

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 29-13212 V1

WATER RIGHT NUMBER: 29-13212 V1

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	WH LAND & LIVESTOCK A PARTNERSHIP C/O MICHAEL R MCNABB 976 MCNABB INKOM, ID 83245 (208) 251-6336

Priority Date: 04/01/1943

Basis: Beneficial Use

Status: Active

<u>Source</u>	<u>Tributary</u>
LITTLE POCATELLO CREEK	SINKS

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
STOCKWATER	01/01 to 12/31	0.020 CFS	
	<u>Total Diversion:</u>	0.020 CFS	

Location of Point(s) of Diversion

LITTLE POCATELLO CREEK	SW1/4SW1/4	Sec. 4, Twp 06S, Rge 35E, B.M.
BANNOCK County		

Place of Use

STOCKWATER

Twp	Rge	Sec	NE				NW				SW				SE				Totals
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
06S	35E	5												X			X	X	
06S	35E	8	X	X			X												

Conditions of Approval:

1. 108 This water right includes a point of diversion established in accordance with a notice filed under the provisions of Section 42-113(3), Idaho Code. The water delivery system established in accordance with this notice shall be fully enclosed and shall be equipped with an automatic shutoff valve or a mechanism for returning unused water to the source through an enclosed water system. The water delivery system shall be designed to facilitate measurement of the rate of flow through the system.
2. 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.
3. N11 THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

IDAHO DEPARTMENT OF WATER RESOURCES

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4. N13 THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.

Remarks:

1. Explanatory PARCEL #: R3851000800, R3851001000, R3851002500, R3851002600

Comments:

1. csaxton 7/29/2001 Instream Stock
Comment: Recommended as Claimed
2. csaxton 7/29/2001 Priority Date
Comment: Priority evidence provided even though not required.
3. dshaff 1/28/2002 42-113 Change
Comment: The claimant filed a form 42-113 to notify IDWR the stock would use water from a diversion works rather than straight from the creek. The Recomm was modified to reflect those 42-113 changes.

Dates and Other Information:

Decreed Date:
 Enlargement Use Priority Date:
 Enlargement Statute Priority Date:
 Defendant:
 Plaintiff:
 Civil Case Number:
 Judicial District:
 Notice of Error Flag:
 State or Federal:
 Owner Name Connector:
 Water District Number:
 Generic Max Rate Per Acre:
 Generic Max Volume Per Acre:
 Swan Falls Trust or Nontrust:
 Swan Falls Dismissed:
 DLE Act Number:
 Carey Act Number:
 Mitigation Plan: False

Verification Log:

<u>Element</u>	<u>Date Time Stamp</u>	<u>Reviewer</u>	<u>Log text</u>
POD	1/28/2002 12:18:41 PM	dshaff	Edited point location
POU	1/28/2002 12:23:44 PM	dshaff	Edited shape boundary
POU	1/28/2002 12:45:41 PM	dshaff	Edited shape boundary
POU	1/28/2002 1:36:55 PM	dshaff	Edited shape boundary
POD	1/28/2002 1:39:21 PM	dshaff	Edited point location

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 29-13212 V1

Priority Date	1/28/2002 1:42:44 PM	dshaff	(No) 1. Should this water use have been included in a later court decree of the water rights from this source? (No) 4. Is the basis of claim decree or license? (No) 7. Is the basis of claim a Application or Permit? (No) 8. Is the basis of claim a posted notice? (No) 9. Is the Priority Date claimed after the date a permit is required for the source and the water use? (Yes) 12. Does the claim file contain sufficient evidence of Priority Date? (Yes) 15. Is the basis of claim coded correctly? (No) 16. Is a Priority Date remark and/or condition required? Description for Question 12/13 - Stockwater claim with a reasonable priority date.
POD	1/28/2002 1:44:56 PM	dshaff	(No) 1. Is the basis of this claim a Decree or License? (No) 2. Is the basis of this claim a Application or Permit? (Yes) 6. Is there evidence that there has been a change in the POD? (No) 7. Can the change be verified as an accomplished transfer? (Yes) 8. Was a transfer filed? (Yes) 10. Is a POD remark and/or condition required? Description for Question 6 - A 42-113 change was filed to move the points of diversion from instream to a specific diversion point. Description for Question 8 - 42-113
Source	1/28/2002 1:45:32 PM	dshaff	(No) 1. Is the basis of claim Decree or License? (No) 2. Is the basis of claim an Application or Permit? (No) 6. Is the basis of claim a Posted Notice? (No) 7. Is there evidence that there has been a change in the source? (Yes) 10. Does the file contain all the necessary information to verify the source? (No) 11. Is a Source remark and/or condition required?
POU	1/28/2002 1:46:33 PM	dshaff	(No) 1. Is the basis of this claim a Decree or License? (Yes) 2b. Is the POU required? (No) 3. Is the basis of claim a Application or Permit? (Yes) 7. Is there evidence that there has been a change in the POU? (No) 8. Can the claim be verified as an accomplished transfer? (No) 9. Does the claim include an enlargement in the POU? (Yes) 12. Was a transfer filed? (No) 14. Is a POU remark and/or condition required? Description for Question 9 - Description for Question 13 - True

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 29-13212 V1

Use	1/28/2002 1:47:41 PM	dshaff	(No) 1. Is the basis of this claim a Decree or License? (No) 2. Is the basis of this claim a Application or Permit? (No) 6. Is there evidence that there has been a change in the Purpose of Use? (Yes) 11. Does the file contain all the necessary information to verify the Water Use? (No) 13. Is a Purpose of Use remark and/or condition required? Description for Question 10,11,12 - Stockwater
Season	1/28/2002 1:48:54 PM	dshaff	(No) 1. Is the basis of claim Decree or License? (No) 2. Is the basis of claim a Application or Permit? (No) 6. Is there evidence that there has been a change in the Period of Use? (Yes) 12. Does the file contain all the necessary information to verify the Period of Use? (No) 13. Is the basis of claim a decree, license, or a transferred beneficial use right that has had the Period of Use administratively determined? (No) 15. Is irrigation claimed as a Purpose of Use? (No) 18. Is a Period of Use remark and/or condition required? Description for Question 15 - Claimed year around, which is reasonable.
POD	1/28/2002 1:50:01 PM	dshaff	(No) 1. Is the basis of this claim a Decree or License? (No) 2. Is the basis of this claim a Application or Permit? (No) 6. Is the basis of claim a posted notice? (No) 7. Is a flow measurement required? (No) 9. Is the source Groundwater and does the purpose of use require a diversion volume limit? (No) 11. Has a diversion volume limit been established by a decree, license or transfer for this water use? (Yes) 12. Is a Quantity remark or condition required? Description for Question 7 - de minimus stockwater
Summary	1/28/2002 1:54:40 PM	dshaff	(No) 1. Is the basis of this claim a Decree, License, Permit, Application or Posted Notice? (Yes) 3. Is the water being used for all of the purposes claimed and to the extent claimed? (Yes) 5. Is an additional remark and/or condition required? (Yes) 6. Would you like to view the recommended right? (No) 7. Is this a split or combined right? (No) 8. Do you have documents you would like to attach or link to the file? (Yes) 9. Would you like to set the verification date?

IDAHO DEPARTMENT OF WATER RESOURCES

Adjudication Recommendation Report 29-13212 V1

Summary	7/29/2001 11:50:22 AM	csaxton	1. (YES) The basis of the claim is beneficial use. 2. (YES) All the water being used for all the purposes is being claimed and to the extent it was claimed. 5. (NO) General remark was not required. 6. (NO) Explanatory remark was not required. 7. (YES) Additional condition was required. 8. (YES) Wanted to view the recommended right. 9. (NO) This is not a split right. 10. (NO) This is not a combined right. 11. (NO) Documents were not linked or attached to this file. 12. (YES) Set the verification date.
Contacts	7/29/2001 11:38:17 AM	csaxton	1. Appointment has not been scheduled. Comment for 1: Met with Mike McNabb in my office on 7/25/01

IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommendation Report 29-13212 V1

WATER RIGHT NUMBER: 29-13212 V1

<u>Owner Type</u>	<u>Name and Address</u>
Current Owner	WH LAND & LIVESTOCK A PARTNERSHIP C/O MICHAEL R MCNABB 976 MCNABB INKOM, ID 83245 (208) 251-6336

Priority Date: 04/01/1943
Basis: Beneficial Use
Status: Active

<u>Source</u>	<u>Tributary</u>
LITTLE POCATELLO CREEK	SINKS

<u>Beneficial Use</u>	<u>From</u> <u>To</u>	<u>Diversion Rate</u>	<u>Annual Volume</u>
STOCKWATER	01/01 to 12/31	0.020 CFS	
<u>Total Diversion:</u>		0.020 CFS	

Location of Point(s) of Diversion

LITTLE POCATELLO CREEK	NE1/4NW1/4SE1/4	Sec. 4, Twp 06S, Rge 35E, B.M.
BANNOCK County	(Beginning of Reach)	
LITTLE POCATELLO CREEK	SW1/4SE1/4SW1/4	Sec. 5, Twp 06S, Rge 35E, B.M.
BANNOCK County	(Ending of Reach)	

Place of Use

STOCKWATER Within BANNOCK County

T06S R35E S04	NESW	T06S R35E S04	SWSW
T06S R35E S04	SESW	T06S R35E S04	NWSE
T06S R35E S05	SESW	T06S R35E S05	SESE
T06S R35E S08	NENE	T06S R35E S08	NWNE
T06S R35E S08	NENW	T06S R35E S09	NWNW

Total Acres: 0

Conditions of Approval:

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. N13 THE QUANTITY OF WATER UNDER THIS RIGHT SHALL NOT EXCEED 13,000 GALLONS PER DAY.
3. N11 THE QUANTITY OF WATER DECREED FOR THIS WATER RIGHT IS NOT A DETERMINATION OF HISTORICAL BENEFICIAL USE.

Remarks:

1. Explanatory PARCEL #: R3851000800, R3851001000, R3851002500, R3851002600

A2913212



IDAHO DEPARTMENT OF WATER RESOURCES
Adjudication Recommendation Report 29-13212 V1

Comments:

1. csaxton 7/29/01 Instream Stock
Comment: Recommended as Claimed
2. csaxton 7/29/01 Priority Date
Comment: Priority evidence provided even though not required.

Dates and Other Information:

Decreed Date:
Enlargement Use Priority Date:
Enlargement Statute Priority Date:
Defendant:
Plaintiff:
Civil Case Number:
Judicial District:
Notice of Error Flag:
State or Federal:
Owner Name Connector:
Water District Number:
Generic Max Rate Per Acre:
Generic Max Volume Per Acre:
Swan Falls Trust or Nontrust:
Swan Falls Dismissed:
DLE Act Number:
Carey Act Number:
Mitigation Plan: False

Element Reviewed/Verified Dates:

<u>Element</u>	<u>Last Reviewed Date</u>	<u>Reviewer</u>	<u>Last Verified Date</u>	<u>Verifier</u>	<u>Status</u>
Contacts	7/29/01 11:38:18 AM	csaxton			Active
Summary	7/29/01 11:50:24 AM	csaxton	7/29/01 11:50:24 AM	csaxton	Active

Verification Log:

<u>Element</u>	<u>Date Time Stamp</u>	<u>Reviewer</u>	<u>Log text</u>
Summary	7/29/01 11:50:22 AM	csaxton	1. (YES) The basis of the claim is beneficial use. 2. (YES) All the water being used for all the purposes is being claimed and to the extent it was claimed. 5. (NO) General remark was not required. 6. (NO) Explanatory remark was not required. 7. (YES) Additional condition was required. 8. (YES) Wanted to view the recommended right. 9. (NO) This is not a split right. 10. (NO) This is not a combined right. 11. (NO) Documents were not linked or attached to this file. 12. (YES) Set the verification date.
Contacts	7/29/01 11:38:17 AM	csaxton	1. Appointment has not been scheduled. Comment for 1: Met with Mike McNabb in my office on 7/25/01



State of Idaho

DEPARTMENT OF WATER RESOURCES

1301 North Orchard Street, Boise, ID 83706 - P.O. Box 83720, Boise, ID 83720-0098
Phone: (208) 327-7900 Fax: (208) 327-7866 Web Site: www.idwr.state.id.us

DIRK KEMPTHORNE
Governor

KARL J. DREHER
Director

January 29, 2002

WH LAND & LIVESTOCK
C/O MIKE MC NABB
976 MC NABB RD
INKOM ID 83245

RECEIVED

FEB 01 2002

Department of Water Resources
Eastern Region

RE: Snake River Basin Adjudication Claim A29-13212
Notice of Diversion for Instream Stockwater Use

Dear Claimant:

The Department of Water Resources acknowledges receipt of the water right notice you submitted under Section 42-113(3), Idaho Code. Please refer to the above referenced number in all future correspondence regarding this notice.

The filing of the notice does not confirm the validity of the water right. However, the changes indicated in the notice are being incorporated into the recommendation IDWR has prepared for the Snake River Basin Adjudication court. A copy of the revised recommendation is enclosed.

Please note that the diversion described in your notice may occur only if the following conditions are met.

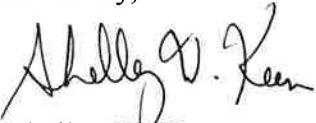
- The water is diverted from a surface water source to a trough or tank through an enclosed water delivery system.
- The water delivery system is equipped with an automatic shutoff or flow control mechanism or includes a means for returning unused water to the surface water source through an enclosed delivery system, and the system is designed and constructed to allow the rate of diversion to be measured.
- The diversion is from a surface water source to which the livestock would otherwise have access and the watering tank or trough is located on land from which the livestock would have access to the surface water source from which the diversion is made.
- The diversion of water out of the stream in this manner does not injure other water rights.
- The use of the water diverted is for watering livestock.

- The bed and banks of the source shall not be altered as that term is defined in section 42-3802, Idaho Code, except that an inlet conduit may be placed into the source in a manner that does not require excavation or obstruction of the stream channel, unless additional work is approved by the Director of the Department of Water Resources.
- The amount of water diverted for watering of livestock shall not exceed thirteen thousand (13,000) gallons per day.

Also, please note that water right owners are required to report any change of water right ownership and/or mailing address to the Department within 120 days of the change. Failure to report these changes could result in a \$100 late filing fee. Contact any office of the Department or visit the Department's homepage on the Internet to obtain the proper forms and instructions.

Please contact me at 208-327-7946 if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Shelley W. Keen".

Shelley W. Keen
Water Rights Supervisor

Enclosure

MEMORANDUM

DATE: January 25, 2002

TO: Don Shaff

FROM: Shelley W. Keen *SWK*

RE: Data entry for stockwater notice based on a beneficial use claim

We recently received a Notice of Diversion for Instream Stockwater Use [see §43-113(3)] based on the instream stock use claimed in 29-13212. These notices fall into two categories: those that are like statutory claims because there is no prior water right or claim filing, and those that are like transfers because they are based on a prior filing. For those based on a prior filing, we update the record with the new point of diversion, place of use, rate, and condition 108, which says:

This water right includes a point of diversion established in accordance with a notice filed under the provisions of Section 42-113(3), Idaho Code. Diversion and use of water from this point of diversion shall not exceed 13,000 gallons per day for stockwater use. The water delivery system established in accordance with this notice shall be fully enclosed and shall be equipped with an automatic shutoff valve or a mechanism for returning unused water to the source through an enclosed water system. The water delivery system shall be designed to facilitate measurement of the rate of flow through the system.

Because this one is based on a claim, it looks like the changes should be made to the claim and recommendation records. Would you like to edit the claim and recommendation directly, or would you prefer that we use the transfer process to update the recommendation from our end? The disadvantage to using the transfer process is that we have to use up an application number, but these are not really applications.

P.S. - I've got a confirmation letter to send the claimant when data entry is complete.

*Data entry completed. A report is attached. I presume applicable paperwork will be sent to Eastern for the claim file. *SK* 1/29/02*

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES

RECEIVED

DEC 19 2001

NOTICE OF DIVERSION FOR INSTREAM STOCKWATER USE

Department of Water Resources
Eastern Region

(To provide notice of intent to divert surface water from a stream or riparian area to troughs or tanks for the watering of livestock)

1. Name of Right Holder WA LAND & LIVESTOCK Phone 775-3633
Mailing address % Mike McNabb 976 McNabb Rd Chukar, Id 83245
2. Source of water supply Little Porcatella Creek tributary to sinks
3. Point of diversion is in Gov't. Lot 1/4 SW 1/4 SW 1/4, Section 4,
Township 6S Range 35E, B.M., Bannock County.
4. Description of diversion and delivery system:
 - a) Describe the type of diversion: 1.5" plastic pipe intake.
 - b) Describe the delivery system: 1.5" poly pipe.
 - c) Describe the number, type and total capacity of troughs or tanks 6 steel or metal 1000 gal each troughs.
 - d) Describe the automatic shutoff or flow control mechanism or means of Returning unused water to the source: To begin with we will use an automatic float system but eventually we will put in a 1.5" poly pipe back to the stream.
 - e) Describe how the system is designed to allow measurement of the rate of diversion: According to NRCS our output would be 9 gpm. In addition the most cows we will have there would be 800 or which would allow 26 gallon/pair which would be more than needed.
5. Describe the place of use by placing an X in the appropriate 40-acre tract(s) below:

TWP	RGE	SEC	NE				NW				SW				SE			
			NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE
6S	35E	5												X			X	X
6S	35E	8	X	X			X											

6. Priority date claimed or established: 4/01/1943
7. Rate of diversion: .02 cfs

8. Season of use: From 1/01 to 12/31
9. a) Who owns the property at the point of diversion? WH Land & Livestock
b) Who owns the property at the place of use? WH Land & Livestock
10. When will construction occur? Immediately if possible or in spring of 2002.
11. Comments: _____

I hereby assert the following:

- a) Diversion is from a surface water source to which the livestock would otherwise have access. The land where the watering tanks or troughs will be located is land from which the livestock had access to the source of water from which diversion is being made.
- b) The diversion of water out of the stream as described in this notice is for watering livestock and will not injure other water rights.
- c) I will not alter the bed and banks of the source as the term is defined in section 42-3802, Idaho Code. I understand that I may place an inlet conduit into the source in a manner that does not require excavation or obstruction of the stream channel, unless the director of the department of water resources approves a stream channel alteration permit for additional work.
- d) I understand that upon determination of interference with other water rights, the Director may order curtailment of diversion or use of water under this notice or may require the diversion and delivery system to be modified to prevent injury.
- e) I will not divert more than 13,000 gallons per day for livestock watering from this diversion, and I will not use more than one point of diversion under this notice.
- f) I am authorized to make the changes described in this notice and that if the notice involves a federal grazing allotment, the permittee consents to the changes described in this notice.
- g) I understand that any willful misrepresentation on this notice will void any right to divert water for livestock under this notice.

Dated this 18 day of December, 2001

Mike M. Nabb
Right Holder or Authorized Representative

FOR DEPARTMENT USE

Received by HWT Date _____ Preliminary check by _____
Fee: \$ 25.80 Received by HWT Receipt No. E027340 Date 12-19-01
Water District No. _____ Entered into data base _____ By _____

12744202

STATE OF IDAHO

Department of Water Resources

Notice of Diversion for Instream Stockwater Use
Section 42-113, Idaho Code

Name of Right Holder: W H Land & Livestock Co Mike Mc Nab
Initial Review By: HUT Date: 12-20-01
Based on prior recorded instream stockwater right? Yes ☐ No ☒
If yes, right number: 29-13212 Instream Stock Div. No. _____
Also, if right was claimed in SRBA, this notice will amend claim.
If no, enter as statutory claim.

CHECK:

- | | |
|-------------------------------------|---|
| ☒ | Name & address |
| ☒ | Date of Priority |
| ☒ | Source |
| ☒ | Period of use |
| ☒ | Point of diversion (limited to 1 diversion) |
| ☒ | Location of use |
| ☒ | Signature |
| ☒ | \$25.00 filing fee |
| ☒ | Water District <u>NA</u> |
| ☒ | Amount of Water |
| ☒ | Description of diversion/delivery system. |

Receipt No. EO27340

Publish? Yes ☐ No ☒ (Regional Determination*)



Review Complete

By: [Signature]
Date: 12-20-01

*Generally not advertised unless determined to be necessary by Regional Manager.

Idaho Department of Water Resources Receipt

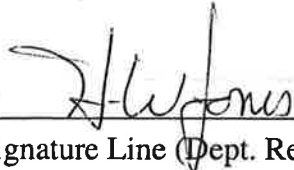
Receipt ID E027340

Payment Amount Date Received Region Status
Payment Type Check Number

Payer Comment

Fee Detail

Amount	Description	Fund	FD	PCA	SO
\$25.00	STOCK WATER DIVERSIONS	0229	21	63141	1155



Signature Line (Dept. Representative)

July 16, 2001

WH LAND & LIVESTOCK
C/O MIKE MC NABB
976 MC MABB
INKOM ID 83245

RE: Notice of Claim to a Water Right

Dear Mr. McNabb,

I am returning your check and your claim you submitted on July 13, 2001. There are several items incomplete on the claim form you submitted. Listed below are the items on the claim that need to be completed. However, before we get to that, I have come across some additional information that may change the way you want to file.

Background:

As I understand it, you want to file an Adjudication claim for in-stream stockwater. Then, in order to divert the water from the stream, Form 113 needs to be filed to allow diversion from the stream to an out of stream tank.

Previously you were encouraged to file the long claim form that cost extra but would allow for a greater diversion rate and omit the 13,000 gallon a day limitation. However, based on the limitations of Form 113 (item 7 in the instructions enclosed) and that it is department policy to recommend 0.02 for in-stream stockwater use, I would suggest just paying the \$25 dollar filing fee for a standard short form for Domestic and Stockwater use. I am enclosing a short form in case you want to start over, but if you wish to just modify the original claim you sent in that will be fine. The only difference is there is the \$25 fee instead of the \$73.00 fee we spoke about before.

Then you can complete form 113 (you can submit that with your claim). Note there is a \$25 dollar fee per diversion.

I was involved in a telephone conversation with Lisa Wood who represents an Attorney Randy Budge. As I understand it, preparations for a settlement conference are in the works. You may wish to wait on filing the claim until the completion of the settlement conference.

As far as completing the claim form, the information that was missing on your original filing is addressed below.

Additional Information Needed:

Item 4.b:

The beginning and ending points of the stream that the stock drink from needs to be described to a 40 acre tract. I have enclosed a map for your convenience.

Item 6 and 7:

Diversion rate: You can claim anything you wish, but for in-stream stock for less than a 1000 head of cattle the standard diversion rate is 0.02 cfs (item 7 on Form 113 instructions).

Item 10:

Each 40 acre tract that the stream passes through where the stock drink from needs to be described. See enclosed map for reference.

Map needs to be provided.

You can use the enclosed map to mark the locations of the Beginning and Ending points, and the place of use.

Item 14:

Please indicate the number of stock that are watered from the stream.

Conclusion:

I apologize for any confusion that I might have created regarding this matter. Please feel free to contact this office with any questions.

Respectfully submitted,

Craig L. Saxton
Water Resource Agent
Adjudication Bureau

LAW OFFICES OF

**RACINE, OLSON, NYE, BUDGE & BAILEY
CHARTERED**

LOUIS F. RACINE, JR.
WILLIAM D. OLSON
W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
MITCHELL W. BROWN
ERIC S. HUNN
DAVID E. ALEXANDER
LISA M. CHRISTON
RICHARD A. HEARN, M.D.
ERIC L. OLSEN
LANE V. ERICKSON
LISA A. WOOD, CPA

CENTER PLAZA-CORNER FIRST & CENTER
POST OFFICE BOX 1391
POCATELLO, IDAHO 83204-1391

TELEPHONE (208) 232-6101
FACSIMILE (208) 232-6109

SENDER'S E-MAIL ADDRESS: rcb@racinelaw.net

BOISE OFFICE

CONRAD J. AIKEN

101 SOUTH CAPITOL
BOULEVARD
U.S. BANK PLAZA, SUITE 202
BOISE, IDAHO 83702
TELEPHONE: (208) 395-0011
FACSIMILE: (208) 433-0167

RECEIVED

JUL 18 2001

Department of Water Resources
Eastern Region

July 6, 2001

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

John C. McNabb
6993 N. Rapid Creek Road
Inkom, Idaho 83245

Michael Ray McNabb
976 W. McNabb Road
Inkom, Idaho 83245

William Burl McNabb
8401 W. Buckskin Road
Pocatello, Idaho 83201

Re: *Hart Partnership v. WH Land & Livestock Partnership*

Gentlemen:

This office has been retained by James W. and Cherie Hart and Harry Hartwigsen, individually and as managing partners of Hart Partnership (hereinafter "Hart"), to pursue such legal action as may be necessary against WH Land & Livestock Partnership and its partners, Michael Ray McNabb, William Burl McNabb and John Chester McNabb (hereinafter "McNabb"), to recover property damages and obtain injunctive relief as a result of McNabb's operation of unlawful confined animal feed lots, unauthorized water diversions from the creek for stock watering, cattle grazing, dry land farming and other agricultural operations within the Little Pocatello Creek Drainage. The purpose of this letter is to give you notice of the Harts' claim, request payment of the damages already incurred, request that necessary repairs be completed to prevent additional damages in the future and demand that the unlawful and unauthorized conduct immediately cease, as described more specifically below.

HART RANCH HISTORY:

The Hart Ranch consists of approximately 2000 acres which is mostly contiguous and lies along Little Pocatello Creek on the east bench north of Pocatello in Sections 5 and 6 of Township 5 South, Range 35 East, and Section 1 of Township 5 South, Range 34 East, B.M., Bannock County, Idaho. The property was originally homesteaded in 1914 by Henry Hartwigsen.

The Harts own all of the water rights in Little Pocatello Creek. The water rights consist of the first 2.0 cfs with a priority date of 4/27/1906 acquired from the original owner, Samuel M. Shaffer. These water rights are evidenced by Idaho Department of Water Resources Water Right No. 29-02041. Hart uses all of the water from Little Pocatello Creek for irrigation purposes during the normal irrigation season from April 1 to October 1 to raise hay and grain on 100 acres. Additionally the water is used year-round for livestock watering, fish propagation, culinary, recreational and esthetic purposes. Reservoirs constructed on the creek in the early 1950s are used to store irrigation water as well as raise fish and waterfowl. The ranch is historically significant since the Oregon Trail runs through the property.

McNABB PROPERTY:

The McNabb property consists of 3936.36 acres acquired from Red Top Farms, Inc., by Warranty Deed dated April 1, 1991. It includes the SE1/4 SW1/4, S1/2 SE1/4 of Section 5 and NE1/4 NW1/4, N1/2 NE1/4 of Section 8, Township 5 South, Range 35 East, B.M., Bannock County. This property is east of the Hart property upstream on Little Pocatello Creek.

By 1993 McNabb had plowed up approximately 2500 acres of sagebrush and began dry land farming. According to the Bannock County Soil Survey, much of this property is located on slopes greater than 12% which are considered a "high erosional hazard" for farming. As a result of the McNabb farming practices, substantial siltation has occurred in Little Pocatello Creek filling the Hart reservoirs and diminishing both the water quantity and quality.

Additionally, from December 1999 to May 1, 2000 and again from November 1, 2000 to June 1, 2001, McNabb operated confined animal feed lots which contained and wintered approximately 500 head of cattle on about 50 acres along Pocatello Creek bordering the Hart property. These cattle have had full access to the creek and have caused substantial damage to the riparian areas and water quality. No system is in place to manage the waste. The confined animal feed lots do not comply with applicable state, local and federal laws.

The records of the Idaho Department of Water Resources reflect that McNabb owns no water rights in Little Pocatello Creek or elsewhere in the vicinity for stock watering purposes or for the operation of the animal feed lots. Additionally, as a part of McNabb operations, the water from the creek has been wrongfully and unlawfully diverted by artificial means, further injuring the riparian areas and damaging the water quality.

HART RANCH DAMAGES:

Hart has been adversely impacted and damaged as a direct and proximate result of the McNabb confined animal feed lots, cattle grazing practices, creek diversions and dry land farming operations. The damage includes:

- Loss of water available for irrigation purposes causing crop loss damages.
- Diminished quality and quantity of water killing all fish and other aquatic life in the Hart irrigation reservoirs.
- Extensive and excessive siltation of the Hart irrigation reservoirs, causing increased maintenance expense.
- Bacterial contamination of the Hart's domestic well, rendering it unusable.
- Bacterial and nutrient contamination in Little Pocatello Creek, rendering it unsuitable for culinary, livestock and recreational purposes.

A. SEDIMENTATION - FISH IMPACTS:

Increased sedimentation load in Little Pocatello Creek has been caused by in stream trampling of cattle grazing the creek. The effects of in stream trampling include erosion from degraded banks, reduced trapping of sediment from lack of vegetation and loss of bank stability. The Hart Ranch reservoirs have excessive buildup of sediment. This has caused all fish to be killed and has made annual cleanup and repair necessary.

Analysis of the total suspended solids reflects total maximum daily load levels approximately 10 times the allowable levels established by the Idaho Department of Environmental Quality and the EPA.

B. WELL CONTAMINATION:

As a result of the fecal deposition from cattle in Little Pocatello Creek and the adjacent drainage, the Hart's domestic well has also become contaminated. Samples taken in March, April and May of 2000 all reflected excessively high fecal coliform levels ranging from 3100 to 5800 organisms per 100 ml. Idaho Division of Environmental Quality Standards mandate that fecal coliform levels shall not exceed 406 organisms per 100 ml for primary contact and 576 colonies per 100 ml for secondary contact.

C. CONTAMINATION/DEGRADATION OF LITTLE POCATELLO CREEK.

As indicated above, fecal coliform levels in the creek are now approximately 10 times greater than limits set by the Idaho Water Quality Standards. According to correspondence from the Natural Resources and Conservation Service which inspected the McNabb's confined animal feed lots, approximately 500 head of cattle are winter fed on about 50 acres of McNabb property along Little Pocatello Creek bordering the Hart property. Based upon confined animal feed lot regulations of the State of Idaho, this translates to approximately 3000 tons of manure being deposited in the Little Pocatello Creek riparian area. This deposition would include about 20 tons of nitrogen, 4 tons of phosphorus, and 10 tons of potassium. This information supports the high level of fecal coliform found in Little Pocatello Creek and the contamination of the Hart well.

The Idaho State Department of Agriculture requires a waste management system be in place for the operation of confined animal feed lots. McNabb has none. Also, the EPA requires a National Pollutant Discharge Elimination System ("NPDES") permit for discharge of waste from confined animal feed lots. McNabb has none. The lack of a waste management system results in additional manure runoff. The confined animal feed lots are on slopes where there is little to no vegetation. These factors increase the amount of manure runoff into Little Pocatello Creek.

Dissolved oxygen measured in the Hart's large irrigation/fish reservoir reflects dissolved oxygen levels approximately one-half of the minimum Idaho Water Quality Standards. Measured phosphorus levels are 8 times greater than acceptable levels. This further evidences the diminished water quality resulting from the McNabb operations and resulting damage to Hart.

The damage sustained to the Little Pocatello Creek watershed as a result of the McNabb operations described above has been observed and well documented by numerous state and federal governmental agencies, including the Idaho Department of Environmental Quality, Idaho Department of Water Resources, Idaho Department of Health & Welfare and U.S. Department of Agriculture.

D. HART DAMAGES:

The acts and conduct of McNabb as described above are unlawful and represent a total disregard for the water quality, riparian area and general environment of Little Pocatello Creek. The McNabb conduct also could be considered a willful and wanton disregard for the health and safety of the Hart family members, livestock and property, that may subject McNabb to punitive damages in addition to property damages.

The property damages sustained by Hart are substantial and continuing. The exact extent and amount of the Hart damages has not yet been determined and is in the process of being documented and calculated.

In addition to past and present damages, Harts can be expected to suffer future damages for which McNabb is liable until such time as the damage to the stream and riparian areas have been corrected and stream conditions improve. Expert studies have shown that complete exclusion of livestock from streams is necessary for anywhere from 2 to 15 years to reverse negative impacts and allow stream conditions to improve. Accordingly, Hart demands that McNabb immediately take the following action to mitigate further damage to Hart:

1. That all confined animal feed lots along Little Pocatello Creek be permanently eliminated.
2. Alternatively, that all confined animal feed lots in the Little Pocatello Creek Drainage be eliminated until such time as a waste management system is in place in compliance with the rules and regulations of the Idaho State Department of Agriculture, and a National Pollutant Discharge Elimination System permit has been obtained from the EPA.
3. That all livestock grazing along Little Pocatello Creek and the riparian areas be eliminated until such time as negative impacts have been reversed and normal stream conditions return.
4. That livestock grazing practices in the Little Pocatello Creek Drainage be modified as necessary to bring water quality, siltation and nutrient standards into compliance with state and federal law.
5. That farming practices in the Little Pocatello Creek Drainage be modified as necessary to bring water quality, siltation and nutrient standards into compliance with state and federal law.
6. That McNabb develop and implement an environmental damage mitigation plan to comply with applicable state and federal water quality laws to the satisfaction of the governmental agencies administering those laws.

SETTLEMENT PROPOSAL:

If you have a Comprehensive Farm Liability Insurance Policy, you may have insurance coverage applicable to some or all of the Harts' claims. In that event, it may be advisable to report this claim to your insurance agent.

The Harts are willing to schedule a meeting for the purpose of reviewing and discussing with you the claims and demands set forth in this letter in an attempt to reach an amicable settlement. Alternatively, we request a written response setting forth your position and any supporting documents if you disagree with the facts which we've been provided and set forth, deny

responsibility or have any other alternative proposals for resolution. **Please respond within ten (10) days from the date of your receipt of this letter.**

If you fail to respond, or if the matter cannot be resolved, we have been instructed by Hart to commence litigation against you to recover all damages they are entitled to by law and obtain permanent injunctive relief. If litigation is necessary, we will also seek to recover reasonable attorney fees and costs incurred.

To discuss this matter or provide your response, please feel free to contact myself or John R. Goodell at this office (232-6101) or James W. Hart or Harry Hartwigsen.

Sincerely,

A handwritten signature in dark ink, appearing to read "Randall C. Budge". The signature is written in a cursive, flowing style with a large initial "R".

RANDALL C. BUDGE

RCB:rr

cc: See Attached

cc: James W. and Cherie Hart
Harry Hartwigsen
Lisa B. Safford
Idaho State Department of Agriculture:
Travis C. Kater
John Chatburg
Kelly Mortensen, Sr.
Idaho Division of Environmental Quality
David Hull
Idaho Department of Water Resources
Harold W. Jones
United States Department of Agriculture
Ron Davidson

January 20, 1967

I. S. Albert Johnson
Route #2
Pocatello, Idaho

II. Priority

- A. Priority established by T. C. Martin as a war temporary permit
- B. Established in 1943 as Class II war temporary permit with 200 c 4/1 to 11/1 65% FR 910 AUMs. In 1944 by Board action changed to 250 C 4/1 - 10/31 21% FR 368 AUMs which became the accepted privilege
- C. Original application and correspondence in T. C. Martin case file (closed).

III. Commensurability

A. Original base property

1. Legal description

T. 5 S., R. 35 E. 3314 Acres

$W\frac{1}{2}NE\frac{1}{4}$, $W\frac{1}{2}NW\frac{1}{4}$, $SE\frac{1}{4}NW\frac{1}{4}$, $SW\frac{1}{4}$, $S\frac{1}{2}SE\frac{1}{4}$, Sec. 25
 $E\frac{1}{2}$, $W\frac{1}{2}W\frac{1}{2}$, $E\frac{1}{2}NW\frac{1}{4}$, Sec. 26
 $E\frac{1}{2}$, $S\frac{1}{2}NW\frac{1}{4}$, $N\frac{1}{2}SW\frac{1}{4}$, $SE\frac{1}{4}SW\frac{1}{4}$, Sec. 27
 $E\frac{1}{2}SE\frac{1}{4}$, Sec. 28
 $NW\frac{1}{4}NW\frac{1}{4}$, Sec. 29
 $NE\frac{1}{4}NE\frac{1}{4}$, $W\frac{1}{2}E\frac{1}{2}$, $E\frac{1}{2}W\frac{1}{2}$, $W\frac{1}{2}NW\frac{1}{4}$, Sec. 30
 $N\frac{1}{2}S\frac{1}{2}$, $SW\frac{1}{4}SW\frac{1}{4}$, Sec. 31
 $N\frac{1}{2}S\frac{1}{2}$, $SE\frac{1}{4}SE\frac{1}{4}$, $S\frac{1}{2}NE\frac{1}{4}$, Sec. 32
 $W\frac{1}{2}NW\frac{1}{4}$, $N\frac{1}{2}SW\frac{1}{4}$, $NE\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}$, Sec. 33
 $S\frac{1}{2}NW\frac{1}{4}$, $N\frac{1}{2}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$, $E\frac{1}{2}NE\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}$, Sec. 34
 $NW\frac{1}{4}NW\frac{1}{4}$, $S\frac{1}{2}NW\frac{1}{4}$, $N\frac{1}{2}SW\frac{1}{4}$, $NE\frac{1}{4}$, Sec. 35:

T. 6 S., R. 35 E. 953 Acres

$W\frac{1}{2}NW\frac{1}{4}$, Sec. 3
 $NE\frac{1}{4}$, $S\frac{1}{2}S\frac{1}{2}$, $NW\frac{1}{4}SE\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}$, Sec. 4
 $SE\frac{1}{4}NW\frac{1}{4}$, $N\frac{1}{2}SW\frac{1}{4}$, $SE\frac{1}{4}SW\frac{1}{4}$, $S\frac{1}{2}SE\frac{1}{4}$, Sec. 5
 $NE\frac{1}{4}SE\frac{1}{4}$, Sec. 6
 $NE\frac{1}{4}NW\frac{1}{4}$, $N\frac{1}{2}NE\frac{1}{4}$, Sec. 8
 $N\frac{1}{2}NW\frac{1}{4}$, Sec. 9

2. Base property rating in 1943 from T. C. Martin from Long Form Application.

On file with Pocatello BLM office. Shows when BLM ^{issued} ~~shows~~ cattle grazing permits on this location.

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 29-13212
Date Received: 7/25/01
Receipt No: E026956
Received By: CS

NOTICE OF CLAIM TO A WATER RIGHT
ACQUIRED UNDER STATE LAW

1. Name of Claimant(s)

WH LAND & LIVESTOCK A PARTNERSHIP Phone: (208) 251-6336

C/O MICHAEL R MCNABB
976 MCNABB
INKOM ID USA 83245

2. Date of Priority: 04/01/1943

3. Source: LITTLE POCA TELLO CREEK Trib. to: SINKS

4. Point of Diversion:

Township	Range	Section	1/4 of 1/4 of 1/4 Lot			County	Type
06S	35E	4	NE	NW	SE	BANNOCK	Beginning Point
06S	35E	5	SW	SE	SW	BANNOCK	Ending Point

5. Description of diverting works:

INSTREAM STOCKWATER USE

6. Water is used for the following purposes:

Purpose	From	To	C.F.S.	(or) A.F.A
STOCKWATER	01/01	12/31	0.02	

7. Total Quantity Appropriated is:

0.02 C.F.S.

8. Total consumptive use:

9. Non-irrigation uses:

Number of other uses: 500

10. Place of use:

Township	Range	Section	1/4	of 1/4	Lot	Use	Acres
06S	35E	4	NW	SE		STOCKWATER	
			NE	SW		STOCKWATER	
			SE	SW		STOCKWATER	
			SW	SW		STOCKWATER	
06S	35E	5	SE	SE		STOCKWATER	
			SE	SW		STOCKWATER	
06S	35E	8	NE	NE		STOCKWATER	
			NW	NE		STOCKWATER	
			NE	NW		STOCKWATER	
06S	35E	9	NW	NW		STOCKWATER	

11. Place of use in counties: BANNOCK

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

13. Other Water Rights Used:

14. Remarks:

INSTREAM STOCK. PRIORITY EVIDENCE SHOWS CATTLE GRAZING PERMIT ISSUED BY BLM

15. Basis of Claim: Beneficial Use

16. Signature(s)

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

Number of attachments: _____

For Organizations:

I do solemnly swear or affirm that I am partner _____ of
Title
WH Land & Livestock _____, that I have signed the foregoing
Organization

document in the space below as partner _____ of
Title
WH Land & Livestock _____ and that the statements contained in the
Organization

foregoing document are true and correct. Mike McCall
Signature of Authorized Agent

partner WH Land & Livestock
Title and Organization

7/25/01
Date

State of Idaho)
County of Bonneville) SS.

Subscribed and sworn (or affirmed) before me this 25th

of July 20 01

Jennifer Crabtree
Notary Public

Residing at Idaho Falls Idaho

My commission Expires 9/23/03

