* Ex. J. The license provides for the irrigation of 68 acres, with a rate of diversion of 0.74 cfs and an annual diversion volume of 306.0 AF. The licensed period of use is March 15 to November 15. The *Director's Report* recommended the claim as licensed with two exceptions: (1) a shoulder remark was added to the period of use allowing water use to

begin March 1; and (2) the following remark from the license was omitted from the *Director's Report*:

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

The current owners of water right 63-10435, Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek, through their attorney Scott Campbell, timely filed an objection to the *Director's Report*, objecting to the quantity, purpose of use, and period of year elements of the recommendation. The Claimants specifically object to the inclusion of an annual diversion volume. The State of Idaho timely filed a response to the objection filed by Shelly Tlucek, Byron Tlucek, Rebekah Tlucek, and Kevin Tlucek.

III. PROCEEDINGS ON SUMMARY JUDGMENT

On March 12, 2009, the State of Idaho filed its *Motion for Partial Summary Judgment*, together with a brief in support thereof. Also on March 12, 2009, the Claimants filed a *Motion for Summary Judgment* together with a brief in support thereof. On March 26, 2009, each party filed responsive briefing. Oral argument was heard on April 16, 2009.

IV. ISSUES PRESENTED

Both the water right Claimants and the State of Idaho raise the issue of whether the director is authorized to recommend in a director's report that the quantity element of an irrigation groundwater right include an annual diversion volume where the license for such right did not specify an annual diversion volume.

Additionally, the Claimants raise the issue of whether the responses filed by the State of Idaho are barred by the procedural statutes governing the SRBA.

Finally, the State of Idaho raises the issue of whether the objection filed by the Claimants to the *Director's Report* for water right claim 63-10435 constitutes an impermissible collateral attack on the license issued for that right.

V. STANDARD OF REVIEW ON SUMMARY JUDGMENT

A motion for summary judgment shall be rendered 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 judgment as a matter of law. I.R.C.P. 56(c); *Olsen v. J. A. Freeman Co.*, 117 Idaho 706, 791 P.2d 1285 (1990). All controverted facts are liberally construed in favor of the non-moving party. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987). The burden at all times is upon the moving party to prove the absence of a genuine issue of material fact. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The moving party's case must be anchored on something more than speculation, and a mere scintilla of evidence is not enough to create a genuine issue. *R. G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 797 P.2d 117 (1990). All doubts are to be resolved against the moving party, and the motion must be denied if the evidence is such that conflicting inferences may be drawn therefrom and if reasonable people might reach different conclusions. *Doe v. Durtschi*, 101 Idaho 466, 716 P.2d 1238 (1986). The court is authorized to enter summary judgment in favor of non-moving parties. *Barlow's Inc. v. Bannock Cleaning Corp.*, 103 Idaho 310, 647 P.2d 766 (Ct. App. 1982).

VI. ANALYSIS

1. IDWR has the authority to describe the quantity of a water right using an annual diversion volume in a director's report even though the license for such right did not describe the quantity with an annual diversion volume.

Idaho Code § 42-1411 requires the director to prepare a director's report for water right claims acquired under state law, and sets forth the procedures and authority for making a determination as to the elements of claimed water rights. Idaho Code § 42-1411 states, in part, as follows:

(2) 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 . . . in acre-

feet per year as necessary for the proper administration of the water right;

Idaho Code § 42-1411. Thus while the statute lists the water right elements to be determined by the director, the director is provided some flexibility in describing the elements to provide for the proper administration of the rights. Specifically, with respect to the quantity element, the statute allows the director to describe quantity in terms of an instantaneous rate of diversion (cfs) or in terms of an annual volume in acre-feet per year as necessary for proper administration of the rights. As to irrigation water rights with a source of groundwater, the director has made a determination that the quantity element needs to include an annual volume of diversion, as reflected in IDWR's longstanding policy that the quantity element of such rights be described both in terms of instantaneous rate of flow in cubic feet per second, and in terms of annual volume of diversion in acre-feet per year. In his deposition testimony, Director Tuthill describes the policy as dating back to the early 1970's. *Aff. of Scott Campbell, Ex. B, subcase 63-03174 (Jan. 4, 2008)*.

The methodology used by IDWR to determine the annual diversion volume for irrigation groundwater rights is described by Water Rights Supervisor Jan Shurte as follows:

2. The preparation of a recommendation for a water right in the SRBA with a ground water source involve several steps. If a water right in question with a ground water source had an annual volume of diversion for irrigation described in the original license, the IDWR would use that amount in its recommendation for an annual volume of diversion for irrigation limitation. In the absence of an annual volume of diversion for irrigation limitation in the license, IDWR's procedure for calculating a ground water volume is a two step process. IDWR first calculates a volume by multiplying the number of days in the irrigation season by the rate of flow and multiplying that number by a conversion value of 1.9835 to convert to acre feet. This calculation reflects the amount of acre feet capable of being diverted based upon system capacity (hereinafter referred to as "system capacity method"). IDWR then calculates a volume by multiplying the number of acres of irrigated land and multiplying that amount by the Department's beneficial use standard for the area (hereinafter referred to as "beneficial use method"). This calculation reflects the amount of water that can be beneficially used by the irrigator. IDWR then compares the two calculations and uses the smaller of the two amounts for the recommended volume in the SRBA. Thus, the volume is limited to the lesser of the system capacity or the amount of water IDWR has determined that can be beneficially used.

Affidavit of Jan Shurte Dated March 11, 2009 at 2, 6. As to the particular water rights at issue, Supervisor Shurte states:

7. The methods and amounts of the annual diversion volume for irrigation for these four water rights may be summarized as follows:

Water right number	Limitation amount	Method
63-02529	44,918.30 acre feet	System capacity method
63-03323	1,111.50 acre feet	Beneficial use method
63-03324	1,111.50 acre feet	Beneficial use method
63-10435	306 acre feet	License contained the limitation

Id. As to the beneficial use standard described by Supervisor Shurte and used in the “beneficial use method” calculation, Engineer Jeff Peppersack, IDWR Water Allocations Bureau Chief, states that IDWR has determined that 4.5 acre feet per year is the standard for the maximum amount of water that can be beneficially used in the Treasure Valley area. This determination is based upon a study of crop consumptive irrigation requirements conducted by Richard C. Allen, Ph.D., P.E., and Charles Brockway, Ph.D., P.E. The determination is also based upon an expected irrigation system efficiency of 70 to 75 percent, such expectation being derived from published values for modern irrigation systems. *Affidavit of Jeff Peppersack Dated March 11, 2009* at 3-4.

The Claimants argue that Idaho Code § 42-1411 does not require the Department to impose an annual diversion volume limitation because the language of the statute states that the quantity element be expressed in terms of cubic feet per second “or” acre-feet per year. The Claimants reason that because the subject water right licenses had a quantity element expressed solely in terms of cubic feet per second, the rights are already limited to the amount of water that could be diverted over the course of an irrigation season given the diversion rate – i.e. the system capacity. While it is true that Idaho Code § 42-1411 does not require the Department to use an annual diversion volume to describe the quantity element of all water rights, the Department has clearly determined that such

a description is appropriate and proper to define and administer irrigation water rights with a source of groundwater, including the four rights at issue herein. Because the director has made a determination that irrigation groundwater rights need to be described with an annual diversion volume, any such right previously licensed without an ADV has been so licensed with an undefined or undescribed element. Idaho Code § 42-1427 instructs the director as to how to go about reporting undefined elements in previously licensed or decreed water rights.

The operative portion of Idaho Code § 42-1427 states:

(2) 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. Section 42-1427(2) incorporates Section 42-1409 as the list of elements that shall appear of the standard notice of claim form. The list of elements in Section 42-1409 is the same list of elements that are required to be included in a director's report under Section 42-1411(2). As to the quantity element, Section 42-1409 states in relevant part:

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 annual volume of diversion of water for use or storage in acre-feet per year, or both;

Idaho Code § 42-1409 . The claimants argue that because the above-quoted statute uses the term "or" an annual diversion volume is not a required element. The claimants state that: "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." While it may be true that the quantity element of some water rights in Idaho may be acceptably described solely in terms of diversion rate measured in cubic feet per second, this is not true for groundwater irrigation water rights, where the director has determined that an annual diversion volume measured in acre-feet per year is necessary for the proper administration of this category of water rights. Accordingly, Idaho Code § 42-1427

provides the authority and procedure to determine the previously undefined annual diversion volume for the subject water rights.

For purposes of determining such previously undefined elements, Idaho Code § 42-1427 instructs the director to look to the extent of beneficial use of the rights as of the date of the commencement of an adjudication. In the SRBA that date is November 19, 1987. In other words, the maximum allowable annual diversion volume for an irrigation groundwater right where such volume is undefined in the license would be set at the maximum amount that had been diverted during any irrigation season that occurred prior to the commencement of the SRBA.

Water Rights 63-03323 and 63-03324.

The record reflects that for water rights 63-03323 and 63-03324, the Department used the so-called "beneficial use method" based upon IDWR's standard of 4.5 acre-feet per acre for the Treasure Valley area.¹ The Claimants argue that IDWR's 4.5 AFA standard is an unreliable metric for quantifying beneficial use and therefore cannot be used as a basis for making a determination as to the potential amount of water that may be beneficially used by the irrigator. The record is clear that IDWR did not conduct any particularized factual investigation into the historical water use practices during the claim review and recommendation process. See Tuthill Dep., p. 34, LL 2-4, Ex. M to *Lawrence Aff.*

The Claimants may well be correct that IDWR's 4.5 AFA standard is unreliable regarding the extent of beneficial use for water rights 63-03323 and 63-03324, however this is not an issue that may be resolved on summary judgment. If the Claimants of water rights 63-03323 and 63-03324 assert that IDWR got it wrong, then they will have an opportunity at trial to present evidence in that regard. Until that time, the *Director's Report* is presumed to be correct pursuant to Idaho Code § 42-1411(4).

The crux of the Claimants' argument is that Idaho Code § 42-220 prevents the Department from adding a new restrictive annual diversion volume limitation onto the subject water right licenses. Idaho Code § 42-220 states that water right licenses are

¹ It should be noted that Idaho Code § 42-1401B(1) states that the director "may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state."

"binding upon the state as to the right of such licensee to use the amount of water mentioned therein" The Claimants also rely upon the SRBA District Court decision in the Facility Volume case to support the proposition that the Department cannot use the SRBA to impose a new condition upon a water right that would "redefine the use of a previously issued license" *Order on Challenge (Consolidated Issues) of "Facility Volume" Issue and "Additional Evidence" Issue*, Subcase 36-02708 *et al.*, December 29, 1999)(hereinafter "Facility Volume Order"). The Facility Volume Order recognizes, however, that while Idaho Code § 42-220 prevents a previously licensed water right from being redefined in the SRBA, neither the Facility Volume Order nor Idaho Code § 42-220 prevent the SRBA adjudication process from being used to determine and define any previously undefined elements of a water right.

The Claimants' position is that the previously issued licenses (particularly for 63-03323 and 63-03324) allow for the diversion of water 24/7 beginning on the first day of the irrigation season and ending on the last day of the season, and any annual diversion volume that is less than that amount (i.e. less than the capacity of the system) imposes a new condition or restriction in violation of Idaho Code § 42-220 and the Facility Volume Order. The relevant inquiry then, is whether or not the licenses issued for water right 63-03323 and 63-03324 would allow for the diversion of an annual volume of water equal to the capacity of the system to divert water.² Each of the licenses for water rights 63-03323 and 63-03324 contains the following statement as to quantity:

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 [2.4 for 63-03323 and 2.03 for 63-03324] cubic feet per second.

Lawrence Aff. Ex D and G. The licenses themselves contain an undefined limitation of an "amount actually needed and beneficially used . . ." and shall not exceed the stated rate of diversion. The Claimants essentially argue that such "amount needed and beneficially used . . ." is equal to the capacity of the system, not some lesser amount. The

² The Claimants' expert Scott N. King, P.E. opines: "Provided that typical irrigation efficiency of sprinkler irrigation systems can range from 50% to 87%, total annual diversion water requirements for alfalfa and other highly-consumptive crops when irrigated with typical sprinkler systems could range from 4.6 to 8 acre-feet per acre." As noted above, the combined system capacity for water rights 63-03323 and 63-03324

Director's Report indicates that such amount is 4.5 acre-feet per acre. It is the opinion of this Special Master that the Department is authorized, pursuant to Idaho Code §§ 42-1411 and 42-1427, to numerically define in terms of acre-feet per year the quantity of water described in the license as the "amount needed and beneficially used . . ." The Claimants may well be correct that such amount is greater than 4.5 AFA, but this is an issue of fact that cannot be resolved on summary judgment. Under Idaho Code § 42-1427, the Legislature has directed that this factual question can be answered by looking to the extent of beneficial use prior to the commencement of the SRBA. The *Director's Report* is presumed to be correct, and the Claimants have the burden of demonstrating that during any of the 26 irrigation seasons beginning in 1963 and ending in 1989 (for water rights 63-03323 and 63-03324) more than 4.5 acre feet per acre was actually beneficially used. In accordance with the foregoing, the Claimant's motion for summary judgment is denied and the State of Idaho's motion for summary judgment is granted with respect to water right claims 63-03323 and 63-03324.

Water Right 63-02529.

As to water right claim 63-02529, Claimant Pioneer Irrigation District objected to the quantity and the period of use recommended in the *Director's Report*. The essence of Pioneer Irrigation District's objection is that IDWR may, at some time in the future, extend the period of use for this water right to allow for the use of water earlier (than the recommended beginning date of March 1) or later (than the recommended ending date of November 15) if climate change creates conditions under which such water could potentially be beneficially used. Pioneer Irrigation District is not asserting that the irrigation period of use recommended in the *Director's Report* (3-1 to 11-15) restricts the right beyond what has been historically used, nor beyond what can presently be used based upon the current climate of the Treasure Valley.

In A & B Irrigation Dist. v. Idaho Conservation League, 131 Idaho 411, 958 P.2d 568, the Idaho Supreme Court held that the period of use for water rights decreed in the SRBA be identified by specific dates, rather than simply being identified as "irrigation

is 2,284.6 AFY, or 9.25 AFA. In other words, the system capacity exceeds even the maximum amount that could be beneficially used as stated by Engineer King.

season.” 131 Idaho at 424. As stated above, the license issued for water right 63-02529 did not identify any particular period of use. The *Director's Report* recommended a period of use beginning March 1 and ending on November 15, a period of 260 days. The recommendation in the *Director's Report* is presumed to be correct. I.C. § 42-1411(4). The annual diversion volume recommended in the *Director's Report* of 44,918.30 AFA does not limit the use of water under this right, rather it simply restates the amount of water that can physically be diverted during those 260 days.

Claimant Pioneer Irrigation District objects to the inclusion of the recommended annual diversion volume out of concern that IDWR may lengthen the irrigation season for this water right should changes in climatic conditions yield a longer growing season. Pioneer Irrigation District has not, however, informed this Special Master of any basis in Idaho law that would allow IDWR to alter a period of use decreed in the SRBA after such decree has been entered. Pioneer Irrigation District has also not demonstrated how such legal authority on the part of IDWR, should it exist, would be consistent with the Idaho Supreme Court's ruling that irrigation water rights in the SRBA need to be decreed with specifically identified periods of use. Finally, Pioneer Irrigation District has not presented any basis in Idaho law, nor does this Special Master know of any such basis, that would allow a water right to be decreed in the SRBA with a period of use that includes not only the present growing season, but also is expanded to include an anticipated future growing season.

Simply stated, the annual diversion volume recommend in the *Director's Report* for water right 63-02529 is not a new restriction or limitation on the right, rather it is simply a restatement of the amount of water that can physically be diverted during the 260 day irrigation season. There is no basis in Idaho law for a post-decree expansion of the period of use by IDWR; nor is there a legal basis for an SRBA partial decree to include an anticipatorily expanded period of use to account for speculation as to the length of future growing seasons. In accordance with the foregoing, Pioneer Irrigation District's motion for summary judgment is **denied** with respect to water right claim 63-02529.

2. The objection filed by the claimants to the *Director's Report* for water right claim 63-10435 constitutes an impermissible collateral attack on the license issued for that right.

As to water right claim 63-10435, the annual diversion volume recommended in the *Director's Report* of 306 AFA is the same limitation that was set forth in the license. As stated above, the license also contained the following remark:

The maximum diversion volume is defined as the maximum allowable volume of water that may be diverted annually from the source under this right. The use of water confirmed by this right is limited to the amount which can be beneficially used. The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency.

This remark was omitted from the *Director's Report*. The objection filed by the Claimants Rebekah Tlucek, Kevin Tlucek, Shelly Tlucek, and Byron Tlucek states that they are "objecting to the inclusion of the annual volumetric limitation in the amount of 306.00 afy, as such appears under the Quantity and Purpose and Period of Use elements of the *Director's Report*." Although the above-quoted objection appears to pray for a remedy of deleting the annual diversion volume limitation in its entirety, it is the understanding of this Special Master based upon Claimant's briefing and upon comments made at oral argument on summary judgment that the Claimants also pray for alternative relief in the form of carrying the subject remark over to the SRBA partial decree for the right. See *Claimant's Opening Brief*, at 7 ([T]he *Director's Report* does not contain the above-quoted language from Condition 1 of the license.").

To the extent that the relief sought by the Claimants is deletion of the licensed annual diversion volume, the State of Idaho asserts in its motion for summary judgment that this constitutes an impermissible collateral attack on the prior administrative proceedings. To the extent that the Claimants are seeking inclusion of the subject remark in the SRBA partial decree for water right 63-10435, the State of Idaho in its response brief asserts that this issue is not properly before the Court because the Claimants did not assert this concern in their objection. *State of Idaho's Brief in Response* at 19.

This Special Master agrees with the State of Idaho that deletion of the annual diversion volume in this SRBA proceeding would constitute an impermissible collateral

attack on the prior administrative licensure proceeding, and therefore the remedy sought by the claimants of such deletion is simply not available. On the other hand, this Special Master disagrees with the State of Idaho's assertion that the alternative relief of including the subject remark is not properly before the SRBA Court. The basis of the Claimants objection to the inclusion of an annual diversion volume was that the license contained the remark, and the *Director's Report* did not. If the license issued for the right did not have the remark then the Claimants would not even have a colorable argument that the SRBA decree should omit the previously licensed annual diversion volume.

The inquiry is whether or not the SRBA partial decree to be issued for water 63-10435 should contain the subject remark. This Special Master would surmise that the intent of IDWR in including the remark in the license was that the remark could only operate in one direction -- to decrease the annual diversion volume under the right. It could further be surmised that by not including the remark in the *Director's Report*, IDWR intends to waive any further ability to decrease such annual diversion volume. This Special Master is not willing, however, to engage in such speculation. The plain words of the remark simply do not limit the operation of the remark to only a downward adjustment of the annual diversion volume. The last sentence of the remark states: "The maximum diversion volume may be adjusted to more accurately describe the beneficial use or to implement accepted standards of diversion and use efficiency." Thus, the diversion volume may be adjusted for one of two reasons: (1) "to more accurately describe the beneficial use . . ." or (2) "to implement accepted standards of diversion efficiency." While it is unlikely that the second reason would ever require an upward adjustment of the annual diversion volume, it is certainly possible that the first reason of accurately describing the beneficial use could result in an upward adjustment. Additionally, the remark does not specify the procedural mechanisms that would be employed by the Department to effectuate an adjustment -- whether up or down -- as contemplated in the remark. There is not anything on the face of the remark that would prevent the owner of the right from petitioning IDWR to initiate an administrative proceeding to make such adjustment.

Accordingly, because the remark can be read to reserve a future opportunity in the water right owner to request that the Department make an adjustment to the annual

diversion volume set forth in the license, it is the opinion of this Special Master that such opportunity should not be eliminated in the SRBA, but rather the SRBA partial decree should incorporate the subject remark.

3. The *Responses* filed by the State of Idaho are not barred by the procedural statutes governing the SRBA.

The Claimants assert that IDWR is making an "end run" around Idaho Code § 42-1401B --which directs that the director shall not be a party to a general stream adjudication -- by having the Idaho Attorney General's office file responses and pursue litigation in these subcases. For the reasons set forth below, this Special Master holds that the participation of the State of Idaho through the Attorney General's office in these subcases is proper and not in violation of Idaho Code § 42-1401B.

Idaho Code 42-1401B states:

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.

Idaho Code § 42-1401C states:

Role of state agencies other than the Idaho department of water resources in an adjudication. -- (1) Each state agency, and the Idaho water resource board may file a claim and appear separately in any adjudication through the attorney general. This section shall not apply to the Idaho department of water resources.

(2) The attorney general may appear in any adjudication and shall represent the position of the state of Idaho.

The objections filed by the Claimants assert that the director is without authority to limit or describe the annual diversion volume of a previously licensed irrigation ground water right where the license contained no such description or limitation. This

objection necessarily implicates IDWR's longstanding policy that the proper administration of irrigation groundwater rights requires that the quantity elements of such rights include an annual diversion volume. The Attorney General's office filed responses in these subcases for the purpose of protecting IDWR's ability to effectuate this policy as to these water rights as well as other water right claims that are similarly situated to the instant subcases — i.e. previously licensed irrigation ground water rights with no annual diversion volume set forth in the license. The Claimants argue that because this policy was developed and is implemented by the director, Idaho Code § 42-1401B prevents both IDWR and the Attorney General's office from appearing as a party in these subcases.

The State of Idaho argues that resolution of this issue is a matter of statutory interpretation. Specifically, the State argues:

The issue raised is primarily an issue of statutory interpretation, and '[t]he interpretation of a statute is a question of law over which we [the court] exercise free review This Court must construe a statute to give effect to the intent of the legislature It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.' *Paolini v. Albertson's Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006) (citations omitted). 'Statutes that are *in pari materia* must be construed together to effect legislative intent. Statutes are *in pari materia* if they relate to the same subject.' Here, the Idaho Legislature enacted Idaho Code §§ 42-1401B and 42-1401C in the same act, and both sections relate to the authority of the State to participate in a general adjudication of water rights. Thus, these two sections are *in pari materia* and must be construed together.

State's Brief in Response at 10. Under these two statutes, although the director (and hence the Idaho Department of Water resources) cannot be a party, the State of Idaho through the Attorney General's office may appear and have its position represented. The question presented here is whether the State of Idaho may appear and assert a position relative to a policy determination in the situation where such policy determination originated within the Department. This Special Master holds that the appearance of the State of Idaho under Idaho Code § 42-1401C is proper in these subcases and the State may have its position represented despite the fact that the policy sought to be protected by the State originated within the Department.

Under the Constitution and statutes of the state of Idaho, the State of Idaho is vested with ownership and control of all waters of the state. *See* Const. Art. XV §1; Idaho Code § 42-101. The State of Idaho has created an executive branch department (IDWR) to effectuate the State's responsibility to supervise and control the appropriation of water for beneficial use, and the administration of water so appropriated. In this case, the director has determined that in order to properly administer irrigation groundwater rights, the quantity of such rights needs to be described in terms of an annual volume of diversion. The State has appeared in these subcases to protect its ability to effectuate this policy. There are really only two possibilities as to whence this policy may have arisen – the Idaho Legislature or the Department of Water Resources under authority granted by the Legislature. The fact that the particular policy involved in the instant subcases arose within the Department rather than having been specifically articulated by the Legislature does not diminish the fact that such a policy has been determined to be necessary to carry-out the State's Constitutional and statutory responsibilities.

Idaho Code § 42-1401C unequivocally states that the position of the State of Idaho may be represented in an adjudication through the Attorney General's office. The statute does not provide for any threshold inquiry or examination of the position of the State and whether such position is also the position of the Department. This Special Master is unwilling to engraft such an inquiry onto the statute. In accordance with the foregoing, this Special Master holds that the appearance of the State of Idaho through the Attorney General's office is proper in these subcases pursuant to Idaho Code § 42-1401C; that such appearance is not in violation of Idaho Code § 42-1401B; and the Claimants motion for summary judgment on this issue is **denied**.

VII. ORDER DENYING MOTION TO STRIKE

On April 2, 2009, the Claimants filed a *Motion to Strike*, seeking to strike the following: (1) a portion of the *State of Idaho's Brief in Response to Claimant's Motion for Summary Judgment* wherein the State discusses "problem soils" at the place of use for water rights 63-03323 and 63-03324 and excerpts a discussion of soils from the deposition of the Claimants' expert witness Terry Scanlan; (2) a portion of the *Affidavit of David J. Barber Dated March 25, 2009*, and Attachment II thereto, wherein the State

attaches excerpts and exhibits from the deposition of Terry Scanlan related to soils; and (3) the statement of p. 19 of the *State's Brief in Response* that, "[h]e [Terry Scanlan] also acknowledged that the place of use for water right nos. 63-03323 and 63-03324 has significant impairments related to the shallow soils and other factor's that limit irrigation." The Claimants assert that the above-enumerated references regarding soils are not relevant to the legal issue of whether the quantity element of a previously licensed water right may be recommended by the Department (and decreed in the SRBA) with an annual diversion volume where the license described the quantity only in terms of cubic feet per second. The Claimants argue that the references to and discussions of the soils at the place of use for water rights 63-03323 and 63-03324 should be stricken because such references are irrelevant and therefore inadmissible pursuant to I.R.E. 402. The Claimants state that the discussion of soils "is simply a factual issue that the State is attempting to manufacture in order to survive summary judgment." *Motion to Strike* at 5.

The State of Idaho points out in its *Brief in Opposition to Motion to Strike* that the State moved for summary judgment on two finite legal issues, and did not include any information regarding soils in the materials filed in support of its motion. *State of Idaho's Brief in Opposition to Motion to Strike* at 5. The Claimants argue in their *Brief in Support of Motion for Summary Judgment* that "[IDWR's 4.5 AFA standard for Basin 63] is an unreliable metric for quantifying beneficial use under Section 42-1401B, and should therefore not provide a basis for imposing a new restriction on previously-licensed water rights." *Id.* at 20. In other words, the Claimants argue that as a matter of law IDWR cannot recommend an annual diversion volume in the *Director's Report* because the standard used by IDWR in quantifying such annual diversion volume is unreliable. The State asserts that it submitted the information sought to be stricken in response to this argument made by the Claimants. The State states: "The State wanted to make sure that the district court was aware that there are other factual issues related to the amount of water that the claimants can beneficially use on their own land and that these factual issues could not be resolved by a summary judgment proceeding because of the existence of these material facts that the claimants' own expert acknowledged." *Brief in Opposition to Motion to Strike* at 6.

As discussed above, this Special Master agrees with the State that the reliability of the methodology used by IDWR in determining an annual diversion volume to be recommended in a director's report is not a factor that can preclude IDWR from making such a recommendation as a matter of law. Simply stated, if IDWR has the authority to recommend an annual diversion volume, then any issues regarding the reliability or correctness of IDWR's recommendation necessarily involve questions of fact that cannot be resolved on summary judgment. The State is not manufacturing an issue of fact for purposes of surviving summary judgment; rather upon a determination that IDWR may, as a matter of law, recommend an ADV for these water rights, the next step in the process is to provide the Claimants with the opportunity to present testimony and evidence at trial to demonstrate that the particular ADV recommended by IDWR is incorrect.

While the Claimants' correctly assert that the information regarding soils is irrelevant to the question of law presented in these summary judgment proceedings, such information may be relevant to the question of fact that arises upon a determination that IDWR is authorized to recommend an annual diversion volume for these water rights. Therefore the Claimants' assertion of irrelevancy is misplaced. The information regarding soils in the record has had no bearing on this Special Master's ruling herein. Likewise, striking the information from the record will also have no bearing. Therefore, in accordance with the foregoing and in an exercise of discretion the Claimants' *Motion to Strike* is **denied**.

VIII. CONCLUSION AND ORDER

In accordance with the foregoing this Special Master holds: (1) that the director is authorized by Idaho Code § 42-1411 to include an annual diversion volume in the director's report for the subject irrigation groundwater rights; (2) that pursuant to Idaho Code § 42-1427 the proper measure of the annual diversion volume in a contested subcase is the extent of beneficial use prior to the commencement of the adjudication; and that the numerical description of a previously undefined annual diversion volume is not in violation of Idaho Code § 42-220.

As to water right 63-02529, the State's motion for summary judgment is **granted**, and the Claimants' motion for summary judgment is **denied**. ***A Special Master's Report and Recommendation*** is herein made for water right 63-02529.

As to water right claims 63-03323 and 63-03324, the State's motion for partial summary judgment is **granted**, and the Claimants' motion for summary judgment is **denied**. However, factual issues remain to be resolved. Specifically, the SRBA partial decree for these water rights will include an annual diversion volume under the quantity element, and the Claimants are entitled to an evidentiary hearing to rebut the presumption of the *Director's Report* and to put on evidence of pre-1987 water use pursuant to Idaho Code § 42-1427. In addition, the Claimants objected to the place of use recommended in the *Director's Report*, and there is no indication in the Court's file that the place of use objection has been resolved.

As to water right claim 63-10435, the State's motion for summary judgment is **granted** with respect to deletion of the annual diversion volume in the SRBA decree (i.e. the State's collateral attack argument). The Claimants' motion for summary judgment is **denied** with respect to deletion of the annual diversion volume, but **granted** to the extent that the subject remark from the license is carried forward to the SRBA partial decree. ***A Special Master's Report and Recommendation*** is herein made for water right 63-10435.

Finally, the Claimants' motion for summary judgment is **denied** with respect to the issues raised regarding Idaho Code §§ 42-1401B and 42-1401C.

IX.

ORDER SETTING SCHEDULING CONFERENCE

A scheduling conference will be held in subcase nos. 63-03323 and 63-03324 on **August 25, 2009 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.

X.

REPORT AND RECOMMENDATION FOR 63-02529 AND 63-10435

Based on the file and record herein, IT IS RECOMMENDED that water rights 63-02529 and 63-10435 be decreed with the elements as set forth in the attached *Recommendations for Partial Decrees Pursuant to I.R.C.P. 54(b)*.

Dated June 11, 2009



THEODORE R. BOOTH
Special Master
Snake River Basin Adjudication

CERTIFICATE OF MAILING

I certify that a true and correct copy of the MEMORANDUM DECISION; ORDER DENYING MOTION; SPECIAL MASTER REPORT & RECOMMEND; ORDER SETTING HEARING was mailed on June 11, 2009, with sufficient first-class postage to the following:

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ORDER

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